REPORTS

OF THE

SUPREME COURT

OF

CANADA.

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1912

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.

ERRATA.

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

Page 57—Add foot-note reference to *Lavery* v. *Pursell* "(1) 39 Ch. D. 508, at p. 516."

" 119, line 15—for "deprived," read "derived."

" 457, line 18—for "were," read "was."

" 502, line 28—for "27," read "153."

" 527, line 14—for "27," read "153."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOLUME 45 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Alberta Railway and Irrigation Co. v. *The King* (44 Can. S.C.R. 505). Appeal to Privy Council allowed, 25th July, 1912; ([1912] A.C. 827).

Anderson v. *Municipality of South Vancouver* (45 Can. S.C.R. 425). Leave to appeal to Privy Council refused, 25th July, 1912.

Bœckh v. *Gowganda Queen Mines* (46 Can. S.C.R. 645). Leave to appeal to Privy Council refused, 25th July, 1912.

Cameron v. *Cuddy et al.* (not yet reported). Leave to appeal to Privy Council granted, 12th December, 1912.

Canadian Pacific Rway Co. and *Grand Trunk Rway Co.* v. *Canadian Oil Companies* (not yet reported); and *Canadian Pacific Rway Co.* v. *British America Oil Co.* (not reported). Leave to appeal granted in both cases; appeals to be consolidated; 13th December, 1912.

Cushing v. *Knight* (46 Can. S.C.R. 555). Leave to appeal to Privy Council refused, 9th December, 1912.

David v. *Swift* (44 Can. S.C.R. 179). On a judgment, subsequent to the decision of the Supreme Court of Canada, by the Court of Appeal for British Columbia an appeal was taken direct to the Privy Council. The appeal was dismissed with costs, 18th June, 1912.

The King v. *Cotton* (45 Can. S.C.R. 469). Leave to appeal to Privy Council granted, 2nd July, 1912.

Mackenzie v. *Monarch Life Assurance Co.* (45 Can. S.C.R. 232). Leave to appeal to Privy Council granted, 17th May, 1912.

Maclaren v. *Attorney-General for Quebec et al.* (46 Can. S.C.R. 656). Leave to appeal to Privy Council granted, 16th July, 1912.

"Marriage Laws," In re, (46 Can. S.C.R. 132). The judgment of the Supreme Court of Canada was affirmed by the Privy Council, 29th July, 1912; ([1912] A.C. 880). *See* 59 Can. Gaz. pp. 531, 618, 658.

"Montcalm," The S-S., v. *The S-S. "Kronprinz Olav"* (not reported). Security for an appeal to the Privy Council was approved on the 14th August, 1912.

National Trust Co. v. *Miller; Schmidt* v. *Miller* (46 Can. S.C.R. 45). Leave to appeal to Privy Council granted, 25th July, 1912.

Outremont, Town of, v. *Joyce* (43 Can. S.C.R. 611). An appeal to the Privy Council, taken direct after the appeal sought to the Supreme Court of Canada had been quashed, was dismissed with costs.

References by the Governor-General in Council, In re, (43 Can. S.C.R. 536). Appeal to Privy Council dismissed, 16th May, 1912. *See* (1912) A.C. 571.

"St. Pierre-Miquelon," The S-S., v. *The S-S. "Renwick"* (not reported). Security for an appeal to the Privy Council was approved, 11th December, 1912.

Serling v. *Lavine* (not yet reported). Leave to appeal to Privy Council granted, 19th December, 1912.

Smith v. *National Trust Co.* (45 Can. S.C.R. 618). Leave to appeal to Privy Council refused, 16th July, 1912.

A TABLE
OF THE
NAMES OF THE CASES REPORTED
IN THIS VOLUME.

TABLE OF CASES CITED.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

MORDECAI WEIDMAN AND HIRAM WEIDMAN, TRADING UNDER THE FIRM NAME AND STYLE OF "WEIDMAN AND COMPANY" (DEFENDANTS) ..... APPELLANTS;

1911 *May 11.

1912 *March 21.

AND

BERNARD SHRAGGE (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Contract—Public policy—Restraint of trade—Combination—Conspiracy—Construction of statute—"Criminal Code" s. 498—Words and phrases—"Unduly" preventing competition, etc.—Monopoly.

A contract between dealers fixing prices to be paid by them for specified articles or commodities which may be the subject of trade and commerce with the object of restricting competition and establishing a monopoly therein, constitutes an agreement unduly to prevent or lessen competition within the meaning of section 498 of the Criminal Code, R.S.C., 1906, ch. 146, and is not enforceable between the parties. Judgment appealed from (20 Man. R. 178) reversed, Davies J. dissenting.

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

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Per Davies J. dissenting.—As the agreement was not, in the circumstances, void at common law as being unreasonably in restraint of trade it did not violate the statute.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Mathers C.J., at the trial, and maintaining the plaintiff's action with costs.

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

Ewart K.C. and *F. M. Burbidge,* for the appellants.

M. G. Macneil, for the respondent.

THE CHIEF JUSTICE.—The action in this case is brought for an account based upon a contract between the plaintiff and the defendants which is described in the statement of claim as an agreement

for the purpose of carrying on their business in a manner mutually profitable to both parties to the said agreement.

The defence denies the state of the account as alleged and pleads the illegality of the agreement under sections 496 and 498 of the Criminal Code which are grouped under the general heading of "Offences connected with Trade." The trial judge decided the point of illegality in favour of appellants. On appeal this judgment was reversed.

Having very carefully read the cases cited by counsel at the argument and referred to by the judges below in their notes, I cannot better describe my condition of mind than by quoting from a very recent opinion of an eminent English jurist who said:—

(1) 20 Man. R. 178.

I am convinced it is impossible to give in a few pages a complete and accurate exposition of the English law as to combinations which are in restraint of trade or unduly impede free competition or employment so as to deduce from the numerous and conflicting cases clear and definite principles.

The same authority says that the case of *The Mogul Steamship Co.* v. *McGregor, Gow & Co.*(1), only decided that an action for conspiracy could not be maintained by the plaintiff, because the defendants did not by entering into the contract under consideration render themselves guilty of a criminal conspiracy. But on the question whether the contract was void and illegal because it was in undue restraint of trade or unduly impeded free competition, there was the utmost diversity of opinion both among the judges and the noble and learned Lords. In *Mitchel* v. *Reynolds*(2), the following principles were laid down: that all contracts in general restraint of trade are illegal in the sense of not being enforceable, but that agreements in partial restraint of trade, if for consideration, are valid, provided that the restraint is reasonable, in the sense that it is such as is reasonably necessary for the protection of the person who seeks to impose restraint (covenantee). In this case, however, we are not called upon to consider in what respect the contract declared upon is affected by the principles of the English law as to restraint of trade, nor are we at liberty to invent or give effect to any new ground of public policy. Our duty is to determine its validity in view of those sections of the Criminal Code relied upon. In effect, clause (*d*) of section 498 of the Code declares in very plain language that an agreement which might in itself be perfectly lawful as made by the parties in the exercise of the free-

(1) [1892] A.C. 25.

(2) 1 Sm. L.C. (10 ed.) 391.

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The Chief Justice.

dom to contract or to abstain from contracting, which the English law has for many years recognized in every individual, is unlawful if the object of the parties is to unduly prevent or lessen competition in an article or commodity which is a subject of trade or commerce. In other words, if the object of the parties to the agreement is to interfere with the free course of trade by unduly preventing or lessening competition the agreement is declared to be unlawful. It is not necessary, I repeat, that the agreement should be in itself fraudulent or otherwise illegal; and all agreements which prevent or lessen competition do not come within the operation of the statute; the mischief aimed at is the undue and abusive lessening of competition which operates to the oppression of individuals or is injurious to the public generally. And it is for the courts to say whether in the circumstances of each particular case the mischief aimed at exists. In *The United States* v. *The Trans-Missouri Freight Association*(1), it was held that the "Sherman Act" applies equally to all contracts tending to create a monopoly, whether or not they are reasonable, or whether or not they are unlawful at common law.

Parliament has not sought to regulate the prices of commodities to the consumer, but it is the policy of the law to encourage trade and commerce and Parliament has declared illegal all agreements and combinations entered into for the purpose of limiting the activities of individuals for the promotion of trade; and preventing or lessening unduly that competition which is the life of trade and the only effective regulator of prices is prohibited. The question for decision here, assuming the law to be as I have stated it,

(1) 166 U.S.R. 290.

is: Was the contract declared upon entered into for the purpose of unduly limiting competition in the purchase or sale of an article which is ordinarily a subject of commerce? It is admitted by both parties that junk, the subject-matter of the contract, is ordinarily a subject of commerce. The trial judge found that the manifest purpose of the agreement was to prevent competition between the parties to it, and to affect prices. He said:—

> It cannot be doubted that the tendency of such an agreement would be to lower prices on the junk purchased from the public, and, possibly, to increase the price of junk sold to the consumers.

The learned judge also said:—

> It is true that in the present case the agreement to fix prices was between two dealers only, but these two practically monopolised the whole trade in junk in Western Canada, and when they ceased to compete with each other all competition was gone. The effect of their agreement was not only to limit competition, but to destroy it.

And there can be no doubt on the evidence that the conclusion reached by the learned judge is well founded; the main object and purpose of the agreement was to eliminate competition and to control the junk market in all Western Canada both as to purchases and sales and, on that ground, I hold that the question must be answered in the affirmative and that the agreement is, therefore, bad under the sections of the Code. I can see no distinction in principle between this agreement and one that might be entered into between two or more traders to control the price of all wheat purchased and sold in Western Canada; and if the object was to monopolize the wheat trade of Western Canada instead of, as in this case, the junk trade, would any court hesitate to declare it illegal in that it was calculated to unduly impede free competition to interfere with the free course of trade, and to effect a wrongful purpose?

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I would allow the appeal and restore the judgment of the trial judge with costs.

The Chief Justice.

DAVIES J. (dissenting).—This is an appeal from the judgment of the Court of Appeal for Manitoba reversing a judgment of the trial judge which declared an agreement made between the parties on which the plaintiff had brought an action to be void as contravening section 498 of sub-section (*d*) of the Criminal Code.

The agreement in question was made between two junk and bottle dealers who purchased these articles amongst others in Winnipeg and elsewhere in Western Canada and shipped them for sale to Chicago in the United States of America.

It was dated the 28th of March, 1905, and was to continue from the first of April till the 15th of December following with a provision for an extension thereafter from month to month if mutually agreed upon, and as a fact it was renewed up to the 1st of January, 1907. It professed to fix the maximum prices which each of the parties should pay for the several articles specified in the schedule which prices were to be subject to revision by mutual consent; and provided that each party should make up accounts monthly shewing the profit or loss made on the business done and that the profits should be equally divided.

The trial judge held that

> the manifest purpose of the agreement was to prevent competition between the parties to it and to maintain a fixed price for junk purchased.

He further held, however, on the facts as proved and after reviewing a number of authorities, that

the agreement in question went no further than that in *Collins* v. *Locke*(1); that the provision for carrying it into effect, viz.: the monthly division of net profits, was not unreasonable and that the restraints imposed were nothing like as great as those in the case cited. He, therefore, held the agreement not to be void at common law as being in restraint of trade.

But, while upholding the agreement at common law, he nevertheless held it was void as being in contravention of section 498, sub-section (*d*) of the Criminal Code.

The Court of Appeal for Manitoba, Richards J. dissenting, reversed the judgment and held the agreement was not void either at common law or as contravening the Code. Richards J., the dissenting judge in the Court of Appeal, says nothing about the validity of the agreement at common law, but follows the trial judge in holding that it contravened the statute.

Chief Justice Howell held that outside of the criminal law the agreement was binding and that the intention of Parliament in passing the criminal statute was to

> suppress certain contracts and combinations in restraint of trade and make the parties thereto liable to an indictable offence and that the agreement did not contravene the statute.

Cameron J. agreed with him on both grounds, while Perdue J., agreeing on the first ground that at common law the agreement was not bad, held that it did not violate the statute because it did not "unduly prevent or lessen competition" in the articles it covered.

With respect to the agreement here in question I agree with the trial judge and the three judges of the

(1) 4 App. Cas. 674.

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Court of Appeal that, applying the rule now followed by the courts in determining the validity or otherwise of agreements or covenants claimed to be in violation of the common law, it cannot be held void. That rule, as I gather it from the authorities, is that every case must be decided on its own facts and that the controlling and guilding rule in each case is whether the restraint attempted is reasonable or not with respect to the interests of the parties concerned and to the public interests.

The case of *Nordenfelt* v. *The Maxim Nordenfelt Guns and Ammunition Co.*(1), decided by the House of Lords, determines that a covenant against the covenantor engaging in a particular business though unrestricted as to space was not, having regard to the nature of the business and the limited number of the customers, wider than was necessary for the protection of the company nor injurious to the public interests of the country and, therefore, was valid. The speeches of the distinguished Law Lords who took part in that decision without any dissenting voice united in the test of reasonableness, as being the guiding and controlling test in all cases and whether the covenant or agreement is general or particular. In determining the question of reasonableness they further held that the courts should have regard as well to the interests of the public as of the parties to the agreement and that each case must be decided on its own facts and by the application to them of this general test. The later cases of *Dubowski & Sons* v. *Goldstein*(2), and *Underwood & Son* v. *Barker*(3),

(1) [1894] A.C. 535. (2) [1896] 1 Q.B. 478.
(3) [1899] 1 Ch. 300.

are to the same effect on similar reasoning. In the latter case Lindley, M.R., says, at pages 303-4:—

The law as now settled cannot, in my opinion, be more accurately expressed than it was by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*(1). He said: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with the individual liberty of action in trading, and all restraints of trade of themselves if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." Time was when all agreements in restraint of trade or liberty to work were regarded as against public policy and invalid. But this view of the law was found mischievous and intolerable, and it was gradually disclaimed and modified. The modern doctrine, as I understand it, is that if an agreement restraining a person from carrying on business is injurious to the public interests of this country such agreement is invalid to the extent to which it is injurious, but not further, if it is so framed as to permit of division into two portions, one of which is good and the other bad.

On page 305 he says further: —

As was pointed out by Lord Macnaghten in *Nordenfelt's* case(1) what may be reasonable on the sale of a business may be unreasonable on the departure of a man from the service of his employer; but I do not understand him as saying that a restriction which is *reasonably necessary for the protection of a man's business can be held invalid on grounds of public policy unless some specific ground can be clearly established.* If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *primâ facie* at all events, contrary to the interests of any and every country.

Applying what I conceive to be the modern rule with respect to the validity or invalidity of agree-

(1) [1894] A.C. 535.

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ments or covenants in restraint of trade, I have no difficulty in agreeing on the facts of this case with the finding of the trial judge, confirmed by the Court of Appeal, that the agreement in controversy from his obligations under which the defendants, appellants, seek to escape, is a valid agreement at common law.

The question then remains whether this agreement at common law has been invalidated by the statute. I have reached the same conclusion as that come to by the Court of Appeal that it does not violate the statute. I do not read the word "unduly" which prefaces and controls sub-sections (*a*), (*c*) and (*d*) of section 498 of the Criminal Code as having any greater or wider meaning than "unreasonably" which is the common law test and if that word had been used in the statute the finding of the validity of the agreement at common law would, of course, settle the question. I have heard nothing during the argument, and the consideration given to the case since then has not suggested anything which satisfies me that the word "unduly" was intended to have any broader meaning than "unreasonably." That some limitation was intended by the word is, of course, conceded. If it does not mean unreasonably I do not know what it does mean. I prefer the word "unreasonably" to any of the others suggested, such as "improperly," "excessively," "inordinately," because I think it satisfies the intention of Parliament better than any of the others.

Section 498 of the Criminal Code was first enacted in 1889 in a statute intituled "An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade" which had for its preamble the following:—

Whereas it is expedient to *declare* the law relating to conspiracies and combinations formed in restraint of trade.

Parliament did not pretend to enact something new as part of the criminal law. It was not creating or defining a new offence before unknown to the law. It was simply, as said in the preamble, "declaring" and formulating what I venture to think the existing law then was, namely, that a conspiracy unlawfully (a) to unduly limit facilities for transportation, etc., or (b) to restrain or injure trade or commerce, or (c) to unduly prevent or lessen production, etc., or (d) to unduly prevent or lessen competition in any article which was a subject of trade or commerce constituted a misdemeanour. Punishments by way of fine and imprisonment were added, of course, as sanctions of the declared law.

The drafting of the new statute was, no doubt, faulty. The use of the two words "unlawfully" and "unduly" was necessary, but that it was a declaratory law only and only intended as such I do not doubt.

The Criminal Code of 1892 re-enacted this statute in its 520th section retaining both words "unlawfully" and "unduly" and enacted section 516 declaring what a conspiracy in restraint of trade was. That also was declaratory only of the existing law. In 1899 the section was amended by striking out the word "unduly" in paragraphs (*a*), (*c*) and (*d*). In 1900 the word "unduly" was restored in each of the three paragraphs (*a*), (*c*) and (*d*), while the word "unlawfully" was struck out of the main section so that it read every one was guilty of an indictable offence, etc., who conspired, etc., with others to "unduly" limit, etc. In this latter form it remains at present.

I think the amendment striking out the word "un-

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lawfully" was a desirable one, and that, in view of the enactment of the present section 486 in the Code of 1892, the retention of the word "unlawfully" was unnecessary. The history of this legislation, however, throws little light upon its proper interpretation, but it confirms me in my opinion that Parliament was not so much creating a new criminal offence as it was defining an existing though unwritten one and attaching to it punishments by fine and imprisonment.

If that is so and the misdemeanour defined by the statute is nothing more than a conspiracy to carry out contracts or agreements which by the common law were illegal as being in restraint of trade, the finding that this contract in controversy was not in restraint of trade would also determine that it was not a violation of the statute.

I agree with Chief Justice Howell and Cameron J. that this is the real solution of the difficulties arising from construing section 498 of the Code as creating a new offence instead of as declaring and defining an existing one. I also agree with them and Perdue J. that the word "unduly" as used in the section should not be given a greater or wider meaning than the word "unreasonably" and that if so confined the suggested construction as one declaratory only is confirmed.

Holding, therefore, that the contract in question is not void at common law as being unreasonably in restraint of trade, I am of opinion that it is not within the declaratory law, sub-section (*d*) of section 498 of the Code, which is directed against conspiracies to unduly or unreasonably prevent or lessen competition

in the purchase or sale, etc., of any article, etc., a subject of trade or commerce.

I would dismiss the appeal.

IDINGTON J.—By virtue of long experience in the business each had separately carried on in Winnipeg, these parties determined to control, by fixing the prices to be paid for the commodities dealt in, the entire purchases thereof between Lake Superior and the Rockies. They adopted, not as a partnership though resembling it, a device or plan of sharing the profits derivable from the dealings each might have in specified leading articles of said commodities for which the maximum prices to be paid were to be fixed by them jointly from time to time. These prices, or the lower prices actually paid, were to be the profit-sharing basis, and thus either transgressing by paying a higher price would be automatically penalized therefor.

There was neither joint capital nor mutual contribution of capital in any venture, nor joint action, in use of capital either used, or in the management of the business. Each carried on his own business free from interference of the other. At the end of the year an accounting was to be had of the profit or loss each had made on the basis of the maximum prices so fixed or such less prices as each might have paid. The only recital in the agreement expresses a desire

> of entering into an agreement to facilitate the dealing in various articles hereinafter mentioned, without in any way interfering with the freedom of trade and commerce.

In what way and how was this to facilitate dealing? When regard is had to the language used and to what was actually done this much is clear: first, that merely

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partnership profits was not the purpose of the agreement, and next, that the parties had a consciousness of how perilously near they might be to infringing the statute.

They operated and accounted to each other on the basis of this agreement for a year, and then by letters renewed it, but fell out later; chiefly because the appellants did not conform to the purpose of the agreement. They had so far departed from the paths of rectitude as to buy from another Winnipeg dealer who had come into and ventured to operate in the chosen field of these parties. The mind of respondent never contemplated that kind of "facilitating the dealing in various commodities." It was clearly repugnant to the common purpose and a breach of faith. The recital must have been a mistaken or defective description of the common purpose. After repudiating this vile deed done by his brothers-in-arms, he sued them for an account. The latter set up section 498 of the Criminal Code as a bar to this alleged right of recovery.

The defendants (now appellants) swear the purpose of the agreement was to control the market for themselves within said limits, to cease competition with each other, to get as large a profit by keeping out competition as they could; and he says they succeeded.

The learned trial judge finds this story the true one, though contradicted by the plaintiff (now respondent). He says further,

> the effect of their agreement was not only to limit competition, but to destroy it.

The objection to such extrinsic evidence, which is always admitted to prove illegality, cannot prevail.

I agree with the learned judge's findings of fact

relative to the issue. I do so the more readily as the respondent's letters and admitted conduct confirm or at least harmonize with the appellants' oath and contradict the respondent's.

The section 498 in question reads, as it stood amended at the time in question herein, as follows:—

> Every one is guilty of an indictable offence * * * who conspires, combines, agrees or arranges with any other person * * * (*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, etc.

The phrase "article or commodity" is defined in sub-section (*a*) as anything "which may be subject of trade and commerce."

The entire scope and purpose of this legislation and the operative limits to be assigned it, are difficult of accurate comprehension and definition.

I am, however, with great respect, quite clear that the majority of the court appealed from have misapprehended it.

If I understand them aright, the measure of the word "unduly" is to be found in a long line of authorities where contracts in restraint of trade had been held to be against public policy. If the purpose of Parliament had been merely to make parties to such contracts as these authorities relate to, amenable to the criminal law, the expression thereof would have been easy, and, I apprehend, quite different in terms from those used either in the recital or operative parts of 52 Vict. ch. 41, which first enacted the law in question.

That Act recited:—

> Whereas it is expedient to declare the law relating to conspiracies and combinations formed in restraint of trade and to provide penalties for the violation of the same.

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And in the forefront, as it were, of the offences to be dealt with, we find (a) the limiting of facilities for transportation; (b) the restraining of commerce; (c) the limiting of production, or unreasonably enhancing the price of that produced; and lastly (d) which is in substance quoted above.

The whole scope of this legislation is clearly something beyond the narrow limits upon which the reasoning in support of the judgment appealed from seems to proceed. It cannot be said to be a purely declaratory Act. It covers ground not covered by the then existing law. In no sense can the field it covers be held to be co-extensive with the field of law relative to restraint of trade wherein these authorities had operated.

The case of *Nordenfelt* v. *The Maxim Nordenfelt Guns and Ammunition Co.*(1), relied on to shew earlier cases overruled, or law relaxed, had not even been heard when this statute was enacted.

Not only that, but who that has had to struggle with the innumerable contracts, and distinctions between contracts, alleged to be in some way in restraint of trade, ever dreamed of the law on the subject being made merely clearer by making it the subject of criminal legislation? Yet the offence against public policy involved in the said cases had been recognized, however ill-defined, for nigh three centuries and never seems to have been directly rested on criminal law; nor yet as a supposed violation of morals. Public policy alone it was said required certain limits of time and space to be observed in such contracts, and these limits were measured by that good old word "reason-

(1) [1894] A.C. 535.

able" so often found in every phase of our English law. Why should Parliament discard it and adopt another less in use, less easy of comprehension, if merely declaring and clarifying the law as applied in civil cases relative to restraint of trade ?

Not only had the expansion of trade and commerce in England by the year 1889 rendered the lines laid down in many old cases somewhat unfitted to follow under new conditions then existing in England, but their applicability to Canada and its conditions seemed still more grotesque as a foundation and defined field of operation for a criminal statute such as we have to interpret and construe.

But it may be asked, why should it proceed by prefacing the whole with the word "unlawfully"? And further asked was it not merely the purpose to fix penalties for doing that which was already unlawful ? Is it not clear that the draftsman erred in using both words, "unlawfully" and "unduly," in the connection in which they were placed ? Surely if a thing were unlawful it must be undue. It was never intended to declare that an undue measure of unlawfulness was the thing to become indictable.

Parliament set out, as the recital shews, to declare what was to be held unlawful and evidently intended to declare that the unduly doing that which was referred to in sub-section (*d*) amongst others, were unlawful things, and must be prohibited.

And to make this clear the Act was in 1899, inadvertently, as I think, amended by striking out the word "unduly" and thus leaving "unlawfully" the test. Next session, on attention being drawn to the inadvertence, the word "unlawfully" was stricken out and the word "unduly" restored. The Act as thus

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finally amended is what is pleaded here. This legislative history demonstrates as clearly as possible that it was not as against something already unlawful, but the unduly doing that then lawful so far as the criminal law extended that the amended statute was aimed at.

And with all this effort to express its meaning, we are asked to say it was not "unduly" that Parliament intended to use, but another word so commonly in use in relation to part of the very subject in hand.

It seems to me that so far from designing a law that must have for its limits of operation the field covered by such authorities, it was the settled purpose to avoid that being done. That was something which did not fit the subject in hand.

However, we are not debarred from looking at the legal history of either unreasonable restraint of trade as interpreted by the courts, or anything else within the common knowledge of mankind, which, in order to effectuate the purpose of the legislature, may help us to find out, if we can, what meaning we must attach to the word "unduly" in sub-section (*d*) of section 498 of the Code as it stood in 1905 and 1906.

The contracts usually designated as in restraint of trade at common law, may be so far as falling within the descriptive language of the statute, *primâ facie* within the field of that which is prohibited by this statute. I can, however, imagine instances of such restraint which may arise and yet not have been unduly made within the Act. And for reasons I am about to advert to in connection with the case of *The Mogul Steamship Co.* v. *McGregor, Gow & Co.*(1),

(1) [1892] A.C. 25.

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its operative range as a criminal statute effecting and invalidating contracts must exceed the narrow limits of the old doctrine referred to. It is now for the first time before this court. So far as I can see each of the other cases cited to us, in which different courts have dealt with its application, presented a mass of facts shewing the conduct of those charged with having infringed it to have been more or less repugnant to the minds of all right-thinking men, and hence the duty to apply it apparently clear.

The magnitude of the aggregate business involved, the far-reaching evil consequences likely to flow from upholding as legal the respective schemes attacked in these cases, and the chances that if upheld their peculiar features so obnoxious to the welfare of the community, would be so greatly extended as to become disastrous, all aided the courts to apply the Act.

Whether if such schemes were allowed to run their own course entirely unfettered and unfostered by legislation, the result would be so dreadful as frightened people imagine, one may be permitted to doubt.

If one considers the long history of the abortive attempts exemplified in the long lists of Acts repealed by 22 Geo. III. ch. 71, and 7 & 8 Vict. ch. 24, this doubt will hardly disappear. As we have nothing, however, to do with the wisdom or unwisdom of the legislation, such considerations are only of value here in aiding us by a survey of the whole field of its possible operation to try by drawing lessons from past failures to give it such effect as will not operate detrimentally upon any person, or class of persons, not desiring to improperly defeat competition; and above all, that it may not become itself by virtue of our decision an undesirable restraint upon the freedom of

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men in their business dealings, and thus another hindrance to competition.

This being a criminal statute we must try to find the vicious purpose aimed at in order to bring parties within its prohibitions. What then are to be the distinguishing features that may in any given case, and must in this case, enable us to determine whether or not it falls within any of the prohibitions of the statute? To do that we must examine it in its general bearing and survey if we can its whole possible field of operation.

One thing which must appear in any given case is that the agreement or arrangement is one designed to prevent or lessen competition. It must be also an attempt at what would be an unduly doing thereof, that is agreed upon. It needs neither success nor actual operation nor aught but an agreement to try what if successful would be the unduly preventing or lessening of competition.

Crimes usually imply something all right-minded men condemn. This one may or may not necessarily be so offensive. For example, the contracts of hiring, of leasing, of partnership and incorporation, may in some ways involve an actual, and within some of said cases, unreasonable lessening of competition, and hence be conceivably formed outside the offence created by this statute, or fall well within it. It may be that all of these contracts, or indeed many others *primâ facie* legitimate, and possessing no inherent evil, may involve changes disturbing and possibly lessening competition, yet each and all be so used as to produce a great injury to society. It is this feature of the problem which this Act attacks that requires in the limitation and definition of the offence some quali-

fication such as the word "unduly" has been chosen to serve. The test must in each case be the true purpose and its relation to the activities specified in and by the words of the statute and a finding of an evil or vice answering to the descriptive word "unduly."

It may be asked how can prevention or lessening of competition or attempt thereof be an evil when the fact confronts us that the whole business fabric of Canada is founded upon restraint of competition ? It may be said that in face of such fact it is impossible to assign an evil motive or vicious purpose of any kind in merely contracting to prevent or lessen competition.

It may well be, indeed, that the one is the logical sequence of the other by force of the development thereof, or the activities induced thereby, yet be unjustifiable for those enjoying the benefits of these restrictions to abuse the power thereby given them.

We must, moreover, recognize that there are many statutes for beneficial purposes yet productive of evils which call for amendments to the law to meet the evil by-product thereof, whilst retaining for some wise purpose, the parent statute, as it were.

Corporate creations are necessary for the promoting of manufacturing and commercial life. Yet the facilities and capacities given them also tend in many ways to produce and do produce much of the evil I conceive to be aimed at by the statute.

Patent laws may be righteous protectors of the inventor or discoverer, and beneficient stimulatives, yet may be made undesirable weapons of offence.

It seems to those whose race and country have had such implicit belief in the sanctity of contract, untainted by immorality or illegality, difficult to justify

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on ethical grounds the invasion of any field covered thereby.

It is important, therefore, to make clear from the observation of the operation of possible causes and the experience relative thereto and in other regards, how such a vicious purpose as implied in violating this Act may spring from being tainted with a desire to do that which may not of necessity and under all circumstances be held in itself vicious.

The development of modern industrial and commercial life, however, has certainly, when some of the later results are looked at, justified men in re-examining the profound belief heretofore held in unfettered contract and such competition as may exist therewith. And when they produce as the result of such examination, a statute like this and throw upon the courts the duty of drawing the line at the right place, we must, in order to discriminate properly, examine all such similar suggestions as the several foregoing, and all else within the whole range of legislation bearing on the problem so far as we can, and determine the principles upon which to proceed.

The state assuredly has the right to withdraw its aid from him who plots with another to deprive his fellow-men of the reasonable expectations each of them is entitled to cherish if the ordinary results of competition are allowed that free scope upon which so much of the prosperity and happiness of the dwellers in a free country hang.

It is at this point the crux of the whole question lies. We must assume Parliament realized that the unlimited power of competition begotten of combination, and the unlimited right of contract cannot any longer exist together with a full enjoyment of the

ordinary results of competition to which I have just referred, and hence a new statutory crime had to be created.

The necessity for finding in this new crime the vicious or evil purpose inherent in the agreement of the parties to it, renders it necessary to determine in each case as it arises where the ordinary rights of the public to enjoy their reasonable expectation of due and fair competition, (which are yet possible within the limits left when legitimate effect has been given or allowed for the restrictive legislation I have referred to,) are at an end and the absolute right of contract begins. We need not traverse here the whole field, but use, as illustrative, a part of the evil existent under the old law, and the operation thereon of the new, and observe the wide distinction between the operation of the doctrine of public policy relative to restraint of trade, and the effective range of this new law.

The law as it stood in England coeval with the first passing of this Act, and till then existent as our law also, was laid down by the highest authority, relative to the right of competition as follows, in the case of the *Mogul Steamship Co.* v. *McGregor, Gow & Co.*(1), Lord Halsbury said:—

> I would rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.
>
> I entirely adopt and make my own what was said by Lord Justice Bowen in the court below: "All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the pre-

(1) [1892] A.C. 25, at p. 37.

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sent argument at the bar it may be doubted whether ship-owners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go, and no further.'"

And in the same case Lord Morris said, at page 49, as follows:—

> The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons.

It is to be observed that this was said in a case where the "conference" or league of shippers seemed by reason of its being against public policy to be admittedly not binding between the parties. In that case it seems to have been also made clear that those entering into such contracts committed no offence for which an indictment would lie.

We know, as part of common knowledge, that the most effective weapon such combinations have used on a gigantic scale to crush out competition, in the United States, for example, has been that which was adopted by the defendants in that case.

If this statute is not aimed at such combinations here, what can it have been aimed at?

There are a great many subsidiary methods commonly in use to promote the ends such combinations are directed to. Amongst those are the purchases or leases of factories to hold them in idleness; the combinations to fix prices, and to refuse to deal with any one who will neither accede thereto nor join the association, nor submit to undertaking for an observance of their rules; the restrictive contracts in sales; and the rebates given, or shifting rates of profit conditioned upon the observance of the terms imposed relative to resales and thus and thereby covering the

fixed or variable prices, and the lists of parties or classes of people not to be dealt with, or alone to be dealt with.

Often these devices are aided by the use or abuse of the patent laws which are made to lend a strength to the operation of these compacts dictated by the combinations; and the use or abuse of the incorporating laws are made to bear the like fruit.

The combination to remove competition by such like devices means, when pushed far, the ruin of many by the temporary lowering of, and fitful changing of, prices; and though some of the public may reap for a time the benefit of such proceedings, it means later on the payment by the public of much higher prices than in a fair competition at a fair continuous normal rate of profit would have to be paid, and generally as much higher as can possibly be extracted from the public regardless of any measurement of price by way of what a fair profit requires. In the long run it means, if successful, the reaping of enormous wealth by the few, to the detriment of the many.

The right in this country to drive others out of trade by such means and for such selfish purposes, so plainly recognized by the quotation above, as legitimate in England and formerly here, is taken away by this statute. The statement of this legal right was not intended by their Lordships to countenance the use of any but legal means.

Bowen L.J., in joining in the judgment from which the above appeal to the House of Lords was taken, says in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), at page 614, as follows:—

(1) 23 Q.B.D. 598.

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No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it.

It is quite clear, however, that the covert use of all these means which the late Bowen L.J. refers to, are likely to be facilitated if not encouraged by a recognition of freedom to resort to the schemes this state of law in England permits. This statute is intended to prohibit not only the use of all such schemes but also all else conceivably productive of the like results as such means as Bowen L.J. defines might produce, whether allied together with such schemes or not.

The doctrine of *Allen* v. *Flood*(1) might also help in conceivable circumstances to lend an appearance of legality to that which would thwart the operation of this Act and in such cases may have to be discarded.

The almost exultant tone of exposition several of the judgments in the *Mogul Case*(2) adopt in maintaining the law as laid down above may be well warranted in a country enjoying free trade. But we have chosen an entirely different commercial system and must have regard thereto. We must act in harmony therewith. We must assume that an Act such as this is not placed on the statute book for an idle purpose. Its operation must not be minimized simply because of difficulties in the way of enforcing it. Its purpose is to crush out of existence an evil. Its success, if any, must depend on its administration. Its great risk of failure lies in the fact that the requisite knowledge of the social and commercial forces shaping the social

(1) [1898] A.C. 1. (2) 23 Q.B.D. 598.

structure does not lie in the daily path of the lawyer's life, and that it cannot be well supplied by expert evidence.

I desire to guard against the impression that each of many of the devices I have referred to by way of illustration, and others of a like kind that do exist, must necessarily be obnoxious to the Act. It is the purpose to which they may be put that is the test. If that purpose be to bring about what the Act is designed to frustrate, it is vicious. My endeavour herein is to point the attitude to be taken and the path or way to ascertain and identify in the concrete an evil which is incapable of concise and accurate definition.

The application of tests by which to ascertain the possible evil results the Act seeks to avert may be much facilitated by a study in that regard of the jurisprudence of the United States with a commercial system and an historical development similar to but older than our own.

The enhancing or lowering of prices; the variation thereof without obvious causes other than the evil purpose the Act forbids; the margin of profit; the scale of business, the operative field; the frame of the contract; the devices used therein and in its execution; the refusal to deal with others without assigning any reasonable cause, which is so inconsistent with the ordinary motives of men presumed to be governed by a due observance of the Act; the entire conduct of the parties and the results produced, must each and all furnish some aid to determine whether or not the Act has been intended to be violated.

On the other hand every step taken in the past to enlarge the bounds of human freedom of thought and action, has stimulated discovery and invention, and

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as a product thereof, increased competition, which may have left by the way here and there financial wrecks as the result thereof. This has made men cry aloud in denunciation of the waste of human energy, and loss of human comfort resulting from competition. The cry is often a thoughtless one. People raising it seldom reckon with the absolutely necessary waste there is and must ever be incidental to growth; though all nature attests it on every hand. Destroy competition and you remove the force by which humanity has reached so far. The altruism some people would substitute for it may, when it has arrived, bring with it a higher sense of justice, but it has not arrived. All these considerations must always be kept in view and not be lightly set aside or the results involved therein be confounded with the actual products of violation of the Act and used as absolute or necessarily any proof of a vicious purpose.

For example, though rate of profit may be some guide, the use of any standard of profit itself apart from the comparison of changes of one time or set of conditions with another, must, as evidence, be of trifling value.

To apply the standard of profit that might enable the stupid, the slothful, the ignorant, the overcapitalized man working with antiquated machinery, and a mill or warehouse overmanned, to compete with the standard that may be fairly reached by the men of brains, of energy, of sleepless vigilance, with only adequate capital to earn dividends for, and all the advantages that the latest improvements, invention or discovery can furnish, would be a sorry one indeed for society.

The fate of the former class must not be con-

sidered. But the latter must not resort to unfair devices. They do not need them. They are without them the best kind of commercial asset the world can have and must never be depressed or suppressed by this law.

They may, indeed, need to be protected and it ought to be the anxious care of society, and its courts of justice to see that they get protected against the combinations of the men of the other class who ultimately must go to the wall before their onward march if they be given a fair chance.

In thus illustrating the law as it was, the evil to be remedied, the principles to be observed in applying the remedy and the difficulties to be met in doing so, I by no means pretend to have covered the whole ground, but enough to enable those concerned in this case to apprehend the law.

I desire to add a few words here to what I said at the outset on the question of the widely different field covered by the doctrine of public policy relative to restraint of trade and this criminal statute.

The Act not only destroys a former right of combination, but also renders illegal every direct or indirect device contrived by the art of men to serve those agreeing in the purpose of acquiring the market for themselves and adopted by them to execute such purpose, and thus also destroys the devices they may have incidentally adopted to promote the main purpose. All that is, directly or indirectly, knowingly used to promote any criminal purpose must be held void.

A world-wide difference exists and may by grasping this principle of law be appreciated here between the consequence flowing from the application of the public policy principle and that of this statute.

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It is quite conceivable that in many ways people might have entered into contractual relations of a subsidiary or collateral character with any of the parties to the combination in question in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*(1), sub-serving the purposes thereof and be bound by and able to enforce such collateral or subsidiary contracts, even if the existence and purpose of the combination were known to the people so contracting.

I can find no authority which has ever reached so far as to hold contracts having such an indirect relation to the restraint of trade being held void or tainted thereby, with illegality.

Indeed, within the principle that "when the object of an agreement is unlawful the agreement is void" (see Pollock on Contracts), it is difficult to see how collateral or subsidiary contracts, for example, designed to facilitate the execution of a plan (of which the execution is legal) once agreed upon could be held void. The compact itself in restraint of trade was void, but the execution of the purpose thereof was held to be legal, though involving the destruction of competition. The subsidiary contracts forming no part of the originating compact, but merely legally aiding that execution of it, could hardly be held void.

On the other hand every kind of contractual relation attempted to be made with any one of the parties to a combination obnoxious to this statute and to the knowledge of the party so contracting and sub-serving the purposes of the combination in doing that which violates the Act would be clearly void if for no other reason than constituting an aiding or abetting a vio-

(1) [1892] A.C. 25.

lation of the criminal law or as part of a conspiracy to defeat the criminal law.

This exact distinction I draw between the operation of the doctrine of public policy and this Act was not taken in argument and though I am profoundly convinced of its validity and importance, I am not to be taken as carrying in absence of argument, or necessity of doing so, the suggestion as to the validity of contracts subsidiary or collateral to a scheme formed in restraint of trade as violating public policy too far or indeed further than mere illustration and suggestion.

The doctrine of restraint of trade violating public policy is not abolished by this Act which I conceive not to be a substitution therefor. And as suggested by many learned judges the interest of the public means something possibly not yet passed upon in all its shades. Nor am I to be taken as suggesting that the illustration the *Mogul Steamship Co.* v. *McGregor, Gow & Co.*(1) furnishes covers all this Act is applicable to; far from it.

In this case I do not see such difficulties as I have adverted to as possible and as I anticipate must arise in many others. In addition to the vicious purpose to be sought in such cases which I think is only too apparent herein, we have the extent of field over which it was intended to reign, and did reign in its execution. It would have presented much greater difficulty had respondent's thorough going contempt for the thought of doing anything like a *"malimid"* (Hebrew for school-teacher), or, indeed, in any way regarding the welfare of others, not been made so apparent.

(1) [1892] A.C. 25.

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His one thought was, if possible, to destroy all competition and, if need be, those who ventured to come in competition with him. His language and conduct portray exactly what this statute strikes at. Its aim was to put out of business use the methods of men banding themselves together to render it difficult if not impossible for others to become rivals, and stop competition in the same field of business.

These parties succeeded so far that their profits were nearly doubled. They seem to have been reasonably successful previously to this and thus had no excuse for their conduct. Their purpose was so clearly obnoxious to the Act it would matter not even if increased profits had not been reaped. The legal result ought to be the same.

It is because of the novelty of the case and the need that there should be no misapprehension arising from its results, and that honest men may not be entrapped from reliance on the former state of law here and in England, which I have adverted to, and still existent in England, which seems in harmony with the commercial ethics of most men, that I have dealt at such length with it.

It is to be observed that the individual seems still free to do as was permitted to the combination in the *Mogul Case*(1). The corporation possibly may also, but there a nice puzzle may be presented some day which I will not venture to anticipate. It may itself be founded on a scheme to violate the Act.

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

(1) [1892] A.C. 25.

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DUFF J.—The learned trial judge has in effect found that it was one of the direct and governing aims of the parties to the agreement in question to restrict and if possible suppress competition in the buying and selling of the articles specified in the Provinces of Manitoba, Saskatchewan and Alberta with the object of establishing and maintaining a monopoly of the distributing trade in those articles. I think the evidence supports that view. At least one of the articles — scrap iron — is shewn to have been a commodity of considerable commercial importance. I think that in entering into such an agreement the parties to it were guilty of an offence under section 498(*d*) of the Criminal Code.

I agree with the Court of Appeal that looked at from the point of view of the parties alone the provision of the agreement for fixing the prices at which the commodities in question were to be bought would be a provision reasonably necessary for the protection of the interests of persons who should agree to share profits and losses in the purchase and sale of such commodities. But that circumstance, in my judgment is not decisive of the question upon which we have to pass in this appeal.

The view upon which the judgment of the Court of Appeal is based as I understand it, is that the question at issue must be decided by ascertaining whether at common law the courts would have refused to enforce this agreement as being an agreement in restraint of trade: and that the answer to this question must in turn be governed by the opinion of the court upon the point whether or not the term of the agreement providing for the fixing of prices was reasonably necessary for the protection of the interests of the parties

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under their contract to share profits and losses. That view, I think, with respect, is based upon an inadequate conception of the principle of the common law as well as of the theory underlying the enactment we have to apply.

An opinion which has often found expression in text-books and sometimes in the judgments of very distinguished judges is that the common law considers freedom of contract of such paramount importance that given a principal lawful contract not in itself affecting any restrain of trade (a partnership, a contract for the sale of a business, a contract of employment) subsidiary agreements restraining trade or competition are entitled to the aid and protection of the law if only such subsidiary agreements are reasonably necessary for the protection of the individual interests of one of the parties in the principal transaction.

But it is impossible now to affirm that such is the rule of the common law. In *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt*(1), at page 649, Lindley L.J. said:—

> In *Rousillon* v. *Rousillon*(2), Lord Justice Fry, in one of those admirable judgments for which he was so justly celebrated, came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of Lord James in *Leather Cloth Company* v. *Lorsont*(3), and is, in my opinion, the doctrine to which the modern authorities have been gradually approximating. But I cannot regard it as finally settled, nor, indeed, as quite correct. *The doctrine ignores the law which forbids monopolies.*

In the same case Bowen L.J. said, at pages 667-668:—

(1) (1893) 1 Ch. 630.
(2) 14 Ch. D. 351.
(3) L.R. 9 Eq. 345.

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For the purpose of clearness I will, in conclusion, attempt to summarize the exact ground on which I consider this case should be decided. The rule as to general restraint of trade ought not, in my judgment, to apply where a trader or manufacturer finds it necessary, for the advantageous transfer of the goodwill of a business in which he is interested, and for the adequate protection of those who buy it, to covenant that he will retire altogether from the trade which is being disposed of, provided always that the covenant is one the tendency of which is not injurious to the public. This last element in the definition ought not, I think, to be overlooked, for I can conceive cases in which the absolute restraint might, as between the parties, be reasonable, but yet might tend directly to injure the public; *and a rule founded on public policy does not admit of any exception that would really produce public mischief;* such might be possibly the case if it was calculated to create a pernicious monopoly in articles for English use — a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts, may some day or other become extremely important.

The judgment of A. L. Smith L.J., at pages 672 and 673 makes it clear that that learned judge accepted the view that an agreement in restraint of trade would not be enforced if it was clearly one prejudicial to the interests of the public however unexceptionable it might be from the point of view of the parties.

In the House of Lords (1), Lord Herschell says, at page 549:—

I must, however, guard myself against being supposed to lay down that if this can be shewn (that is to say, if it can be shewn, to be reasonable from the point of view of the parties' interests) the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the *covenant might nevertheless be held void on the ground that it was injurious to the public interest.*

Lord Ashbourne, at page 559:—

I do not see anything to lead to the conclusion that the covenant is injurious to the public interest. I entirely agree with the Lord Chancellor in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of.

(1) [1894] A.C. 535.

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Lord Morris, at page 575:—

> These considerations (*i.e.*, the governing considerations in determining the validity of an agreement in restraint of trade) I consider, are whether the restraint is reasonable and *is not against the public interest;*

and finally, Lord Macnaghten, at page 565, states the law thus:—

> The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned *and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.* That, I think, is the fair result of all the authorities.

It is quite clear that all of these eminent judges had in view the possibility of a state of circumstances arising in which the public interest in restraining encroachments upon freedom of competition might have to be maintained at some sacrifice of the public interest in freedom of contract, even in such common commercial transactions as the sale of a business.

It was because, no doubt, in the opinion of the legislature the conditions had actually come into existence which Lord Bowen foresaw as a possibility merely, that this legislation was enacted. The particular sub-section with which we are concerned was plainly intended to protect the specific public interest in free competition. In applying the section the public interest in freedom of contract in commercial matters, and especially in freedom of disposition by

the individual of his own labour and skill and in freedom of dealing in private property, must, of course, be kept scrupulously in view; otherwise there might conceivably be some risk of ultimately defeating the objects of the enactment by depriving the legitimate commercial energies of the country of some of their important incentives. But, giving full effect to these considerations, I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade, comes under the ban of the enactment.

ANGLIN J.—The plaintiff sues for an accounting of profits made by the defendants in their junk business, to a share of which he claims to be entitled under the terms of an agreement between them. The defendants, who pleaded as a defence the illegality of this agreement, on the grounds that it was designed to effect a restraint of trade unlawful at common law and that it contravened clause (*d*) of section 498 of the Criminal Code, in that it was an agreement to unduly prevent or lessen competition in the purchase and sale of articles which were a subject of trade or commerce, appeal from the judgment of the Court of Appeal for Manitoba reversing the judgment of Mathers C.J., who had held that the agreement, although not illegal at common law, was in contravention of clause (*d*) of section 498 of the Code.

If the determination of this appeal depended solely upon an appreciation of the evidence contained in the record, I should be disposed not to entertain it,

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notwithstanding the dissent of Richards J.A., from the judgment of the appellate court. As I understand the matter, however, it is upon the meaning to be attributed to the word "unduly" in section 498 of the Code that the Court of Appeal differed from the learned trial judge and it is the appellate judges' interpretation of that important statutory provision which the defendants ask us to review.

I agree with the decision in *The King* v. *Elliott* (1), that it does not follow that, because an agreement, of which the alleged purpose is

> to unduly prevent or lessen competition in the * * * purchase, * * * * or sale of some article or commodity which may be a subject of trade or commerce,

is not unlawful at common law, it may not constitute an offence against clause (*d*) of section 498 of the Code. As pointed out in that case, Parliament, in striking out the word "unlawfully," with which the introductory paragraph of section 520 (now section 498) originally concluded (55 & 56 Vict. ch. 29), should be credited with an intention to effect some real change in the law. I cannot think that this word was struck out merely because it was thought that, upon a proper construction, the agreements dealt with in section 498 would be held to be only such agreements as are declared by section 496 to be conspiracies in restraint of trade. As originally enacted in the Code of 1892, section 520 (now section 498) contained both the words "unlawfully" and "unduly." To constitute an offence under it the parties must have unlawfully agreed "to unduly limit facilities for transporting, etc., to unduly prevent, limit, or lessen manufacture, etc., or to unduly prevent or lessen competi-

(1) 9 Can. Cr. Cas. 505.

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tion in production, manufacture, purchase, barter, sale, transportation, etc." The history of section 498, I think, precludes the view that in amending it, Parliament merely wished to remove a tautologous word. "Unduly" was first struck out (62 & 63 Vict. ch. 46), "unlawfully" being left in; but in the following year (63 & 64 Vict. ch. 46) "unlawfully" was struck out and "unduly" was restored. As the Code was originally drawn, section 516 (now section 496) did not govern section 520. The latter section was complete in itself. Since it contained the word "unlawfully" there could be no occasion to import that restriction from section 516. I see no good reason for now giving to section 496, which is an exact reproduction of section 516, an effect which the latter did not have, and, obviously, was not meant to have, in the original Act.

If, however, section 496 should be held to modify or qualify anything in section 498, I would incline to the view that it would be the principal or introductory clause. If so, it would apply to each of the sub-clauses of section 498 and no change would have been effected by striking out the word "unlawfully." While, as pointed out by Phippen J., in *The King* v. *Gage*(1), there are serious difficulties in reading clause (*b*) of section 498 as wholly unrestricted (the learned judge treating clauses (*a*), (*c*) and (*d*) as specifying particular instances of a generic offence covered by clause (*b*) thought the word "unduly" should be read into it), as at present advised I am not prepared to accede to the view expressed by Howell C.J., at page 430, and referred to in *The King* v. *Clarke*(2), that clause (*b*) of section 498 should be confined in its applica-

(1) 13 Can. Cr. Cas. 415. (2) 14 Can. Cr. Cas. 57, at p. 63.

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tion to such agreements as are declared to be conspiracies in restraint of trade by section 496. But it is not now necessary to determine that question, and I allude to it merely to avoid any possibility of leaving the impression that I would import into the clause (*b*) the word "unlawfully."

The single, if not simple, question before us is whether in the instrument under consideration the parties agreed "to unduly prevent or lessen competition in the * * * purchase, * * * (or) sale" of junk and bottles.

It is perhaps doubtful whether there is in the agreement any sufficiently definite provision as to sale prices to bring it within the statutory prohibition. But there is a distinct undertaking as to purchase prices to be paid by the parties, which I cannot read as aught else than a mutual promise that during the currency of the agreement neither would pay for bottles or junk prices higher than those specified in the schedules. That this agreement tended "to prevent or lessen competition" between the parties to it in the purchase of the scheduled articles there can be no question. In view of the fact that they controlled from 90% to 95% of the junk business in the territory in which they operated (a circumstance most material and proper for consideration in determining the true nature of the agreement, its purpose and the intent of the parties to it) it seems to me equally clear that, if carried out, it would tend to destroy in that territory all substantial competition in the purchase of junk and bottles and to leave the public as to the market price for these articles entirely at the mercy of the contracting parties.

The suggestion that, if too great a depression in

prices should result, competition would be invited rather than discouraged seems to ignore the fact that provision is made for consultation between the parties as to sale prices and that it is declared to be the intent of their arrangement that they are to work for the mutual advantage of both. The evidence establishes that the prices to which they bound themselves to adhere in purchasing the scheduled articles were materially smaller than had been paid by them when there was competition between them. Of course it would be to their mutual interest to place these prices as low as practicable, yet not to put them so low nor to raise their sale prices so high that the margin of profits would invite the invasion of their field by really formidable rivals. Were such an invasion threatened they had it in their own hands at any time to reduce their sale prices to meet it. Small competitors they were in a position to crush. I have no doubt that the purpose of the agreement was to prevent or lessen competition in the purchase of junk and bottles for the advantage of the parties, without regard to the public interest, but with the certain incidental consequence that the latter interest would suffer as the result of the provision for a substantial reduction in such purchase prices below what they would be under fair competition. It is not open to question that the agreement was well calculated to accomplish its purpose.

But every agreement to prevent or lessen competition is not declared to be an offence. The elimination or diminution of competition must be undue. It is suggested that if "unduly" does not mean "unlawfully" — and the history of the section seems to forbid such an interpretation — it is used as the equivalent

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of "unreasonably," and that before an agreement can be said to provide for unduly preventing or lessening competition, the court must be satisfied that it is designed to do so to an extent not reasonably necessary for the protection of the interests of the parties to it, whatever may be its effect upon the interests of the public. I cannot accept that suggestion. It would re-introduce the common law test of illegality as defined in the modern cases such as *Collins* v. *Locke* (1); *Dubowski & Sons* v. *Goldstein* (2), and others referred to in the judgments of the provincial courts and at bar in this court. If deemed an interchangeable equivalent of "unduly" the presence of the word "unreasonably" in clause (*c*) of section 520 as originally enacted and now found in section 498, is scarcely intelligible. If the word "unreasonably" were used in the statute instead of "unduly" there might be much to be said for the view that any agreement reasonably necessary for the protection of the parties to it is not in contravention of section 498.

The difference, in my opinion, between the meaning to be attached to "unreasonably" and that which should be given to "unduly" when employed in a statutory provision such as that under consideration is that under the former a chief consideration might be whether the restraint upon competition effected by the agreement is unnecessarily great having regard to the business requirements of the parties, whereas under the latter the prime question certainly must be, does it, however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive, or oppressive re-

(1) 4 App. Cas. 674. (2) [1896] 1 Q.B. 478, at p. 484.

strictions upon that competition the benefit of which is the right of every one ? *The King* v. *Elliott*(1).

Applying this test to the agreement before us, when we find that it was designed and, if carried out according to the intent of the parties, would be effectual to destroy all competition in the articles which it covered throughout the extensive territory in which they operated, that it was intended to bring about a material reduction directly in the prices which had been paid to junk and bottle collectors and indirectly in the prices which had been paid to the public for the purchase of such articles when competition was unfettered and which would obtain under fair competition, and that the situation was such that the parties to the agreement were not subject to other competition and were in a position effectively to combat the introduction into their territory of other competitors, the proper conclusion seems to be that it was an agreement unduly to prevent or lessen competition in the purchase of these articles.

I might add that if, notwithstanding its utter disregard of the public interest and the incidental prejudice to that interest which it was calculated to cause, such an agreement would nevertheless be lawful if shewn to be reasonably necessary for the protection of the business interests of the parties to it, the evidence in the record does not establish such necessity. The effect of the operation of the agreement would appear to have been to increase the profits which the parties had been previously making by upwards of 15% — an object which though legitimate, or even laudable, does not sanction the employment of illegal or prohibited means to attain it. It is not

(1) 9 Can. Cr. Cas. 505, at p. 520.

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established that the profits made by the plaintiff and the defendants before the agreement in question was entered into were not reasonably sufficient; still less that the increase provided for and brought about was indispensable to their conducting reasonably successful business enterprises.

It may be that to give effect to the defendants' plea of illegality will enable them dishonestly to escape from the consequences of a bargain which they made fully understanding and appreciating its effect. But that the purpose of Parliament in enacting section 498 of the Criminal Code should be carried out and that the influence of its provisions for the protection of the public interests should not be weakened or impaired is much more important than that in a particular case a party to an illegal agreement should be prevented from dishonestly evading his private obligation.

I would, with respect, allow this appeal and restore the judgment of the learned trial judge. The appellants should have their costs in this court and in the provincial Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellants: *Andrews, Andrews, Burbidge & Bastedo.*

Solicitors for the respondent. *Elliott, Macneil & Deacon.*

THE NATIONAL TRUST COMPANY, LIMITED, AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

WILLIAM MILLER AND WILLIAM D. DICKSON AND THE EASTERN CONSTRUCTION COMPANY, LIMITED (DEFENDANTS) ..... } RESPONDENTS.

1911
*Nov. 13, 14.
1912
*March 21.

THERESE SCHMIDT AND JOHN SHILTON (PLAINTIFFS) ..... } APPELLANTS;

AND

WILLIAM MILLER AND WILLIAM D. DICKSON AND THE EASTERN CONSTRUCTION COMPANY, LIMITED (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mining Act—Grant of mining land—Reservation of pine timber—Right of grantee to cut for special purposes—Trespass—Cutting pine—Right of action.

The Ontario Mining Act, R.S.O., [1897] ch. 36 as amended by 62 Vict. ch. 10, sec. 10, provides in sec. 39, sub-sec. 1, that "the patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands may at all times, during the continuance of the license, enter upon the lands and cut and remove such trees and make all necessary roads for that pur-

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

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pose." By the other provisions of the section, the patentee may cut and use pine required for necessary building, fencing and fuel and other mining purposes and remove and dispose of what is required to clear the land for cultivation, but for any cut except for such building, fencing and other mining purposes he shall pay Crown dues.

Held, Idington and Duff JJ. dissenting, that a patentee and a lessee of mining lands who had taken possession thereof, but were not at the time of the trespasses complained of in actual physical possession, have, notwithstanding such reservation, or exception, such possession of the pine trees, or such an interest therein, as would entitle them to maintain actions against a trespasser cutting and removing them from the land. *Glenwood Lumber Co.* v. *Phillips* ([1904] A.C. 405) followed; *Casselman* v. *Hersey* (32 U.C.Q.B. 333) discussed.

In this case the defendants cut and removed the pine timber from plaintiffs' mining lands without license from the Crown, but claimed that they subsequently acquired the Crown's title to it and should be regarded as licensees from the beginning.

Held, Idington and Duff JJ. dissenting, that assuming that the Crown could after the trees had been cut and removed, take away by its act the plaintiffs' vested right of action the evidence shewed that defendants were cutting on adjoining Crown land as well as on plaintiffs' locations and did not clearly establish that any title acquired by defendants included what was cut on the latter.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the plaintiffs.

The plaintiffs are patentees of mining locations in the Rainy River District under letters patent from the Ontario Government. By the "Ontario Mining Act" the pine timber on the location is excepted from the grant and remains Crown property subject to the right of the patentees to use it for certain specified purposes. Any licensee of the Crown may enter on the land and cut and remove it. The plaintiffs at the time this action was begun had not taken physical possession of the mining land.

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The defendants, The Eastern Construction Co., had a license from the Crown to cut timber on lands adjacent to the locations and contracted with the defendants Miller and Dickson for a supply of railway ties to be delivered at the right-of-way of The National Transcontinental Railway. In carrying out this contract Miller and Dickson cut the pine and other trees on plaintiffs' location, had them made into ties and removed same from the land. The action was brought for the value of the trees so cut and damages for injury to the land thereby. The facts are more fully stated in the opinions of the judges on this appeal.

The trial judge gave judgment for the plaintiffs which was reversed by the Court of Appeal in so far as the pine was concerned. The plaintiffs appealed to the Supreme Court of Canada.

Anglin K.C. and *J. A. McIntosh*, for the appellants. The patentees brought the statutory right to use the timber for the purposes specified. *Gordon* v. *Moose Mountain Mining Co.*(1), and see *McLean* v. *The King*(2), at page 546.

Miller and Dickson cannot rely on a subsequent license from the Crown which would be to permit a wrongdoer to set up in justification permission to deprive the injured party of his vested rights. See *Lamb* v. *Kincaid*(3).

The Eastern Construction Co. by accepting and paying for the ties became liable for the trespass.

J. H. Moss K.C., for the respondents, referred to *Freeman* v. *Rosher*(4); *Lewis* v. *Read*(5).

(1) 22 Ont. L.R. 373.
(2) 38 Can. S.C.R. 542.
(3) 38 Can. S.C.R. 516.
(4) 13 Q.B. 780.
(5) 13 M. & W. 834.

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THE CHIEF JUSTICE.—On the whole, I concur in the opinion of Mr. Justice Anglin.

IDINGTON J. (dissenting).—The question raised herein is reduced to the narrow point of whether or not the grantee of lands under the "Mines Act," R.S.O. 1897, has such possession in the pine timber on such lands so granted him by the Crown, that he can recover the value thereof when cut and removed from the lands, not only from the actual trespasser, but from those taking under him the fruits of the trespass after the removal, and without the purchaser having any notice or knowledge of such trespass until after the removal.

I think the question must be answered by the interpretation of section thirty-nine, sub-section 1, of the said Act, which is as follows:—

(1) The patents for all Crown lands sold as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such land may at all times during the continuance of the license enter upon the lands and cut and remove such trees and make all necessary roads for that purpose.

The grant is made expressly subject thereto and then the title declared to be qualified

in this that it is subject to the conditions imposed by the said Act for the purpose of securing the carrying out of mining operations in and upon the said land.

When we turn to section 34 of the Act, we find the title thus qualified is in truth dependent for seven years from the grant upon certain mining developments taking place at the instance of the grantee from year to year notwithstanding the apparently absolute grant, and that in default of that being done, the title may revert to the Crown.

He has no more property in the pine trees, or charge of or over them, than if they were growing upon an adjacent lot under such legal conditions that he might by virtue of a covenant from the owner in fee simple in certain contingencies which might or might never happen, have a license to cut and use same for his use in developing his mining interest in the land granted for such purpose, but for no other purpose.

The trees having continued the property of the Crown, how can the grantee in any such case assert the right of property claimed here, when the trees have been cut and removed from the land?

The appellants as such grantees had neither a legal nor physical possession of the pine trees and hence no basis on which to rest a claim to the ties into which they were cut.

They were under no position of responsibility to the Crown to have them protected from the acts of others than themselves.

Their sole relation to the pine trees, or the Crown as owner of them, was that upon certain contingencies happening, if the Crown by its license had not in the meantime taken the trees, then they (the appellants) had a license to use them for specified purposes.

But when we find they had been removed from the land, cut into ties and are being delivered to the respondent company, how can it be possible by virtue of such a contingent license, to say the appellants had any property in the ties?

Their legal position may have entitled them to bring an action for damages against any one without colour of right so changing the condition of things

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that they could not enjoy that to which they had a legitimate and reasonable expectation of enjoyment, by virtue of their implied license when it had become operative.

Whatever the form of action it does not appear to me it could ever be trespass. Nor can it be trover. It has been said a bailor can call on a bailee recovering in trover for an account. What right would the Crown have to call on the appellants for the fruits of such an action? The bailor has that right *pro tanto* his interest in case the bailee makes recovery. But on what legal ground could the Crown here rest such a claim ?

Likewise in the case of lessor and lessee, the latter being liable for waste is responsible therefor, and being answerable to the lessor is the proper party to sue for trespass and to recover full damages.

The Crown might sue the trespassers for and recover the value of these trees taken notwithstanding the appellants' recovery. But how can the trespasser answer the Crown by any such recovery as sought herein ?

It seems an extraordinary thing if because the appellants have a grant which may terminate, indeed, be abandoned, by reason of necessity for an expenditure upon it far beyond its commensurate value in order to comply with the terms of the grant, they can thus indirectly strip the land of its pine timber and carry away that which may far exceed the minerals in value.

This would be to convert that which was intended to convey minerals and preserve timber into a grant to convey timber.

The possession of the appellant was, it is said,

found by the learned trial judge. Such possession as he had evidence of must be attributable to the title disclosed.

What rights of recovery the bare possessor owing no duty, in relation to the thing trespassed upon, to any one else may have as against a mere trespasser and the measure of damages in such a case are beyond the present inquiry.

This is a case where the actual or physical possession clearly goes no further than the legal, and that does not entitle appellants to claim as alleged in the statement of claim that the trees were their property. Nor does it entitle them to follow the trees when cut and converted into a something else.

Again, the right of the appellants was subject to be divested by any licensee of the Crown cutting by virtue of his license.

How do we know there has not been outstanding such a license ?

The parties hereto argued as if none existed, but when a something happened in the Crown Lands Office of which we only know part, the appellants say with force, we do not know it all.

Assume a renewable license outstanding at the date of the grant, what possible right is left in the appellants to claim those ties or their value?

The argument, addressed to us, which maintained it was only licenses existent at the date of the grant that the statute had in view, does not meet the possibility I have adverted to.

Nor do I think it meets the point in any aspect. The mining might fail to be of any value to any one and the last possibility of the miners resorting to the timber might disappear; are we to assume that the

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Crown could not then issue a license to cut these trees reserved as its property ?

Surely no such absurd result was ever contemplated by any one.

And unless we can maintain it was so, this pine timber was liable to be cut at any time by licensees of the Crown.

But why labour with it ? How can trespass as to these pine trees ever lie on such a title ?

No case cited, when examined closely, has in truth any but an illusory resemblance to this case, save the case of *Casselman* v. *Hersey*(1), which is distinguishable, but I may add, no more binds us than the finding of the learned trial judge which is sought to be restored by virtue of a finding of possession.

I think the appeal ought to be dismissed with costs.

The appeal in the case of Schmidt against the same parties must also fail.

They were argued together, being so much alike. I have not found them identical by any means, but the case of the grant is so much stronger in some aspects needless to dwell upon, that having fully examined it I need not say more than that the weaker one fails also.

DUFF J. (dissenting).—This appeal arises out of two actions which were tried together, in which the appellants claimed reparation from the respondents for damages alleged to be suffered by them in consequence of the cutting and taking away of timber from certain mineral locations. These locations consisted of two sets (each comprising four) one of which, throughout the proceedings referred to under

(1) 32 U.C.Q.B. 333.

the head of the "National," was held by the plaintiffs in the action of the National Trust Co. against Miller, under Crown grants issued pursuant to the "Mines Act" of Ontario, sections 26 to 34. The other set, referred to in the proceedings as the "Schmidt" locations, was held by the plaintiffs in the action of Schmidt against Miller under leases granted under the authority of section 35 of the same Act. Of the timber in question all but a very small percentage (less than eight per cent.) consisted of pine which was the property of the Crown, being expressly excepted from the grants and leases referred to. The learned trial judge held the respondents accountable to the appellants for the full value of the pine timber taken from the locations; but on this point his judgment was reversed by the Court of Appeal. The substantial question is whether on this point the judgment of the Court of Appeal is right.

The material facts are either undisputed or are decided by the findings of the learned trial judge; but in the view I take of the questions arising on the appeal, more especially of some points not raised by the parties themselves, it is necessary to dwell with a little care upon these facts as well as upon the course of the trial and the nature of the case made by the parties there.

The trespasses complained of took place in the month of February, 1909. They were actually committed by the defendants Miller and Dickson, who had entered into a contract with the respondents, the Eastern Construction Co., to cut, from a defined area, timber for railway ties, to manufacture this timber into ties, and to deliver the ties at certain places designated on the line of the Northern Trans-

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continental Railway, then in course of construction. The Eastern Construction Co. had a permit, issued by the Ontario Government under the authority of the "Crown Timber Act," to cut timber from Crown lands within an area described in the permit, which will be sufficiently designated for my present purpose by saying that the southern boundary of it was Vermilion River — which it may be mentioned is a short river connecting two lakes north-west of Lake Superior, in Rainy River District, at a distance of about 200 miles from Port Arthur. The Eastern Construction Co. had entered into an arrangement with the firm of O'Brien, Fowler & McDougall (who were engaged in constructing part of the Transcontinental Railway under a contract with the Dominion Government), by which the Eastern Construction Co. (who were not themselves engaged in railway building) were to give to the O'Brien firm the use of their permit for a commission of one cent upon each tie manufactured from timber cut upon the permit; and the method by which the arrangement was carried out was that the Eastern Construction Co. engaged Miller and Dickson as contractors to cut the ties required from the area affected by the permit, and to deliver them at the railway line where they were taken possession of by O'Brien, Fowler & McDougall.

The appellants' locations were all situated south of Vermilion River outside the area affected by the permit.

In the beginning of February, Miller and Dickson, in circumstances which it will be necessary to refer to more particularly when considering the responsibility of the Eastern Construction Co., began cutting timber south of Vermilion River from Crown lands as

well as from the appellants' locations. On the 24th February, when nearly the whole of the timber cut in the course of these trespasses had been manufactured into ties and delivered, Mr. Margach, the Crown timber agent for the district of Rainy River, then on one of his tours of inspection with Inspector Smith, observed that Miller & Dickson were exceeding the limits of the Eastern Construction Co.'s permit, and ordered them to stop. A few days afterwards Mr. Margach notified Miller & Dickson that they might remove any timber that had been cut. When this permission was given, Mr. Margach was aware of the fact that Miller & Dickson had been cutting on the mineral locations in question, and the permission was intended to apply, and was understood to apply to the Crown timber cut there.

On the 26th February Mr Margach reported Miller & Dickson's trespasses to the Department of Crown Lands, informing the Department at the same time that the area trespassed upon included the appellants' locations. On the 6th March he formally notified the Eastern Construction Co. that Miller & Dickson had been trespassing south and east of Vermilion River, that he had ordered them to stop trespassing, but had authorized them to remove what they had cut and to make a separate return of it.

Some time in April or May, Mr. Alexander McDougall, the managing director of the Eastern Construction Co., interviewed the Commissioner and Deputy Commissioner of Crown Lands, on the subject of the dues to be charged in respect of the government timber affected by these trespasses. According to the government regulations, the government is entitled to charge double dues for timber cut in tres-

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pass. In September, Inspector Smith, of the Department, was directed by the Crown timber agent to make an examination and return of the extent of Miller & Dickson's trespasses, including the trespasses on the mineral locations. Smith's report was made in September, 1909, and that report was put in at the trial by the appellants, and upon it the learned trial judge based his estimate of the damages to which he found the appellants entitled. In November of the same year the Crown timber agent, by direction of the department, delivered an account to the Eastern Construction Co. for Crown dues on timber cut under the company's permit, including the Crown timber cut upon the mining locations. The dues so charged for the timber cut in trespass were the ordinary dues payable to the Crown for timber cut under license, in other words, the department treated timber taken by Miller & Dickson from the mining locations as timber lawfully cut under the authority of the department.

These facts, as I have already said, are either found by the learned trial judge, or not seriously open to dispute: and on these facts the respondents were held by the learned trial judge to be accountable to the appellants for the full value of the timber taken from the mining locations. The Court of Appeal held on the contrary that as respects the pine timber which was vested in the Crown, the appellants were not entitled to recover.

Before examining the respective grounds of these conflicting views, it will be convenient to state what are the rights of the Crown and the appellants respectively in the timber standing on the mining locations. With regard to the granted locations, those rights are defined in section 39 of the "Mines Act" (R.S.O. 1897), ch. 360, which is as follows:—

39. (1) The patents for all Crown lands sold as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands may at all times during the continuance of the license enter upon the lands and cut and remove such trees and make all necessary roads for that purpose.

(2) The patentees or those claiming under them (except patentees of mining rights hereinafter mentioned) may cut and use such trees as may be necessary for the purpose of building, fencing and fuel on the land so patented, or for any other purpose essential to the working of the mines thereon, and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation.

(3) No pine trees, except for the said necessary building, fencing and fuel, or other purpose essential to the working of the mine, shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of, except for the said necessary building, fencing and fuel, or other purpose aforesaid, shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw logs.

By section 40, section 39 is made applicable, with some modification, to locations held under lease. For the purposes of this case the rights of the lessees in respect of timber upon leased locations may be treated as if they rested upon section 39. The effect of the first sub-section is apparently to leave the property in the pine trees in the Crown entirely unaffected by the grant. "The pine trees shall," the Act says, "continue to be the property of Her Majesty." The effect of such a provision seems to be that the ownership of the trees is severed from the ownership of the soil, but the quality of the ownership of the trees is not in any degree altered by the grant of the soil. The timber remains vested in the Crown as a corporeal hereditament. A standing tree, (as Chitty L.J. said in *Lavery* v. *Purssell*)

is just as much a hereditament in point of law as a house which is standing on the land and just as much so as the mines which are underneath. I only speak now as a real property lawyer. I am bound of course by English law to say that a tree is not a chattel.

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There is no distinction in point of law between the timber on the land and the mines.

I am dwelling on this because it appears to me to have an important bearing upon the principal argument addressed to us by Mr. Anglin on behalf of the appellants.

The principle (as applicable to the case where the grantor is a subject) seems to be stated by Mr. Leake with his usual accuracy in his book on the Uses and Profits of Land, at p. 30:—

> A grant, or an exception from a grant, of the trees growing in certain land, creates a property in the trees, separate from the property in the soil; but with the right of having them grow and subsist upon it. An estate of inheritance in a tree may thus be created; which would be technically described as a fee conditional upon the life of the tree.

The authorities cited by Mr. Challis, at p. 256 of his book on the Law of Real Property, establish beyond question that a determinable fee may be validly limited to a man and his heirs "as long as such a tree shall grow," or "as long as such a tree stands;" and the reason why such limitations are good is given in *Liford's Case*(1), at p. 49(*a*), and is there said to be because a man may have an inheritance in the tree itself.

It is perfectly true there is authority that where trees are sold under a contract that they shall be removed, the trees may, for certain purposes, be held to be chattels, the land being regarded simply as a warehouse for the timber; and, of course, a grant or reservation of timber may be so framed as to grant or reserve, as the case may be, only a chattel interest in the trees. We are not concerned with such cases.

(1) 11 Co. 46(*b*).

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The language of section 39 to which I have adverted makes it impossible, in my judgment, to give any other effect to that section than this, that the property in all pine trees standing on a Crown location granted under the provisions of the "Mines Act," is to remain in the Crown unaffected entirely by the grant of the location, with all the incidents normally attaching by law to such property. It would follow, of course, that, notwithstanding the grant of the location, the Crown would retain all its powers of dealing with the reserved timber and all such powers are exercisable lawfully with respect to such timber as may be exercised in respect of Crown timber growing upon any part of the Crown domain. It is material to add that, in view of the contentions which have been made in this case, in my judgment this timber falls within the scope of section 3 of the "Public Lands Act" which vests in the Crown Lands Department the

management and sale of the public lands and forests;

that such timber, moreover, is

timber on the ungranted lands of the Crown,

within the meaning of sub-section 1, of section 2, of the "Crown Timber Act"; and that consequently, it may be made the subject of licenses granted under that section. It would, I think, be an unwarranted restriction upon these words to confine their application to lands the soil of which remained ungranted. The contention that they ought to be so restricted was made by Mr. Anglin, not with much confidence, I thought, but a moment's consideration shews that the difficulties in the way of that construction are insuperable. It is obvious that the Legislature is addressing itself, in this phrase, to the question of the Crown's power of disposition over the timber which

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is to be the subject of a license granted under these sections. Nobody would argue, for example, that a grant of the minerals would take the land which was the subject of the grant out of the category of "ungranted lands" within the meaning of this section, nor do I suppose anybody would argue that lands sold under the provisions of sections 13 and 14 of the "Free Grants and Homesteads Act" are not, with respect to minerals and timber, "ungranted lands" within the terms of the Act. With respect to the minerals reserved as well as with respect to the pine trees rereserved, such lands are correctly described as ungranted lands. So it seems clear that the lands comprised within a mineral location to which section 39 applies are, with respect to the pine timber "ungranted lands." The grantee of the location holds his location, therefore, subject, as regards the pine timber, to the right of the Department of Crown Lands to deal with that timber in every respect as if it were timber standing upon soil still vested in the Crown. That being so, the provision in the first sub-section of section 39, authorizing the holders of licenses to enter upon locations for the purpose of cutting Crown timber thereon, obviously cannot be restricted to licenses in existence at the time of the grant of the location. Sub-sections 2 and 3, however, confer upon the grantees of locations certain rights in respect of this timber. These rights become exercisable only upon the happening of the statutory conditions, namely, that the timber is required for the purpose of working the mines on the location, or that there has been an actual clearing of the land for the purposes of cultivation, and that it has been necessary to remove the pine trees in the course of such clearing. It

is important to observe that there is here no grant of the timber necessary for mining purposes. The right of the mine owner is to take such pine timber as may be necessary for mining purposes, provided that, when it becomes necessary to take it, it is there to be had. The grantee of the location acquires no property in the pine trees *in situ*, no assurance that they will not be removed, no right to object to the removal of them under the authority of the Crown. Until they are appropriated by him, or at all events until the necessity for taking them has arisen, they are absolutely subject to the authority and disposition of the department having the management of the Crown forests. Licenses may be granted in respect of them under the "Crown Timber Act." If required for a public work, the construction of a government railway, for example, the Crown Lands Department would unquestionably have the power to devote them to such purposes. If they are cut and taken away by a trespasser, the Department has precisely the same discretionary powers of dealing with the trespass as it would have in the case of timber cut from any other part of the Crown domain.

It is necessary in order to make my view of the case clearly understood, to observe, before proceeding to examine the validity of the grounds upon which the learned trial judge proceeded, that the appellants did not at the trial rest their claim upon any contention that there had been any interruption of, or interference with, the exercise of their rights to take pine timber for mining purposes.

It was not alleged that the appellants were engaged in any mining operations upon any of the locations which required the use of the timber, or that

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they had any intention of undertaking such operations. As to the locations held in fee, the evidence is perfectly clear; it is admitted by Mr. Shilton himself explicitly that at the time of the trial there never had been "any actual sinking of the shaft or penetration to the rock"; nor any "straight attempt to develop them and find out what quantity of ore can be found in place." It is also admitted that there was no intention of working or developing these locations within the near future.

With regard to the locations held under lease, it appears that some work was at one time done upon one of them; a cross cut had been made 20 or 30 feet long, 15 deep at one end, and about 8 feet wide at the top. But at the time of the trial no mining operations were in progress or in contemplation. No timber had ever been cut on any of the eight locations for mining purposes.

There is another ground upon which one might have expected the appellants to attempt to base their claim to relief if the facts had justified it. The appellants' right to take the pine timber for mining purposes is a right annexed by the statute to the ownership or other interest held by them in the locations. The acts of the respondents Miller & Dickson have, of course, deprived them of all possibility of exercising this right in respect of the timber which has been removed; and if, as the appellants contend, this was done without lawful justification or excuse, by means of and in course of trespass upon the land, for the benefit of which the right of exercisable, then I should have thought the appellants entitled to reparation to the extent of the loss suffered by them by reason of these wrongful acts. But the measure of that loss is not the

value of the trees; obviously it is the value of the contingent right to take the trees. In estimating the value of that right two elements must, of course, be taken into account, first, the probability of the timber ever being required for the purposes for which the statute permits it to be taken, and, secondly, the probability of the timber being permitted by the Department of Crown lands to remain until it should be so required. In estimating the amount of the loss to the appellants which can fairly be said to have been the "natural and probable consequence" of the acts complained of, these two elements must necessarily be considered. We are not at liberty, however, to consider the appellants' case from this point of view. The appellants in the most explicit way refused to put their claim as a claim to the value of a contingent right; and the learned trial judge refused to consider the points I have just indicated as in any way affecting either the appellants' right to recover or the extent of the damages to which they should be entitled. Evidence was tendered by the respondents of the practice of the Department in granting licenses to cut timber on locations such as the appellants' with a view to shewing the precariousness of the appellants' rights. This evidence was, on the objection of the appellants, rejected as irrelevant. It was, I think, irrelevant in view of the proposition of law on which the appellants based their case. The learned trial judge also treated the probability of the locations being developed to such an extent as to require the use of the timber taken, as irrelevant. I repeat, the appellants' claim is not, and has not at any stage of the proceedings, been based upon an allegation that they have been interrupted in the exercise of their timber

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rights, nor have they asked to be compensated for the actual loss they have suffered by reason of being deprived of the possibility of exercising those rights in future in respect of the timber removed.

The mode in which the appellants put their case at the trial as well as in the Court of Appeal and in this court was this. They were, they said, in possession of the soil on which the pine timber stood, and consequently in possession of the timber; and notwithstanding the fact that the timber was owned by the Crown and delivered by the Crown officers into the possession of the respondents after it was cut, the respondents are, under the authority of *The Winkfield*(1), responsible for the full value of what they took away by the trespass. As the learned trial judge puts it at page 201:—

> Nevertheless, it seems to me to be clear that there were interests and rights given with the lands to the patentee and to the lessee for mining purposes, and that they were in fact in possession of the whole lands including the timber, and, whatever rights the Crown may have, a mere trespasser has no right to avail himself of the rights of the Crown, that in short, a trespasser is responsible for the whole value of that which he takes away by his trespass, and the damages arising from the injury done to the property by reason of the trespass, and that in this case, the fact of the trespass not being in dispute, the fact of the timber being actually taken away and sold and converted by the defendants not being in dispute, the fact that the plaintiffs were in possession, that they had put improvements upon the lands, that there was a *bonâ fide* development of the prospect upon the lands, that they were in possession lawfully and legally, and have the right to be protected from the acts of any trespassers; and the trespassers cannot, I say, rely upon any rights of the Crown in reducing the amount of damages caused by reason of the trespasses which they have committed.

As I understand the view of the majority of the court, each step in this course of reasoning is assented

(1) [1902] P. 42.

to in the judgment of this court, and out of deference to that view, it is I think my duty to examine the two principal propositions upon which it is based.

1. Were the appellants in possession of the timber *in situ* ? It may be noted that there is no suggestion of a possession of the timber *de facto*. Mr. Shilton candidly admits that the appellants had never cut any pine timber. As to possession (he is a member of the Ontario Bar and solicitor on record for the plaintiffs in the Schmidt case), he said that it was "probably a question of law" depending upon the statute and the instruments in evidence. As to possession in law then, let us look at the case of the leased locations first; in respect of which the point has been explicitly decided more than once. Where trees are excepted, they are, in the words of *Herlakenden's Case*(1),

> severed from the possession of land during the term.

In *Liford's Case*(2), it was held that the lessor in such a case "has the young of all birds that breed in the trees." And in *Raymond* v. *Fitch*(3), it was held by the Court of Exchequer that a covenant by the lessee not to cut trees excepted from the demise was purely collateral to the land demised for the reason that

> the trees being excepted from the demise, the covenant not to fell them is the same as if there had been a covenant not to cut down trees upon an adjoining estate of the lessor (p. 598).

The effect of the decisions is stated by Mr. Leake in the work already referred to, at p. 31:—

> A lease of land for life or for years, excepting the trees growing upon the land, leaves the trees in the possession of the lessor, with the right of having them grow in the soil; the trees then

(1) 4 Rep. 62*a*, at p. 63*b*. (2) 11 Rep. 46*b*, at p. 50*a*.
(3) 2 C.M. & R. 588.

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are no part of the demised premises, and the fruit or product of the trees presumptively goes with the trees. Consequently the wrongful cutting of the excepted trees by the lessee is technically an act of trespass, being committed upon property which is in the possession of another. But if the lessee wrongfully cut trees included in the lease, it is an act of waste and not a trespass, and the distinction is to be observed in the remedy.

I am unable to understand for what reason not applicable to the case of the leased locations, the timber on the granted locations could be held to have passed into the possession of the grantees. The possession of the timber I should have thought was just as distinct as that of a seam of coal excepted out of a grant. Indeed, it was frankly admitted by Mr. Anglin, who argued the case on behalf of the appellants, that his contention on the subject of possession would logically result in this, that the grantee in fee of land, under a grant containing an exception of the coal, would acquire by virtue of his grant alone, such a possession of any seams of coal as would entitle him to maintain an action against the under-ground trespasser for the full value of the coal taken, even in a case in which the trespass should be literally confined to the coal bed itself. That I should have thought, with great respect to the majority of the court, who, I understand, accept the contention so advanced, distinctly contrary to all principle. I do not know why the usual rule should not be followed and the scope of the grantee's possession determined by his right of possession. *Low Moor Co.* v. *Stanley Coal Co.*(1). I do not know why an underground trespasser should, in such a case, be held to be a trespasser as against the owner of the surface, any more than a trespasser on the surface should be held to be a tres-

(1) 34 L.T. 186.

passer as against the owner of the coal. Nor, indeed, why in this case a trespasser on the timber should in respect of his acts of trespass on the timber be held to be a trespasser as against the owner of the soil, any more than the trespasser on the soil should be held to be *ipso facto* a wrongdoer against the owner of the timber. In the case of timber the proprietor of the timber as having the right to some extent to exclude the owner of the soil from the occupation of it, in virtue of his right to have the trees grow upon the soil, would seem rather to be in possession of the soil to the extent of the occupation thus involved. Mr. Anglin relied upon two cases; the case of the *Glenwood Lumber Co.* v. *Phillips*(1), and that of *Casselman* v. *Hersey*(2). The first case involved no question of the possession of a corporeal hereditament and I cannot understand its application to such a case.

As to the second decision. With all respect to the court that decided it, I am unable to follow the view there expressed and acted upon. It is now, however, suggested, and I understand the majority of the court to agree, although the view was not presented on the argument, that a rule was laid down in *Casselman* v. *Hersey*(2), which, even if erroneous, has, on the principle of *stare decisis,* become a part of the law of Ontario because that decision has stood unreversed and so far as the reports of decided cases are concerned at all events, unquestioned for a great number of years. I think it is impossible to invoke with any propriety the doctrine of *stare decisis* in connection with this decision. It is a very wholesome

(1) [1904] A.C. 405.

(2) 32 U.C.Q.B. 333.

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rule where a decision of a superior court has been acted upon for a great many years so that the rule established by it has regulated the transactions of business men or the practice of conveyancers, or the proceedings of courts, that the decision, or rather the rule which has been drawn from it, may properly be treated as constituting a part of the law applicable to such things independently altogether of the question whether or not the decision was originally founded upon satisfactory grounds. That is because in such cases as stated by Thessiger L.J. in *Pugh* v. *Golden Valley Railway Co.* (1), at p. 334, the rule may

> fairly be treated as having passed into the category of established and recognized law.

But this is a principle which has no possible application to the point now said to have been established by the case in question. There was no dispute in that case, as there is no dispute here, as to the meaning of the exception in the patent. At page 340, Mr. Justice Wilson says:—

> The trees remained, therefore, notwithstanding the grant, the property of the Crown, and they were so at the time of the cutting and removing of them by the defendant.
>
> The right of the Crown to the soil itself on which the trees grew was not excepted; but by reason of the exception, the Crown had the right to the nutriment of the soil sufficient for the growth and preservation of the trees which were excepted.

So far as the reciprocal rights of the Crown and the patentee were concerned, the decision is unquestioned, and is obviously right; nobody on this appeal raises any question with regard to that point. The proposition for which it is now sought to invoke the decision as an authority is that possession of the soil carries with it, *ipso jure,* the possession of the trees,

(1) 15 Ch. D. 330.

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notwithstanding such an exception, to such an extent as to entitle the grantee to sue in trespass for the value of such trees when cut and carried away by a trespasser. That is a point which never could arise except in some litigation between the grantee and a trespasser. I see no ground whatever for holding that, on that point, the decision has become part of the Ontario law. It would be really most extravagant to suppose that the fact of such a point having been determined in favour of the grantee could ever have entered into the calculations of anybody when dealing with lands to which the decision could apply. There is not the slightest evidence that the decision has ever, on this point, been accepted in Ontario. It is not to be found referred to in any text-book. On the point in question, it is not to be found referred to in any reported case, and to me at all events, there is sufficiently convincing evidence of the fact that it has never regulated or affected transactions generally, from the circumstance that neither the Chief Justice of Ontario, nor my brother Idington, nor Mr. Justice Meredith, appears to have been aware that it has ever had any such operation. Then it is said that the decision involved the construction of the "Free Grants and Homesteads Act" of that time; that that Act has been re-enacted since with no material variation, and that consequently the Legislature must be taken, under a well-known rule of construction, to have adopted and sanctioned the decision. I repeat that the decision in so far as it involved the construction of the exception in the patent and of the statute upon which the

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exception was based, has no bearing upon any controversy in this appeal. The construction of the statute here is not in dispute. If it be assumed that the construction given to the Act in question in that court has been adopted (which, as I say, is not disputed), the appellants have still to make good the contention on the point of possession. It would be stretching the rule relied upon to an extent not, I think, justified by any decision or by any principle, to hold that the adoption of the views expressed in *Casselman* v. *Hersey*(1) as to the meaning of the exception involved the adoption of the views there expressed on the subject of possession. But the truth is that the rule referred to is one which must always be applied in this country with a great deal of caution. Every one knows that statutes are often consolidated and re-enacted without careful reference by the legislature, or by the draughtsman of the statutes, to decisions which the courts may have given upon the construction of the words employed. It was for this reason that, in 1891, the Dominion Parliament passed an Act excluding the rule of construction referred to in the interpretation of Dominion statutes and that enactment was adopted in 1897 in the Province of Ontario, as one of the provisions in the "Interpretation Act" included in the Revised Statutes of that year. These are the relevant sections. Section 7, sub-section 1, is as follows:—

> 7(1). This section and sections 8 to 12 of this Act and each provision thereof, shall extend and apply to these Revised Statutes of Ontario and to every Act of the Legislature of Ontario, passed after the said Revised Statutes take effect * * * .

(1) 32 U.C.Q.B. 333.

And section 8, sub-section 57, is in these words:—

57. The Legislature shall not, by re-enacting an Act or part of an Act, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise, been placed upon the language used in such Act or upon similar language.

These provisions obviously govern the construction of the statute in question, which is chapter 36 of the Revised Statutes of 1897, at all events in respect of grants and leases issued under it subsequent to the year 1897.

For these reasons it seems to me to be clear that in felling and carrying away the trees, the respondents Miller & Dickson were not, except as to trespasses upon the soil which was vested in the appellants, committing any trespass of which the appellants have any title to complain.

2. But apart from this, is it really the law of England, as Mr. Anglin contended, and as I understand the majority of the court to hold, that the doctrine of *The Winkfield*(1), and of *Glenwood Lumber Co.* v. *Phillips*(2), has any application to trespasses in respect of corporeal hereditaments? The rule as I understand it is correctly stated in Mayne on Damages, at p. 513:—

In actions for injury to land, the measure of damages is the diminished value of the property, or of the plaintiff's interest in it, and not the sum which it would take to restore it to its original state.

* * * *

The damages will vary considerably, according to the plaintiff's interest in the land. This is obviously just, both to prevent the plaintiff getting extravagant recompense when his interest is on the point of expiring, or very remote, and to prevent the defendant being forced to pay for the same damage several times over. The same act may give rise to different injuries; the tenant may sue for the injury to his possession, and the landlord for the injury to his

(1) [1902] P. 42. (2) [1904] A.C. 405.

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reversion. And so where several are entitled to succession as tenants for life, in tail, in fee, each can only recover damages commensurate to the injury done to their respective estates. Hence where a stranger cuts down trees, the tenant can only recover in respect of the shade, shelter, and fruit, for he was entitled to no more; and so it is where the occupant is tenant in tail after possibility of issue extinct; but the reversioner or remainderman will recover the value of the timber itself.

The appellants in this case, as I have pointed out, have deliberately elected not to put forward any claim based upon the extent of the injury to their contingent interest caused by the acts complained of. The claim is based, and the loss has been appraised upon the assumption that they were entitled to the full value of the timber.

The appellants' contention must be rejected for another reason. Both Miller & Dickson and the Eastern Construction Co. became lawfully entitled to deal with the pine timber which had been felled on the locations by reason of the direction given to them by the Crown timber agent at the end of February. The evidence of the Crown timber agent himself is precise upon the point that his direction to Miller & Dickson to remove what had already been cut referred to the timber cut upon the locations as well as to timber cut upon the Crown lands. The pine was the property of the Crown, and there can be no possible question that the Crown Lands Department would, in the circumstances existing, be acting entirely within its authority as having the management of the Crown forests, in disposing of the timber so felled, after the manner which it deemed to be best in the public interest. The Crown timber agent says, moreover, that he acted in accordance with a settled rule; that he gave the direction with the object of having the ties reach their intended destination. It

might, he says, have been a very serious thing to prevent the delivery of the ties. He professed to act with the authority of the Crown Lands Department in what he did; and what he did was afterwards ratified by them. The evidence on this point is undisputed and it is conclusive. The agent reported stating that pine had been cut from the mining locations as well as from Crown lands outside the limits of the Eastern Construction Co.'s permit. The Department of Crown Lands afterwards directed the inspector to ascertain the quantity of pine timber cut from the locations, and, as I have already mentioned, the Eastern Construction Co. was billed for dues for this timber in accordance with the scale in use in respect of timber cut under the authority of a permit, thus treating the timber as timber cut under such authority. It is, therefore, incontestable that from the end of February onward the possession of this timber and of the ties manufactured from it, whether in the Eastern Construction Co., or in the O'Brien firm, or in the Dominion Government, was a perfectly lawful possession, and that from that time onward, the persons in possession had full authority to deal with it.

Some stress was laid upon the letter of the Deputy Commissioner of the 18th March, but reading that letter in connection with the acts of the departmental officials, it is quite clear that the Deputy Commissioner could have intended only to refer to timber to which the appellants were entitled. The letter of Mr. Margach advising the Department of the trespasses upon the locations was produced at the trial, although not actually put in evidence, and the letter written in November is explicit to the effect that the bill for dues covers the Crown timber taken from the mining loca-

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tions as well as that taken from lands still vested in the Crown. No other conclusion seems to be possible from the undisputed facts than that at which the Court of Appeal arrived, namely, that from the date of Mr. Margach's instructions to Miller & Dickson to remove the timber cut, the respondents were dealing with all the Crown timber in question under the authority of the Crown Lands Department. To rely on this is not, as Mr. Justice Meredith points out, to set up a *jus tertii*. The respondents are setting up their own rights. It is to be noted, moreover, in this connection, that the facts were brought out in the plaintiffs' own case. Inspector Smith called by the appellants, at page 64 of the appeal case, says that it was by the instructions of the Government that in September he made the count of ties from the mining locations, and at page 73, that instructions were given to Miller & Dickson to remove the ties taken from the mining locations, and on the same page, that the purpose of the count of ties made by him in September, 1909, was to enable the Government dues to be collected. It would be impossible, I should have thought, to sustain in these circumstances the claim for the full value of the timber, even if in a general way the decisions referred to could be held to have any application.

Let us take the case of the finder, for example. Is it really the law that a trespasser having taken an article from a finder is liable to pay the full value of it to the finder, notwithstanding the fact that before action the owner has come into the matter and has authorized the trespasser to keep the article which is the subject of the trespass? Is it conceivable that in such circumstances, unless special damages could

be proved as attaching to the trespass itself as distinguished from the detention of the article, that the finder could recover more than nominal damages for the wrong done to his possession? I should have thought it was plain he could not.

Another ground is now suggested which was not suggested at the trial or in the Court of Appeal, or on the argument before us, for sustaining the judgment of the learned trial judge. It is said that, assuming the appellants had not possession of the trees *in situ*, they came into their possession when they were felled to the ground and that the possession so acquired was sufficient to entitle them to maintain detinue and to recover the full value of the timber as it lay there. To this ground of recovery the objection to which I have just adverted, namely, that by reason of the act of the Crown officials the respondents became, before the action was brought, entitled as against the appellants to the possession of the timber, seems equally applicable. But it appears to me to involve a very considerable strain upon the principles of English law relating to the subject of possession to hold that the timber in question ever came into the possession of the appellants as chattels. Consider the facts. The trespasses in question began about the first of February. The contractors, Miller & Dickson, proceeded in this way. They cut roads into territory south of Vermilion River entering the sites of the locations as well as the adjoining Crown lands — and at various places in the vicinity of these roads they started concurrently the felling of timber. As the timber was felled it was manufactured into ties on the spot, and these ties were hauled to the piling stations. In this way they proceeded until the end of February with-

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out any interference. There was nobody in the locality, or within hundreds of miles of the locality having any authority on behalf of the appellants to interfere with them. The only person in the district having authority to take possession of the timber, the Crown timber agent, confirmed the possession of the contractors when the cutting came to his notice. Throughout the course of the whole proceedings, it has never been suggested on behalf of any of the parties that the respondents had not *de facto* possession of the timber from the time it was felled until it was delivered at the piling stations. It is perfectly obvious from the evidence that they had and must have had as much physical control over the timber as in the circumstances would be necessary to constitute possession in fact. So far from disputing this, counsel for the appellants more than once during the trial emphasized the circumstance that the manufacturing and the hauling of the ties for delivery proceeded contemporaneously with the cutting. (See, for example, p. 158.) And I have already referred to the observation of Mr. Shilton that the possession upon which the appellants relied was a possession implied by law. The possession relied upon by Mr. Anglin in his argument before us was the possession upon which the learned judge based his judgment, and upon which the claim was based at the trial, namely, the possession of the trees as they stood upon the soil. It was not suggested that the respondents had not *de facto* posesssion from the time the trees were felled. It would be necessary, therefore, in order to make good this position, to rest upon some rule of law vesting possession of the felled timber in the holders of the locations solely by reason of their

possession, that is to say, their legal possession of the soil upon which the timber fell, as against the *de facto* possession of Miller & Dickson. I do not think there is any such rule of law, and if authority were needed for the purpose of negativing such a rule, it may be found in the case of *Bridges* v. *Hawkesworth*(1), in which it was held that a purse found lying on a shop floor in the day time while the shop was open for business, by a customer, was not, while lying there, in the possession of the owner of the shop.

It is suggested, however, that some such rule is deducible from the language of Lord Davey in *Glenwood Lumber Co.* v. *Phillips*(2). The circumstances with which Lord Davey was there dealing were these: timber had been cut by a trespasser upon Crown lands. Subsequent to this cutting a lease was granted. After the granting of the lease and occupation under it by the lessee, the timber which had been so cut was removed by the trespassers. It was held that the lessee, as lessee and occupier, had a sufficient possession of the timber to entitle him to maintain detinue for the value of it. Of course, in its broad features, the case is immediately differentiated from the present case by the intervention of the Crown Lands Department, and the authority given by the Crown officers to the respondents in this case to deal with the timber before the action was brought. In the *Glenwood Case*(2) the granting of the lease and the occupation by the lessee under it, had the effect of vesting in the lessee the possession of the lands and a right to the

(1) 21 L.J.Q.B. 75.

(2) [1904] A.C. 405.

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possession, at least, for the benefit of the Crown of all chattels on the lands to which the Crown had a right of possession at the time of the granting of the lease, and which were not intended to be excepted from the lessee's possession. Such chattels came under (to use the phrase of Patteson J., in *Bridges* v. *Hawkesworth*(1)), the "protection of" the lessee's occupation. The lessee, therefore, clearly acquired a right to the possession of the timber which was felled and was lying within the limits of the demised property. This right of possession alone would be sufficient to entitle the lessee to maintain detinue even against the *de facto* possession of the trespassers, and there is no suggestion in the report of the case that the trespassers had *de facto* possession. In the case before us the trees in question had been expressly excepted from the possession of the appellants, and stood exactly in the same position as, for example, timber felled without authority upon adjoining Crown lands and piled upon ground within the limits of one of the appellants' locations. The argument under consideration logically applied would give a right to the holders of the locations to recover the full value of such timber, notwithstanding subsequent permission from the Crown Lands Department given to the trespasser to appropriate the timber. That is a result which cannot, I think, be fairly deduced from the *Glenwood Case*(2).

Thus far I have dealt only with the pine timber, and I have proceeded upon the assumption that the Eastern Construction Co. stand in the same case with Miller & Dickson.

(1) 21 L.J.Q.B. 75.

(2) [1904] A.C. 405.

As to the tamarac, there is no ground, so far as I can see, upon which Miller & Dickson can be excused. I am inclined to think that they are not responsible for damages arising from the trespass to the soil so far as such trespass may have been merely incidental to the cutting and carrying away of the pine trees. There is certainly much to be said for the proposition that as an incident of the property in the trees the Crown would have the right to deal with a trespasser in all respects as if the trespass had been committed on Crown lands, and consequently to waive all wrongful acts incidental to the trespass, in order to claim either the value of the timber cut or compensation for it on the footing of the trespasser having acted under a permit, if the circumstances were such as to entitle the Crown to make the latter claim. In this case the Crown was clearly, I think, entitled to take that position. See the judgment of Bowen L.J. in *Phillips* v. *Homfray* (1). The amount affected by this point is, however, trifling.

The Eastern Construction Co., however, with regard to the whole case, stand in a totally different position from that of Miller & Dickson. The learned trial judge has found that they did not authorize the trespasses, that is to say, that the trespasses were not authorized by anybody who was in a position to bind them. They were held liable on the ground, as he puts it, that they took the ties with a full knowledge of the circumstances in which they had been obtained by Miller & Dickson; that they paid for them in part, and that they sold them. He concludes that by these acts they adopted what Miller & Dickson did and

(1) 24 Ch. D. 466.

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made themselves responsible for it. On this branch of the case I think the learned judge has fallen into some error in failing to appreciate, in its bearing upon the conduct of the Eastern Construction Co., the fact that all parties from the time Miller & Dickson were stopped cutting by the orders of the Crown timber agent, dealt with the Crown timber and the ties which had been manufactured from Crown timber with the authority of the Crown Lands Department. There is no evidence that before that time the Eastern Construction Co. had done any act which could be construed as an adoption of the wrongful acts of Miller & Dickson. Samuel McDougall, Sr., who, as I have pointed out, was authorized only to count the ties, to classify them, and to submit them for inspection to the Government inspector, was aware of the fact that some of these ties had been cut from the appellants' locations. But it is not disputed that the ties from the appellants' locations were mixed up by Miller & Dickson with ties taken from the Crown lands in such a way as to make identification impossible: see appellants' factum, p. 2; and as I have pointed out, it is not suggested that Samuel McDougall, Sr., had any knowledge of the cutting of tamarac from the mining locations, that is to say, of the cutting of any timber which was the property of the owners of those locations. McDougall had no authority to do anything on behalf of the Eastern Construction Co. amounting to an adoption of the trespass, any more than he had power to authorize a trespass antecedently. When the responsible officials of the Eastern Construction Co. became aware of the trespass Miller & Dickson had already received authority from the Crown Lands Department to deal

with the Crown timber as if it had from the beginning been rightfully in their possession. What was afterwards done in dealing with the timber can fairly be attributed to this authority. It is perfectly true that during the month of April, after the Eastern Construction Co. had become aware of the trespasses, they paid considerable sums of money to Miller & Dickson, but it should be remembered that the timber taken from the locations constituted only about one-sixth of the timber cut by Miller & Dickson. The ties, as I have said, were inextricably mixed and until Inspector Smith made his report nobody was in a position to know the exact extent of the trespass upon the locations. That was not until September. The evidence is perfectly clear that Miller & Dickson at first represented to Mr. Alexander McDougall that the trespass upon the locations was very slight. The appellants themselves were unable to give any sort of accurate information, and it was not until the end of June that they assumed the utterly unreasonable position that none of the ties cut by Miller & Dickson south of Vermilion River should be used in railway construction. It is perfectly clear that when this position was taken by the appellants the Eastern Construction Co. were absolutely entitled under the authority of the permission given by the Crown timber agent, to make use of all ties cut from timber owned by the Crown, whether on the locations or off the locations. As to the timber not the property of the Crown, it consisted exclusively of tamarac, and there is no reason for supposing that at this time at all events any of the officers of the Eastern Construction Co. knew that any tamarac had been taken from the locations; and of the tamarac ties cut from the locations, there were fewer

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than 900 altogether. Notwithstanding all these circumstances, the Eastern Construction Co. did retain a sum almost sufficient to pay Miller & Dickson all that Miller & Dickson would have been entitled to receive from them for the cutting and manufacturing of ties to the number of those manufactured from timber cut from the mining locations.

Some stress was laid upon the circumstance that the Eastern Construction Co. paid the wages bill of Miller & Dickson for work done in trespass on the locations. In paying the wages bill they simply honoured the cheques issued by Miller & Dickson as they were bound to do under their contract. It is an impossible suggestion that in doing that they were making themselves responsible for everything done by the workmen who were so paid.

The Eastern Construction Co. are responsible for the value of the tamarac ties cut from the appellants' location which were received by them. That is more than covered by the amount paid into court.

I think the appeal should be dismissed.

ANGLIN J.—The appellants in the first action are owners of certain mining locations in the District of Rainy River in the Province of Ontario and the appellants in the second action are lessees of other mining locations in the same district. They seek damages for alleged wrongful cutting upon and removal from their respective locations of pine and tamarac timber and for incidental injuries due to negligence in the cutting and removal.

The defendants, Miller & Dickson, cut and removed the timber under contract for their co-defendants, the Eastern Construction Company, who obtained the

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lumber and ties so produced. For the cutting and removal of the pine the Court of Appeal, reversing Clute J., has held that the appellants cannot recover from either of the defendants. Under its judgment the Eastern Construction Company is also relieved of liability in respect of the other items of the plaintiffs' claim.

Miller & Dickson are, however, held liable for the tamarac, its ownership by the plaintiffs not being questioned, and for such damages, if any, as the plaintiffs sustained owing to negligence in cutting and removing both pine and tamarac. From this part of the judgment no appeal has been taken.

The appellants seek to restore the judgment of the trial judge awarding them damages against all the defendants for the cutting and removal of the pine and to have the Eastern Construction Company, as well as Miller & Dickson, declared liable to them in respect of the other items of claim.

The fact of the cutting and removal of the timber from the plaintiffs' locations is not in question. No justification is advanced for the cutting of the tamarac. Neither is it contended by the respondents that when the pine was cut and removed they had a license from the Government to cut or take it, although some subsequent ratification or approval by the Department of Crown Lands of their having done so is now set up. The Eastern Construction Company claims that it is not responsible for the tortious acts of its co-defendants, Miller & Dickson, who, though made respondents, were not represented at bar in this court.

The principal question is as to the right of the appellants to recover against any of the defendants in respect of the cutting and removal of the pine. The

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Crown grant and Crown lease under which the appellants respectively claim are subject to the provisions of the "Mines Act" (R.S.O. 1897, ch. 36), and contain the reservation prescribed by section 39 of that statute, which, as amended by 62 Vict. ch. 10, sec. 10, reads as follows:—

39 (1) The patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands, may at all times, during the continuance of the license, enter upon the lands, and cut and remove such trees and make all necessary roads for that purpose.

(2) The patentees or those claiming under them (except patentees of mining rights hereinafter mentioned) may cut and use such trees as may be necessary for the purpose of building, fencing and fuel, on the land so patented, or for any other purpose essential to the working of the mines thereon, and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation.

(3) No pine trees except for the said necessary building, fencing and fuel or other purposes essential to the working of the mine, shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of, except for the said necessary building, fencing and fuel, or other purpose aforesaid, shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw logs.

For the plaintiffs it is contended that notwithstanding the exceptions thus made, they had such possession of what was so excepted, or such an interest in it, as sufficed to give them a status to maintain an action in trespass or in trover against the defendants as strangers and trespassers.

That such an exception of standing trees (it appears to be an exception though called a reservation, *Douglas* v. *Lock*(1), at pp. 743 *et seq.*), has the effect of "dividing the trees in property from the land, al-

(1) 2 A. & E. 705.

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though *in facto* they remain annexed to the land," (1), and "parcel of the inheritance" (2), is old and undisputed law. It is argued that of the part of the inheritance so excepted from a grant the grantee has no possession in law, although the land on which the trees stand is his, the right to nutriment out of it for the trees being the only interest in it of the grantor. *Legh* v. *Heald* (3), at page 626. It may be that the rule of English law which ascribes to the person in possession of land the possession of chattels upon it and, as against a trespasser, title to them by reason of such possession, thus enabling him to maintain an action for the wrongful taking away of them by a stranger and to recover as damages their full value, although they are the property of another (4), does not apply to trees reserved out of a grant or lease while standing, and that, apart from any proprietary or licensees' interest in the pine trees which the statute gave them, the plaintiffs could recover in respect of the mere felling of such trees only damages for the wrongful entry on their lands. But that possession such as the plaintiffs had of their mining lands would, notwithstanding an unqualified reservation in the Crown patent and Crown lease of the pine trees, entitle them to maintain an action *in detinue* against a stranger wrongfully cutting *and removing* such trees and to recover as damages the value of the timber taken was held by the Upper Canada Court of King's Bench in *Casselman* v. *Hersey* (5), decided in 1872. The possession which the plaintiffs in that case had of

(1) *Herlakenden's Case*, 4 Rep. 62*b*, at p. 63*b*.
(2) *Liford's Case*, 11 Rep. 46*b*, at p. 48*b*.
(3) 1 B. & Ad. 622.
(4) *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405, at pp. 410-11.
(5) 32 U.C.Q.B. 333.

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the lands from which the timber was removed was much the same as that which the present plaintiffs had of their mining locations. Upon the sufficiency of such possession that decision has since been approved in *Kay* v. *Wilson*(1), at page 143, and in *Mann* v. *English*(2), at page 249; (see Lightwood on Possession of Land, p. 60); and I do not understand it to be questioned in the judgment of the Court of Appeal in the present case. What was decided by the other branch of the judgment in *Casselman* v. *Hersey* (3) has never been challenged in Ontario, so far as I am aware, until the decision of the Court of Appeal now before us, in which, it is noteworthy, no allusion is made to that case. It is cited with approval on the question of damages by Osler J. in *Johnston* v. *Christie*(4). It is probably now too late to question its correctness, *Trust and Loan Co. of Upper Canada* v. *Ruttan*(5).

Since *Casselman* v. *Hersey*(3) was decided the statutes of Ontario have been thrice revised and consolidated. On each occasion the legislature re-enacted the provision of section 39 of the "Mines Act" (R.S.O. 1897, ch. 36), for the reservation of pine substantially in the form in which it is now found. (Vide R.S.O. 1877, ch. 29, sec. 12; and R.S.O. 1887, ch. 31, sec. 12.) The same course has been followed in regard to sections 13 and 14 of the "Free Grants and Homesteads Act" (R.S.O. 1897, ch. 29), which make similar provisions. (Vide R.S.O. 1877, ch. 24, sec. 10; 43 Vict. ch. 4, secs. 2, 3, and 4; R.S.O. 1887, ch. 25, secs. 10 and 11.) Both the "Mines Act" and the

(1) (1877) 2 Ont. A.R. 133.

(2) (1876) 38 U.C.Q.B. 240.

(3) 32 U.C.Q.B. 333.

(4) (1880) 31 U.C.C.P. 358, at p. 362.

(5) 1 Can. S.C.R. 564, at p. 584.

"Free Grants Act" contain reservations of pine timber in terms substantially the same as those which were passed upon in *Casselman* v. *Hersey*(1). In re-enacting them without making any attempt to change the effect which such a reservation was held to have, or to alter or restrict the rights which the grantee, notwithstanding it, was held to enjoy, the legislature must be understood to have done so in the light of the interpretation put by the court upon the language which it used. *Clark* v. *Wallond*(2). The following provision of the "Interpretation Act" of the R.S.O. 1897 (chapter 1, section 8, clause 57), first became law in Ontario in 1897:—

> The legislature shall not, by re-enacting an Act or part of an Act, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise, been placed upon the language used in such Act or upon similar language.

There is no similar clause in the "Interpretation Act" in the consolidation of 1877, nor in that of 1887. Whatever may be said, therefore, of the effect of the re-enactment of these statutes in the revision of 1897 in view of sub-section 57 of section 8 of the "Interpretation Act" of that year, it cannot be assumed that the legislature re-enacted the sections of the "Mining Act" and of the "Free Grants Act" in 1877 and again in 1887 in ignorance of the judicial interpretation which had been put upon such a reservation of pine timber as they provided for. When re-enacted in 1897 not only had the language of these statutory provisions received judicial construction, but that construction must be deemed to have already had legislative recognition and acceptance.

(1) 32 U.C.Q.B. 333.

(2) 52 L.J.Q.B. 321, at p. 322.

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Thousands of grants and leases of mining and homestead lands have been taken and paid for under this legislation in the interval of forty years since the decision in *Casselman* v. *Hersey*(1). In these circumstances, even if we entertained doubts as to the effect of the reservation of pine timber under section 39 of the "Mines Act," we should, in my opinion, if necessary, apply the doctrine of *stare decisis* and decline to disturb the legal rights which Crown patentees were declared to possess under language substantially the same by a judicial decision rendered so long ago and which has been since acquiesced in and never questioned until the present time. *Casgrain* v. *Atlantic and North-West Railway Co.*(2); *Ex parte Campbell*(3); *Corporation of Whitby* v. *Liscombe*(4); *Macdonell* v. *Purcell*(5).

But in the case at bar the reservation to the Crown was not unqualified, as it appears to have been in the *Casselman Case*(1). The present plaintiffs had attached to their mining lands a right not merely to enjoy, until they should be cut down by some duly authorized licensee of the Crown, the shade of the pine trees and any other advantage to be derived from their standing on the lands, but they also had the very substantial right of themselves cutting down and using these trees for

building, fencing and fuel on the land so obtained or for any other purpose essential to the working of the mines thereon.

and, subject to payment of Crown dues, also the right to

cut and dispose of all trees required to be removed in actually clearing the land for cultivation.

(1) 32 U.C.Q.B. 333.

(2) [1895] A.C. 282, at p. 300.

(3) 5 Ch. App. 703, at p. 706.

(4) 23 Gr. 1, at pp. 17, 18, 21, 27, 35.

(5) 23 Can. S.C.R. 101, at p. 114.

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Of this substantial interest in the pine trees the plaintiffs were deprived by their being cut down by the defendants, because, upon their severance from the land, whether effected by a duly authorized Crown licensee or by a trespasser, their special interest ceased just as the special interest or property in timber trees of a lessee holding under a lease without reservation of timber ceases upon severance of the trees from the soil however effected. *Herlakenden's Case*(1). The plaintiffs' statutory rights were confined to cutting for certain purposes and to taking and using what they themselves so cut. They had no statutory right to take or use what the defendants cut, although such cutting was done in trespass. For the wrongful destruction by mere trespassers of their right to cut and use the pine trees so annexed to their property they had, in my opinion, a right of action. *Nuttall* v. *Bracewell*(2); *Jeffries* v. *Williams*(3); *Bibby* v. *Carter*(4); Smith's L.C. (11 ed.), vol. 1, pp. 358-60. The evidence shews and the learned trial judge has found that there was not enough timber on the lands for the mining purposes of the plaintiffs. As wrongdoers and trespassers the defendants cannot be heard to say that the plaintiffs might never have used this timber for such purposes. As against them in assessing damages it must be assumed in the plaintiffs' favour that, but for the wrongful interference of the defendants, they would have had the full benefit of the rights conferred upon them. If entitled to any damages in respect of the destruction of their interest in the pine trees, whether it be regarded as proprietary in its character or as merely

(1) 4 Rep. 62*b*.
(2) L.R. 2 Ex. 1.
(3) 5 Ex. 792.
(4) 4 H. & N. 153.

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an interest of licensees, the plaintiffs in this aspect of the case would seem to be entitled to recover the full value of what was wrongfully cut. But I do not rest my judgment on this ground.

On another ground the plaintiffs' claim against the persons responsible for the wrongful removal of the pine trees seems to me unanswerable. When those trees were felled the plaintiffs' special interest or property in them ceased. But it did not vest in the wrongdoers. Neither did they acquire by their trespass the rights of the Crown. As the pine trees lay upon the ground they were the property of the Crown. But for the reservation they would have been the plaintiffs' property. The cutting, however, though wrongful, converted that which had been a part of the inheritance into chattel property. *McLaren* v. *Ryan*(1). Lying on the plaintiffs' lands, those chattels, though belonging to the Crown, were legally in their possession because of their possession of the land.

Even if continuous physical possession of the pine trees by Miller & Dickson, from the moment when they were cut until they were removed from the plaintiffs' lands, would have precluded legal possession of them as chattels being ascribed at any time to the plaintiffs as owners and lessees respectively of such lands, there is no proof of such continuous physical possession in the record and in the absence of proof it will not be presumed in favour of trespassers. "Delivery is favourably construed; taking is put to strict proof." The evidence of continuous physical possession, if they had in fact kept such possession, lay peculiarly

(1) 36 U.C.Q.B. 307, at p. 312.

within the knowledge of the defendants and the burden was certainly upon them to produce it. Taylor on Evidence (10 ed.), p. 376(*a*). As trespassers Miller & Dickson could have no constructive possession of anything of which they had not actual possession. While, if a person enter under title, his possession of part of a tract of land will generally be regarded as giving him constructive possession of the entire property, where the entry is without title, the legal possession of the trespasser, at all events as against the person lawfully entitled to possession, is limited to the area of his effective occupation. So in the case of movables,

> a man who is not entitled to take possession can obtain possession only of that which he actually lays hold of.

Ex parte Fletcher(1). The same rule applying to land and to chattels in regard to the extent of wrongful possession there is no reason why they should be subject to different rules as to the duration of such possession. In the case of land the possession of the trespasser ceases as soon as his actual occupation comes to an end: *Trustees, Executors and Agency Co.* v. *Short*(2). By an application of the same principle, on the cesser of the physical possession of movables held by wrong, the law will not attribute to the wrongdoer continued constructive possession of them, but the right to possession will draw after it the constructive possession and the person having such right will be deemed to have the legal possession. "Possession acquired by trespass is a continuing trespass from moment to moment so long as the possession lasts." There is no presumption of the continuance of illegality: at all

(1) 5 Ch. D. 809, at p. 813.

(2) 13 App. Cas. 793, at p. 798.

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events, its continuance will not be presumed in aid of a guilty person seeking thus to improve his legal position. Moreover, "in the case of goods legal possession is recognized more readily than in the case of land and mere right to possession is sometimes described as 'constructive possession' and is allowed the advantages of legal possession." Encyc. Laws of England (2 ed.), vol. XI., p. 327. The removal of the pine trees from the plaintiffs' lands by Miller & Dickson should, in my opinion, be regarded as a taking of them from the possession of the plaintiffs. Either on this ground, or because their right to possession gave them, as against the trespassing defendants, "the advantages of legal possession," they had a status to maintain this action.

Lord Davey, delivering the judgment of the Judicial Committee in a case in which unsuccessful applicants for a lease of timber lands (the appellants) had cut timber on the lands in anticipation of obtaining such lands and had removed it after the lease had been granted to the respondent, said:—

> The action was in substance for trespassing on the respondent's lands and for detinue of the logs removed from his lands. * * The action was in fact so treated by the learned judge at the trial. It was then said that at any rate the logs were, as between the respondent and the Crown, the property of the Crown.
>
> The answer to this argument is that the appellants were wrong-doers in every step of their proceedings. There is not a hint in either the pleadings or the evidence of any title in the appellants to cut the trees. * * * The appellants were wrong-doers in entering on the lands of the respondent for the purpose of removing the logs, and also in removing the logs, which were certainly not their property.
>
> *The respondent, on the other hand, was, in their Lordships' opinion, lessee and occupier of the lands, and, as such, had lawful possession of the logs which were on the land.* It is a well-established principle in English law that possession is good against a wrong-doer, and the latter cannot set up a *jus tertii* unless he claims under it. This question has been exhaustively discussed

by the present Master of the Rolls in the recent case of *The Winkfield*(1). In *Jeffries* v. *Great Western Rly. Co.*(2), Lord Campbell is reported to have said: "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him having no title in himself is a wrong-doer, and cannot defend himself by shewing that there was title in some third person, for against a wrong-doer possession is title." The Master of the Rolls, after quoting this passage, continues: "Therefore, it is not open to the defendant, being a wrong-doer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all, and therefore, as between those two parties, full damages have to be paid without any further inquiry." Their Lordships do not consider it necessary to refer at any greater length to the reasoning and authorities by which the Master of the Rolls supports this conclusion, and are content to express their entire concurrence in it. *Glenwood Lumber Co.* v. *Phillips*(3).

I am unable to distinguish between the act of the defendants in removing the pine logs from the plaintiffs' lands (the cutting of them is not material to this aspect of the case) and the act of the appellants in removing the logs in the *Glenwood Case*(3), which was held to entitle the respondent (plaintiff) to recover as against the trespassers the full value of the logs removed *on the ground that when removed they were in the possession of the respondent as lessee of the land upon which they lay* and that, as against the trespasser, such possession was equivalent to title.

Although it does not appear in the reports of this case either before the Judicial Committee or in the colonial courts (N.F. Reps. 1897-1903, 390, 454) that the appellants had at any time relinquished or that the respondent had acquired physical possession of the lumber after it was cut and prior to its removal, their Lordships seem to have found no difficulty in

(1) [1902] P. 42. (2) (1856) 5 E. & B. 802, at p. 805.
(3) [1904] A.C. 405, at p. 410.

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ascribing legal possession of it to the latter as lessee of the land and in treating the removal of it as a wrongful taking out of his possession.

The decision in *Casselman* v. *Hersey*(1), may be upheld on the ground that after they were cut and lay as chattels on the plaintiffs' land the defendant in that case wrongfully took away the logs, although Wilson J., no doubt, held the view

> that the lessee or grantor when the trees are excepted is in possession of them as against a stranger and wrong-doer, (p. 341).

See, too, *McLaren* v. *Ryan*(2).

But it is urged that, although the respondents admittedly had no right or title when they cut and removed the pine timber from the plaintiff's lands, they subsequently acquired the Crown title to it and must now be treated as if they had been Crown licensees *ab initio*. This defence was not pleaded and it appears not to have been set up at the trial. It is given effect to, however, in the judgment delivered for the Court of Appeal by Meredith J.A., who says:—

> It is not a case of setting up the *jus tertii;* the defendants have acquired the rights of the Crown and are setting up their own rights so acquired.

The evidence of Alex. McDougall is relied upon to support this finding of the learned appellate judge. I have seldom perused testimony more unsatisfactory. Had the defence now relied upon been pleaded this evidence would not support it. *A fortiori* it does not justify an appellate court giving effect to a contention not presented on the pleadings and not raised at the trial and which the plaintiffs had no opportunity to meet. Assuming that it was competent for the Crown Lands Department, after the pine had been all cut

(1) 32 U.C.Q.B. 333. (2) 36 U.C.Q.B. 307, at p. 312.

and removed from the plaintiffs' lands and delivered to the Eastern Construction Company, to make an agreement in respect of it which would have the effect of destroying the plaintiffs' vested right of action, the evidence in the record falls far short of establishing such an agreement.

Miller & Dickson had cut in trespass upon Crown property as well as upon the locations of the plaintiffs. Apparently in respect of the former, Mr. Margach, a Crown lands official, notified the Eastern Construction Company, by letter of the 6th March, that:—

> The department has refused the permit. You will please see that they do no more cutting. They are at liberty to remove what they have cut and make a separate return of it.

There is no allusion in this letter to the cutting on the plaintiffs' locations, and in view of the attitude of the department in regard to the rights of the plaintiffs as mining locatees as against the trespassing lumbermen, disclosed by a letter of Mr. White, the Deputy Minister, to which I am about to refer, it would seem reasonably certain that the permission for removal given by Margach was intended to cover only timber cut on the Crown lands. The cutting on the plaintiffs' locations appears to have been brought to the attention of the department later in the same month. On the 18th March Mr. White writes to the plaintiffs:—

> Toronto, March 18th, 1909.
>
> Gentlemen:—
>
> Referring to your letter of the 15th inst. with regard to the cutting of Messrs. Miller & Dickson on territory south and east of Vermilion River outside of area covered by permit granted to the Eastern Construction Company, I beg to say that the Department has been in communication with Mr. Crown Timber Agent Margach, in relation to this cutting, and he has been fully

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instructed in the matter so far as relates to lands of the Crown, but if these parties are removing illegally timber from locations to which you may be legally entitled, it would seem to be a matter between you and the parties cutting and taking the timber.

Your obedient servant,

AUBREY WHITE,
Deputy Minister.

There is nothing to shew that the department ever changed its attitude as expressed in this letter in regard to the plaintiffs' rights, or undertook in any way to interfere with or derogate from them, or to give to the defendants a status which would enable them to do so. The timber in question was not cut for the purpose of

building, fencing or fuel on the mining lands or for any purpose essential to the working of the mines.

If cut by the appellants in the course of clearing for cultivation it would have been subject to payment of Crown dues. The defendants having cut in trespass were, no doubt, liable to the Crown for penalties. If the Minister of Crown Lands saw fit to waive the Crown's right to exact penalties and, as a matter of grace, in lieu thereof to accept from the defendants merely ordinary dues in respect of the timber of which they had possession, it by no means follows that he put, or intended to put them for all purposes in the same position as if they had cut under license. The acceptance by the Crown of dues in such circumstances is at the most an equivocal act. It is entirely consistent with an intention on the part of the department to treat the defendants as persons who had acquired from the plaintiffs timber cut for the purpose of clearing the land for cultivation, which the plaintiffs would have the right to dispose of subject to payment of Crown dues. These dues the Crown

claimed from the defendants as the persons in possession of the timber subject to them. It would require something much more conclusive, especially in the face of Mr. White's letter, to establish that the Crown intended to confer on the defendants the rights of licensees *nunc pro tunc* and to deprive the plaintiffs of their vested right of action, or that what took place had that effect. There is no evidence on this point from the Department of Crown Lands, and the testimony of Alex. McDougall is quite inconclusive. It is sufficiently surprising that the defendants should have been permitted to take for the first time in the Court of Appeal the position that they should be treated as having cut and removed the timber in question under Crown license. But I find it still more extraordinary that effect should have been given to such a contention upon the evidence before the court. There is, in my opinion, nothing to sustain it.

For these reasons I would hold the defendants, Miller & Dickson, liable as claimed by the plaintiffs, and, as to them, would allow the appeal and restore the judgment of the trial judge.

The liability of the defendants, the Eastern Construction Company, however, does not necessarily follow. Miller & Dickson were not their servants or agents, but independent contractors.

But the timber and ties cut on the plaintiffs' lands were all delivered either to the Construction Company or to its nominees. The company received property, or the proceeds of property, title to which, because it was wrongfully taken from the plaintiffs' possession, must, in the circumstances of this case, as against all the defendants, be deemed to have been in the plaintiffs. The trial judge has expressed the view that, in

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crossing the line of their license limits and in entering upon the plaintiffs' mining locations, Miller & Dickson acted with the concurrence, if not under the direction of Mr. Samuel McDougall, Sr., who represented the Eastern Construction Company. Although I have no doubt that his powers and authority were much wider than either he or his nephew Alex. McDougall, will admit, whether it was within the scope of his agency for the company to give such a direction so as to bind his principals and to render it in law their direction is possibly doubtful on the evidence. But there is in the testimony of Dickson, Miller, Smith, McLean and Proud, abundant evidence to warrant a finding that Samuel McDougall, Sr., knew from the first that Miller & Dickson were cutting for his company on the plaintiffs' lands. The learned trial judge says:—

> I think Miller & Dickson crossed the line and cut those ties, and that the cutting was afterwards brought to the attention of the Eastern Construction Company, and that they deliberately received and accepted those ties from their contractors, and paid part upon them, and sold them and received the payment therefor.

Although its formal judgment relieves the Construction Company from liability in respect of the tamarac as well as the pine, in delivering the opinion of the Court of Appeal Meredith J.A. said:—

> Upon the finding of the trial judge that the Eastern Construction Company took the goods with knowledge of the circumstances, the holding that they are answerable for the value is right.

I entirely agree with that statement of the law—and, as I have already said, the finding upon which it is based is fully supported by the evidence. Why the Court of Appeal, while accepting this finding, by its formal judgment relieved the Construction Company

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from liability for the tamarac which they got, it is difficult to understand. The discrepancy has not been explained.

Whatever may have been the extent of Samuel McDougall's authority, his position at the Miller & Dickson camp and his relations to the Construction Company were such that I have no difficulty in imputing to that company the knowledge which he had of the fact of the wrongful cutting on the plaintiffs' locations. *Commercial Bank of Windsor* v. *Morrison*(1). That knowledge was material to the business in which he was employed; it came to him in the course of his employment; and it was undoubtedly of such a nature that it was his duty to communicate it to his principal. Halsbury's Laws of England, vol. 1, pp. 215-6; Bowstead on Agency, 4th ed., 346.

The Eastern Construction Company having taken the timber and ties with notice that they were wrongfully cut and removed from the plaintiff's lands, is, in my opinion, equally liable with Miller & Dickson to the plaintiffs in detinue in respect of both the pine and the tamarac so removed. (See Pollock and Wright on Possession, p. 151, note.)

But for such damages as may have been caused by mere negligence or by cutting in an improper and improvident manner, Miller & Dickson are alone responsible. Such misconduct of independent contractors is not imputable to the persons by whom they are engaged.

For these reasons to the extent indicated I would allow the appeal of the plaintiffs and would restore

(1) 32 Can. S.C.R. 98, at p. 105.

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the judgment of Clute J. against the Eastern Construction Company.

The respondents should pay to the appellants their costs in this court and in the provincial Court of Appeal.

BRODEUR J.—I concur with the views expressed by Mr. Justice Anglin.

Appeal allowed with costs.

Solicitors for the appellants, Eastern Construction Co. and others: *Macdonald & McIntosh.*

Solicitors for the appellants Schmidt and Shilton: *Shilton, Wallbridge & Co.*

Solicitors for the respondents: *Dowler & Dowler.*

THE CITY OF SAINT JOHN (DEFENDANT) ..... APPELLANT;

AND

JOHN J. GORDON (PLAINTIFF) ..... RESPONDENT.

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*Feb. 28, 29.
*May 7.

THE CITY OF SAINT JOHN (DEFENDANT) ..... APPELLANT;

AND

ROBERT QUINLAN AND ANOTHER (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Lease—Covenant to pay for improvements—Buildings and erections —Foundation—Piling and filling in—Intention of lessee.

The City of St. John leased certain mud flats, the lease containing a covenant that if the lessees should "put up any buildings and erections for manufacturing purposes" thereon the same, at the expiration of the term, should be appraised in the manner provided and the city should have the option of paying the appraised value or renewing the lease. On expiration of a term the city elected to pay.

Held, that the lessees were entitled to be paid the value of piling and filling in on said lots to form a foundation for buildings erected and in existence at the expiration of the lease, but not for such piling and filling in at a place where no buildings existed, but upon which buildings were intended to be erected for manufacturing purposes.

APPEAL from a decision of the Supreme Court of New Brunswick varying the decree of the judge in

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

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equity and granting the full claims of the respective plaintiffs.

The City of St. John leased to the New Brunswick Red Granite Co. certain lots on the west side of the harbour which at full tide were covered with water. By the terms of the lease the lots were to be used for manufacturing purposes only and it contained a covenant that if buildings and erections for such purposes were put up by the lessees they should be appraised at the end of the term and the city, at its option, would pay their value or renew the lease. The Red Granite Co. sold their interest in the lease to the appellants, who respectively obtained new leases from the city with the same covenants. When so transferred a stone-cutting plant was on the lots in order to establish which the original lessees had to sink piles for a foundation and to overcome vibration had to fill in the lots with stone and other material.

The city expropriated a portion of these lots for the purpose of widening a street, and in the expropriation proceedings the Supreme Court of New Brunswick awarded the lessees the value of the piling and filling in above mentioned. The judgments on these proceedings are reported. See *Sleeth et al.* v. *City of St. John; Gordon* v. *City of St. John*(1).

On the expiration of one term of the respective leases the buildings and erections were appraised, the valuators allowing nothing for the piling and filling in. The city elected to pay and the lessees filed a bill in equity to set aside the award. It was set aside by the Chief Justice sitting as a judge in equity, who held that the lessees were entitled to be paid the

(1) 38 N.B. Rep. 542; 39 N.B. Rep. 56.

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value of the piling and filling in which served as a foundation for buildings and erections existing on the lots when the lease expired. The Supreme Court of New Brunswick varied this decree in accordance with its decision in the expropriation case. The city appealed.

Baxter K.C. for the appellant. The plaintiffs seek compensation for piling and filling in where no buildings or erections exist. But these are not, in themselves, buildings or erections. See *Adamson* v. *Rogers* (1). And if they could be deemed erections they are not erections in the nature of buildings which they must be under this covenant. *Ex parte Benwell, In re Hutton* (2). See also *Truesdell* v. *Gay* (3).

Teed K.C. for the respondents. The case is concluded by the judgment of the Supreme Court of New Brunswick in *Sleeth et al.* v. *City of St. John* (4). See *London Dock Co. and Trustees of Parish of Shadwell, in re* (5), at page 32; *Flitters* v. *Allfrey* (6); *Tait* v. *Snetzinger* (7).

Baxter K.C. in reply. As to *res judicata* see *The Queen* v. *Hutchings* (8), at page 304.

THE CHIEF JUSTICE.—I would allow this appeal with costs.

DAVIES J.—This is an appeal from the judgment of the Supreme Court of New Brunswick upholding

(1) 26 Can. S.C.R. 159.
(2) 14 Q.B.D. 301.
(3) 13 Gray 311.
(4) 38 N.B. Rep. 542; 39 N.B. Rep. 56.
(5) 32 L.J.Q.B. 30.
(6) L.R. 10 C.P. 29.
(7) 1 Ont. W.N. 193.
(8) 6 Q.B.D. 300.

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but varying a decree made by Chief Justice Barker sitting as a judge in equity setting aside certain appraisements made by valuators or arbitrators selected under the provisions of certain leases made by the City of St. John (appellant) to the respondents (plaintiffs) respectively, John J. Gordon and Robert Quinlan and John J. Gordon administrator of the estate and effects of John Sleeth of certain water lots in the City of St. John. These leases contained provisions for their renewal at their expiration at the option of the city or in case of a decision not to renew for the payment of the value of the erections and buildings on the premises when the lease expired in November, 1906, and which had not been included in the compensation awarded by McLeod J. for a part of the leased premises which the city had expropriated a few days before the leases expired. The covenants in the leases are identical and as precisely the same questions arise in each of the cases they have been consolidated for the purpose of argument and decision.

The dispute in the case now before us arose as stated in Chief Justice Barker's judgment

> over the lessee plaintiff's claim for compensation for the earth and stone deposited in the lots for the purpose as they alleged of supporting and stiffening the crib work erected as a foundation for the buildings (which they had constructed on and over the crib work) and which was necessary to prevent the vibration incident to the use of steam engines and the support of heavy weights and necessary in the carrying on of manufacturing for which the lots were by the terms of the leases to be used.

The contention on the part of the city was that this filling was in no sense either a building or erection within the meaning of those words as used in the covenant in the lease providing for compensation

being made for them in the event of the city, the landlord, deciding not to renew the lease.

The learned Chief Justice found that

> the arbitrators proceeded on the assumption that the filling in was no part of the erections and they, therefore, excluded its value, if it had any, from their consideration.

He, therefore, set aside their valuation or appraisement and made a decree declaring that the words "erections and buildings" for which the tenants under the leases in question were in certain events and contingencies entitled to be compensated

> did not include any piling, capping or woodwork on the said demised lots or the filling in of the same except where such piling, capping or woodwork should on the first day of November, 1906 (the day of the expiration of the leases), be in actual use as a foundation for a building for manufacturing purposes; and that in that case the plaintiff is entitled by virtue of the said covenant to have included in the appraisement thereunder such amount as the appraisers may find to be the value on the said 1st November, 1906, of such foundation including therein the value of any earth or other material filled in such formation which was necessary to strengthen and support the same so as to render it a safe and suitable foundation.

The Supreme Court of New Brunswick on appeal refused to accede to the limited construction of the words "erections and buildings" contended for by the City of St. John which was broadly, as re-stated in this court, that stone or other material filled in upon the water lots was not "a building or erection" within the meaning of those words in the covenant no matter what might have been the object and purpose for which such stone or other material was so filled in and irrespective of such stone or other material being at the expiration of the lease in actual use as a foundation for a building erected over them for manufacturing purposes. The Supreme Court adopted and confirmed the decree as far as it went and substan-

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tially for the reasons given by the Chief Justice, but it went further and varied the decree, by adding words to the effect that the compensation to which the tenants were entitled should extend not only to such filling in as was in actual use as a foundation for a building actually existing for manufacturing purposes at the termination of the lease, but to such as had been placed on the lot with the intention of using it as a foundation for a building intended afterwards to be erected, and whether such intention had been carried out or not.

This variation and addition to the equity decree seems to me to go much further than the language of the covenant justifies. It opens up a wide field of speculation and in a case such as that before us where filling in may have been made for more than the one and only purpose and object for which compensation could be assessed, carries us away into the region of mist and doubt and makes it incumbent upon us to determine the issue with respect to the filling forming or not forming part of the erections and buildings upon the land when the lease expired, not upon the facts and circumstances as they then existed, but upon the doubtful frame of mind of the lessee when he made the filling. I do not think the covenant providing for compensation extended beyond buildings and erections for manufacturing purposes actually existing at the time of the expiration of the lease. It did not in my judgment cover erections which not being in themselves made or suitable for manufacturing purposes the tenants may have a more or less vague intention of turning into a manufacturing establishment.

Our attention has not been called to any evidence

or proved facts shewing the existence of conditions to which the variation in the degree would be applicable. I do not understand that such an extended right of compensation dependent upon intention was argued before the Chief Justice in the present case or before the Supreme Court of New Brunswick in the cases decided in the expropriation proceedings before Mr. Justice McLeod, and which the respondents contend finally settled the law as to the construction of the covenant in question. I do think that if adopted the variation would give rise to interminable difficulties and open up a wide field of doubtful speculation. I think the true construction of the covenant should be limited to the foundation of buildings or erections for manufacturing purposes actually erected or existing at the expiration of the lease as distinguished from work done with an intention of making it part of a manufacturing building which intention was never carried into effect or which for many reasons may have changed before the expiration of the lease.

No formal rule, order, judgment or decree was, we are told, ever taken out in the applications made to the court to instruct Mr. Justice McLeod as to what damages he should allow or disallow and we are driven to find out what was really decided from the reasons given by the learned judges who determined the case. There was no stated case; no issue joined and the court were, of course, only asked to construe the covenant in the lease respecting compensation in so far as it dealt with the practical facts relating to the expropriated portions of the lots as to which Mr. Justice McLeod was assessing damages. The question appears to have come before the court three

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times. We have reports of two of these hearings and one is unreported. As to this latter it appears that Mr. Justice Landry and Mr. Justice McLeod, both of whom sat in the case, do not agree as to what was decided.

Mr. Justice McLeod says that in this unreported case Chief Justice Barker

> explained that his previous reported judgments were intended only to cover the piling and filling in necessary for the foundations of the buildings on the lot.

Mr. Justice Landry regrets that his recollection of the unreported decision is not in accordance with that of McLeod J., but he does not say in what particular McLeod J.'s statement is at variance with his own recollection, or what his recollection as to the effect of that judgment is.

However, we have the fact that Mr. Justice McLeod assessed the damages on the basis of his understanding of the judgment and that from his award there was still another appeal to the full court. McLeod J. quoted the notice of appeal given in that case which shews that the question in controversy was whether the lessees were entitled to have the value assessed to them of the piling, stringing and capping and filling over the whole of the expropriated lot taken from the plaintiff, or only of those works under the buildings on the said portion so expropriated. No question was raised as to the right of the plaintiff extending to those portions of the piling and filling, etc., on the lot on which no buildings existed, but over which *buildings were intended to be erected for manufacturing purposes.* This latter part does not seem to me to have been mooted or discussed by counsel, and though there is some language in the reported judg-

ments which might be interpreted as covering the variation in the decree made by the Supreme Court and now before us in this appeal, such language in view of the reported arguments of counsel and of the two questions which Barker C.J. says in his judgment reported in 39 N.B. Rep., at p. 59, were before them then to be settled, must be considered merely *obiter*.

The fact that Barker C.J. in giving his judgment in the case now under appeal adopted and followed what McLeod J. says was his explanation of his reported judgment in 39 N.B. Rep., together with all the facts I have cited convince me that no judgment or decision of the Supreme Court of New Brunswick was ever given or pronounced upon the special point on which the Appeal Court of New Brunswick has varied Chief Justice Barker's decree which can be set up or pleaded as *res adjudicata* upon the point on which the judgment in appeal varies the decree of Chief Justice Barker. Even if the judgment had the effect contended for I wish to be understood as not expressing any opinion as to whether it could or could not support a plea of *res adjudicata* in this case.

The extent to which the decree as varied can be supported must, therefore, depend upon its merits and not upon the point having been *res adjudicata*.

For my own part, I am of the opinion that the decree as pronounced by Chief Justice Barker goes to the utmost limit of the proper construction of the covenant. For the reasons given by him in pronouncing the decree now in appeal and also for those given in his previous reported judgments in 38 and 39 N. B. Reports, pages 543 and 57 respectively, I am of opinion that decree should stand. I think he reached

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a fair legal conclusion as to the covenants in the leases covering and extending as well to the foundations necessary to uphold and maintain the manufacturing buildings erected on the lots and being there at the time of the expiration of the lease as to the buildings themselves. The substructure necessary to uphold and keep useful for manufacturing purposes the buildings and erections constructed upon them were as much part of the erections and buildings as those terms are used in the covenants of the lease as the superstructure itself. It mattered not whether that substructure was of concrete, of stone cemented with mortar, or of piles strengthened either by timber bolted to them or by stones or other filling placed for the purpose of strengthening and keeping them in place and steady so as to enable the contemplated manufacturing to be carried on. In each and every one of the cases suggested the substructure would, I think, form part of the superstructure within the meaning of the words in the covenant.

On this main point I am in full accord with the original decree and with the judgment affirming it of the Appeal Court. For the reasons given by me, however, I am unable to concur in the reasoning of Barry J. with whom the rest of the court concurred as to the variation made in the decree. Nor, as I have said, do I think the doctrine of *res adjudicata* can be invoked to sustain the variation of the judgment which I think cannot be sustained on its merits.

The conclusions I have reached are that the decree of the Chief Justice sitting in the Court of Equity correctly declares the meaning and extent of the covenant in the leases on which the tenants are entitled to have their compensation assessed; and that

the variations of that decree made by the court *en banc* cannot be supported. That the prior judgments of the Supreme Court of New Brunswick, reported in the 38th and 39th volumes of the N.B. Reports, do not, properly interpreted, conclude the questions before us so far as the variations in the decree are concerned, and cannot be set up as *res adjudicata* of the present appeal. That these variations of the decree must, therefore, be supported, if at all, on their merits alone, and that for the reasons I have given they go beyond what I think the covenant calls for or justifies.

I would, therefore, allow the appeal with costs in this court and in the Court of Appeal, leaving the costs on the cross-appeal to the Appeal Court as disposed of by that court.

IDINGTON J.—The appellant leased what may be aptly called water lots with the apparent intention that they should be built upon for manufacturing purposes. At least the lessee or successor was, if not given a renewal at the expiration of the term, to be compensated for such "buildings or erections for manufacturing purposes upon the * * * demised premises" as might have been erected thereon by the lessee or those claiming under him. If the value of such buildings or erections could not be agreed upon, appraisers were to determine same.

In January, 1907, the appraisers had made their awards in the cases before us, and in the following April the city tendered the respective sums thus awarded.

It had happened that the city prior to these proceedings had appropriated some small part in order to widen a street. In determining the damages to be

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paid in respect of the expropriation, a question arose as to the right of the respondents there concerned, to have an allowance made for some piling and filling in between the piles upon which the buildings upon that part rested. I suspect the refusal of the money tendered herein was caused by a desire to see the result of that rather prolonged litigation relative to expropriation and by an intention if the respondent concerned therein was successful, to set up the like claim to that made therein as a ground for attacking the award of the appraisers.

In 1909, a bill in equity was filed by each lessee or successor to set aside the award in regard to his or their respective claims. I may be permitted to doubt if in the then state of the law such a proceeding was open to them as against an award good on its face and in relation to which neither the good faith nor capacity of the appraisers could be impeached, and no very palpable mistake had occurred.

It does not seem to have been desired to take that line of defence and without objection evidence was given by the appraisers of the matters they had in fact considered, and omitted to consider, in estimating the amount to be allowed.

Chief Justice Barker finding error made manifest in this way set the awards aside. From his judgment a consolidated appeal took place to the Supreme Court of New Brunswick. That court modified the decree of Chief Justice Barker and in doing so expressed an opinion that the appraisers might have gone somewhat further than he had intimated permissible.

The city having appealed from this judgment it is now contended that the result of the litigation in the

expropriation case was to create a *res judicata* governing, in some way I do not understand, the determination of this case.

Mr. Justice McLeod on a second trial of said expropriation proceedings gave judgment therein which was confirmed by the full court and must be taken to be the final pronouncement in that litigation in respect of what seems to have been actually in question.

Sitting as an appellate judge in this case he speaks referring to same as follows:—

> Under that judgment the damages in the case before me were assessed simply for the piling and filling in intended for and forming a part of the foundation of the buildings and this Court, as I have said, in Hilary Term, 1909, held that that assessment was right and in accordance with the judgment reported in 39 N.B.R., page 56.

In the absence of the record, which is not produced, I think this must be taken as clearly defining the limits of any question of *res judicata,* that by any chance might be held here to bind anybody.

I have not overlooked a statement of Mr. Justice McLeod in the earlier judgment in appeal indicating that some land piled and filled had not been covered by the buildings. I reconcile it with above by observing the small part of land involved, and the possibility that the piling and filling in may, though not directly under the building, have yet been useful to maintain its stability. Clearly, it is in that regard that Chief Justice Barker and others treated the matter. The stability given the buildings in question seems the key-note of his judgment and of others in that case.

As I do not quarrel with Chief Justice Barker's judgment so far as it relates to the allowance of the value of the stability given to these buildings in question here by the filling in between the piles on which

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the buildings rest, I fail to see how I can make use of the wealth of learning the agitation of the question of *res judicata* herein has produced.

Counsel have very properly tried to make up for a defect in the record, but I do not think they can fairly be supposed to have intended going further than the facts as stated by Mr. Justice McLeod. All they designed doing was to put the record on a fair basis.

It is said by counsel for appellant that one of the cases before us involves no more than filling in between piles under buildings erected, to render them stable.

Counsel for respondent did not clearly concede this, though I suspect it is all that is in truth involved.

In regard to the other case respondent's counsel was quite clear the filling extended much further and involved much more. If so I fail to see how the *res judicata* can arise to help the plaintiff, though I can see how if given effect to, it may, if applicable, defeat him ultimately.

I am thus brought to consider the real issue in this case, and consequently the only issue we can properly pass upon in appeal.

The suit is one purely and simply to set aside the award. Such is the only express prayer of the bill and the general prayer can only extend to the things incidental thereto.

No question is raised now of Chief Justice Barker's right to set the award aside upon the evidence adduced as it was without objection; nor, admitting that evidence, can there be any question in my mind but that the award was properly set aside.

Neither directly nor incidentally to reaching such

a conclusion can the question of *res judicata* have any place.

It would, for the learned Chief Justice in doing so, and for an appellate court reviewing his work, be quite right and proper to elucidate the law relevant to the parties' rights as presented to the appraisers, and as existent at that time when they acted, in order to arrive at a proper determination as to whether or not they had discharged their duty or exceeded their powers.

In such cases the same or future appraisers being called on to act ought to give due heed to the opinion of the courts thus incidentally expressed.

But to introduce something in the nature of *res judicata* which had transpired a year or two after the award so affecting the rights of the parties and ask the court to pass upon it as we are asked to do here is beyond the power of the court unless it had power given it to direct something further to be done. All that was before the court was the single question of whether or not the appraisers had in the state of things before them properly discharged their duty. That question answered as it is by affirming the learned Chief Justice the court was *functus officio*.

I tried, on the argument, to make this point clear, and, if possible, obtain an answer to it, but was unsuccessful.

It occurred to me that there might be some statutory provision enabling, as in England and elsewhere, a power of direction given a court, so seized of a case as to set aside an award, to direct a further reference or remit the matter back to the appraisers with proper instructions.

And, of course, if there existed such a power it

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might be competent for the court to direct the lines upon which the appraisers should proceed and incidentally thereto to pass upon the question now raised of *res judicata* or its equivalent, the law that is to be applied in future proceedings.

Counsel were unable to refer to any such power and seemed to concede that such legislation as had taken place was not in force so far as to be applicable to this case.

The courts of common law had no power until the statute 9 & 10 Wm. III. ch. 15, to set aside an award. Of course, it might happen, when sued upon, to be held invalid by reason of what appeared on its face.

This common law jurisdiction was invoked thenceforward in cases where the submission could be made a rule of court, which was in modern times obtained, as of course, by a side bar rule.

The Court of Chancery had been resorted to and exercised a jurisdiction founded, as Story puts it, on the ground of relief to be given in cases of fraud, accident or mistake.

This state of things continued until the "Common Law Procedure Act, 1854," when the law took a new starting point of a growth I need not dwell upon.

The cases since are worth little as guides in this connection unless regard is had to the possible statutory foundation therefor.

If, as counsel seem to admit, there is no statute bearing on the question here, then the court's duty ended when the award was set aside.

It has occurred to me that there may have arisen in New Brunswick a local practice which we ought to observe and which may justify formulating the opinion of the court in the decree or judgment. I would not wish nor do I presume to disturb such a practice.

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But when relied upon, I cannot see how it can go or be taken further than an expression of opinion of the grounds for setting aside the award and thus, as already suggested, having that weight due to judicial opinion in such case.

In the absence of statutory authority the court can have no power to interfere with the future of the determination of the dispute; and thus certainly no more right to entertain the question of *res judicata* which intervened after the award, than it would if a release or aught else had been put forward.

I may say I have sought to find another state of the law for I think it to be regretted that we cannot refer this case back to the appraisers with binding instructions for their guide.

I think, therefore, Chief Justice Barker's judgment should not have been interfered with by the Court of Appeal.

If I had to pass upon the case as originally before him, I possibly would have expressed the view, that if a building had been actually in process of erection for manufacturing purposes, and had only got so far as the foundation, consisting of piling and filling in, it might be worth while, considering the uncompleted building, if good reason given to shew it was the result of a definite settled purpose merely unexpectedly broken in upon by the landlord's desire to terminate the lease.

So far as I can see there was nothing of this sort in the case. I suspect if there had been, we should have heard of it.

To go further would seem, I submit with respect, to be flying in face of the express language of the covenant.

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Even what I suggest as possible in such a case may go further than the express language, but is it not implied ?

In going thus far I feel I may be trespassing when we have no power to direct.

I have not overlooked the few cases where even before the "Common Law Procedure Act" a reference back was had at common law to complete the execution of the duty the arbitrators had assumed.

Nor have I failed to consider, though no point was made of it, the difference between appraisers and arbitrators.

The sum and substance of the matter is, that where parties have chosen a private forum no one has a right to interfere in the way of managing, controlling or directing that forum, so long as it keeps within its limits as defined in the contract constituting it; and even then the court, unless empowered otherwise by statute, can go no further than set its award aside.

I repeat that is all that was prayed for here.

The appeal should be allowed, as an interference for which there was no warrant, with costs here and in the Supreme Court of New Brunswick save as to the costs of cross-appeal therein, as to which the order providing therefor should stand as to such costs.

DUFF and ANGLIN JJ. concurred in the opinion expressed by Mr. Justice Davies.

Appeal allowed with costs.

Solicitor for the appellant: *J. B. M. Baxter.*
Solicitor for the respondents: *M. G. Teed.*

N. L. MARTIN .....APPELLANT; 1912

AND

*March 25, 26.
*May 7.

FREDERICK C. FOWLER AND OTHERS .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—"Creditors' Relief Act"—9 Edw. VII. c. 48, s. 6, ss. 4 (Ont.)—Contesting creditor's lien—"Assignments and Preferences Act"—10 Edw. VII. c. 64, s. 14 (Ont.).

Section 6, sub-sec. 4, of the "Creditors' Relief Act" of Ontario provides that "where proceedings are taken by a sheriff for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute *pro rata* in proportion to the amount of their executions or certificates to the expense of contesting any adverse claim shall be entitled to share in any benefit which may be deprived from the contestation of such claim so far as may be necessary to satisfy their executions or certificates." Section 14 of the "Assignments and Preferences Act" is as follows:—

"14. An assignment for the general benefit of creditors under this Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment and orders appointing receivers by way of equitable execution subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, for his costs of the creditor who has the first execution in the sheriff's hands."

Held, affirming the judgment of the Court of Appeal (24 Ont. L.R. 356, *sub nom. Re Henderson Roller Bearings, Ltd.*), which affirmed that of the Divisional Court (22 Ont. L.R. 306), that the preferential lien given by the former Act to the contesting creditor is not taken away by said sec. 14 of the "Assignments and Preferences Act."

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

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APPEAL from a decision of the Court of Appeal for Ontario(1), which maintained the judgment of a Divisional Court(2) in favour of the respondents.

The appellant was assignee for the general benefit of creditors under an assignment by the Henderson Roller Bearings, Ltd., and the respondents were execution creditors of the insolvent company. Under the executions issued by the respective respondents the goods of the company were seized by the sheriff, but before they were sold the company assigned. The respondents successfully contested an interpleader issue with a grantee of the goods which were then sold by order of court and the proceeds paid into court.

The only question for decision of the court on this appeal was whether or not the preferential lien given to an execution creditor by the "Creditors' Relief Act," sec. 6, sub-sec. 4, which is set out in the above head-note is taken away by section 14 of the "Assignments and Preferences Act." The courts below held that it was not.

Lefroy K.C. for the appellant. The intent of the legislature in enacting section 14 of the "Assignments and Preferences Act" was to make it impossible for a creditor to obtain more than a ratable share of an insolvent's assets unless his execution has been completely executed by payment and the interpleader proceedings cannot defeat that intent. *O'Brien* v. *Brodie*(3).

(1) 24 Ont. L.R. 356, *sub nom. Re Henderson Roller Bearings, Ltd.*

(2) 22 Ont. L.R. 306.

(3) L.R. 1 Ex. 302.

The cases of *Reid* v. *Murphy*(1), and *Reid* v. *Gowans*(2), relied on in the courts below are distinguishable and do not apply.

Watson K.C. and *J. Grayson Smith*, for the respondents. The goods were not sold under execution, but under a court order. See *Reid* v. *Murphy*(1); *Reid* v. *Gowans*(2); *Federal Life Ins. Co.* v. *Stinson* (3); the execution creditors had, therefore, acquired a new and independent status.

The execution creditors who have borne the brunt of the proceedings and recovered the assets in the interpleader issue should not be deprived of the benefit of their act in favour of other creditors who have held aloof. See *Wood* v. *Joselin*(4).

D. J. McDougall appeared for the respondent the sheriff of Toronto.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

DAVIES J.—The substantial question to be determined upon this appeal is whether the language of the 14th section of "Assignments and Preferences Act," 10 Edw. VII. ch. 64 (Ont.), is broad and comprehensive enough to embrace and cover creditors of the debtor who have previously to the assignment acquired a preferential claim or lien upon the proceeds of the sale of the debtor's property under an interpleader order under section 6, sub-sections 4 and

(1) 12 Ont. P.R. 338.
(2) 13 Ont. App. R. 501.
(3) 13 Ont. L.R. 127; 39 Can. S.C.R. 229.
(4) 18 Ont. App. R. 59.

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5 of the "Creditors' Relief Act," 9 Edw. VII. ch. 48 (Ont.).

I confess myself to have been greatly influenced by the able argument presented by Mr. Lefroy for the appellants, who contended that all and any preferences or liens which would ordinarily exist in favour of certain special creditors under the "Creditors' Relief Act" had been swept away by the 14th section of the "Assignments and Preferences Act."

A careful consideration of these two statutes, however, has convinced me that the impression made upon my mind at the argument was wrong and that so far as a preference lien, private claim or salvage claim, as my brother Duff prefers to call it, existed in favour of the respondents' claims under the "Creditors' Relief Act" it was not taken away by the 14th section of the "Assignments and Preferences Act."

That section reads as follows:—

> An assignment for the general benefit of creditors under this Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment and orders appointing receivers by way of equitable execution subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, for his costs of the creditor who has the first execution in the sheriff's hands.

The language of the section, it is true, is very broad and general, and the object and intention of the legislature plain, namely, to make an assignment for the general benefits of creditors "take precedence of attachments, garnishee orders, judgments, executions not completely executed by payments and orders appointing receivers by way of equitable execution."

The question is: Does this extend to the preference, priority, lien, salvage, or what you choose to call it,

specially created by sub-sections 3 and 4 of section 6 of the "Creditors' Relief Act" in favour of those creditors who accept and discharge the onus of defraying the expense of contesting any adverse claim made by a third party to the property or its proceeds seized under execution and as to which adverse claims have been set up, interpleader orders made, and contests entered upon, with the result of defeating such adverse claims ?

Does the 14th section of the "Assignments and Preferences Act" extend to such a case at all ?

To determine that requires, of course, a careful examination of the object and provisions of the "Creditors' Relief Act."

And, first, I would remark that the preference, lien, prior-charge or salvage, whatever it may be, given to the creditors who take upon themselves the risk and expense of contesting adverse claims to the property or moneys in dispute is not a preference or lien arising out of an unsatisfied execution in the sheriff's hands simply, but is a statutory right created as a reward or salvage to those creditors who undertake at their own expense to defeat an adverse claim and who are successful in doing so. Those creditors who refuse to accept the onus or burden the statute makes the price of the prize or salvage to be gained do not share in the latter's distribution. The creditors who are entitled to join in, or to accept, the statutory burden and to reap the statutory reward are not execution creditors only. "Certificated creditors" are equally entitled to become parties to the interpleader proceedings and to contribute towards the expense of contesting adverse claims *pro ratâ* and to share *pro ratâ* in the fruits of the contest.

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These certificated creditors are those who not having obtained judgment for the amount of their claims are creditors who have under the statute obtained from the County Court judge a certificate or allowance of their claim.

This "Creditors' Relief Act" not only abolishes priority amongst execution creditors, not only creates a lien or charge in favour of those creditors who agree to assume the expense of contesting adverse claims to the property or its fruits levied upon, but puts the certificated creditor on a par with the execution creditor and entitles him

> to share in any distribution as if he had delivered an execution to the sheriff.

The Act also declares, sub-section 3, section 10, that *"for the purposes of interpleader proceedings* the certificate should be deemed to be an execution."

Sub-section 4, of section 6, expressly limits the distribution in cases where proceedings are taken by the sheriff for relief under interpleader proceedings to such execution or certificated creditors who become parties to the interpleader proceedings, agree to contribute proportionately to the expense of the contest, and if successful become entitled to share in the fruits of success.

I do not think the general words of the 14th section of the "Assignments and Preferences Act" extend to such special statutory priorities, liens or privileges conceded as a reward for the burden assumed.

Take a case where the execution creditor on an adverse claim to the property seized being made refused to assume the burden of contesting, and a "certificated creditor" stepped into the breach, accepted the onus and successfully contested and defeated the

adverse claim, the conduct of the proceedings being given to him by the judge would section 14 take away his right of preference or priority of payment which was purely a statutory creation ? I venture to think not and that this negative answer to the question answers the appellant's contention as to the scope of section 14.

No reference is made in that section to the certificated creditors' priority or lien. That did not flow from any execution because none such existed as regards the certificated creditors' debt. It was a pure creation of the statute, and I find no words in the 4th section broad enough to cover it or take it away. This argument I confess influences me very much in determining the proper construction of that section.

It was contended that the special lien created by the "Creditors' Relief Act" had been reduced by the 14th section of the "Assignments Act" above set out to the right to have the costs reimbursed to the creditors who had become liable for them.

But, as I said, that section does not extend to the special priority or lien given under the 6th section of the "Creditors' Relief Act."

At any rate I have not been able to satisfy myself that the judgments of the divisional and appeal courts are both clearly wrong in their construction of these statutes and, therefore, concur in dismissing the appeal.

I have not in view of my conclusion as above expressed deemed it necessary to refer to any of the other points argued.

IDINGTON J.—I agree in general with the reasoning of the several judgments of the learned judges in

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the courts below rejecting the claim of the appellant, and do not think it would serve any profitable purpose to repeat same here. Yet I may, in addition thereto, point out that the costs made by section 14 of the "Assignment Act" a preferential claim, are by no means the same costs which the amendment of the "Creditors' Relief Act" constitute, and always constituted, a lien in favour of execution creditors' taking upon them the burden of an interpleader issue and which are sometimes very great indeed.

To give effect to the contention of the appellant would deprive these execution creditors of all the costs incidental to the interpleader proceedings.

If the "Assignments Act" had been amended before or at the same time as the "Creditors' Relief Act" was amended in that regard to add such interpleader costs to what section 14 of the former preserves as a preferential lien, then the argument of the appellant might have had more force. The grievance of interpleading creditors had long been manifest and when the legislature undertook to remedy it, surely the only remedy manifest in the legislation ought to be applied.

It would be clearly inequitable to expose creditors, entering upon expensive litigation to defeat frauds upon creditors, to defeat and serious loss by such contrivances as manifestly were resorted to in this case.

In this regard the amendment to the law was certainly posterior to the original enactment.

I may also point out as supplementing the alleged technical application of legal principles involved in some of the reasonings I adopt and are relied upon below, that if the appellant or one in the like position was driven to make an independent attack upon any

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fraudulent assignment, he would, as incidental to relief granted, if creditors such as the respondents were joined as defendants, as inevitably they must be, to give entire relief, have to pay these costs as a condition of relief.

I am not saying such a course was open to him, but if conceivable it would come with a better grace from an assignee in the appellant's position, to claim he was only seeking equity than seems open to appellant herein.

I think the appeal must be dismissed with costs.

DUFF J.—I think the appeal should be dismissed. Apart from statutory enactment an assignee for the benefit of creditors takes only that which his assignor can give him. A transfer of property impeachable under the Statute of Elizabeth as a fraud upon the creditors of the transferor may be perfectly inexpugnable so long as the creditors take no steps to have the property applied in satisfaction of their claims; as against the debtor it may give a perfectly good title to the property transferred. At common law, therefore, an assignee under an assignment for the benefit of creditors as such has no status to attack such a transfer as having been made in fraud of creditors. The "Assignments and Preferences Act" appears to treat these transfers in this way. The property affected is regarded as being in the hands of the transferee exigible in satisfaction of the just claims of the creditors generally to the same extent as it would have been so exigible in the hands of the debtor himself. For the purpose of satisfying such claims the transfer is treated as non-existent and an assignee under an assignment to which the Act applies is authorized as

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the representative of the creditors generally, to take such proceedings as may be necessary to have their rights declared. But in the event of the assignee failing to take steps to make the property affected by a fraudulent transfer available for the creditors generally, the Act authorizes any individual creditor to take such proceedings and confers upon such creditors the exclusive right to enjoy the benefits resulting therefrom if the proceedings should be successful. In this latter case the property affected by the transaction successfully impeached is not captured by the assignment at all.

Provisions similar in principle are found in the "Creditors' Relief Act." Under those provisions, speaking broadly, execution creditors who in interpleader proceedings assume the risk of contesting an adverse claim and are successful, become entitled to the benefits arising from their successful proceedings to the exclusion of creditors who have refused to partake in the responsibilities of the contest.

I think there is nothing in the "Assignments and Preferences Act" in virtue of which an assignment by the debtor can have the effect of divesting such creditors of this privilege once it has vested in them. It is not necessary to pass upon the question whether the surplus of property, the subject of such proceedings, could after payment of the privileged creditors be claimed by the assignee for the behoof of the creditors generally: it seems to be clear that there is nothing in the Act which can fairly be held to displace the privilege in favour of such creditors. Section 14, which is relied upon, gives the assignment precedence over "judgments and executions not completely executed by payment." But the privilege in question is

not an incident of the creditor's judgment or execution, it is a special privilege conferred upon him by the law as a reward for his activity in frustrating an attempt to commit a fraud; and I do not think the language of section 14 requires us to hold that it is within the purview of that section. On the whole, reading the relevant statutory provisions together, a reasonable view appears to be that the "Assignments and Preferences Act" recognizes the principle upon which the privilege created by the "Creditors' Relief Act" is based and there is nothing in the former Act which requires us to hold that the benefit of that privilege once acquired is by its provisions devested for the behoof of the creditors as a whole.

ANGLIN J.—In my opinion the assignment to Martin did not deprive the execution creditors who had successfully contested the interpleader issue against Atkinson of the special lien upon the goods under seizure which they thereby acquired in virtue of the provisions of the "Creditors' Relief Act," 9 Edw. VII. (O.) ch. 48. The effect of those provisions was not merely to establish the right of the contesting execution creditors to payment of their executions out of the proceeds of such goods, but also to bar *pro tanto* the right to share in them of all other creditors (sec. 6, sub-sec. 4), including the real claimant who is prosecuting the present proceedings in the name of the assignee, Martin. If any interest in those goods passed to Martin by the debtor's assignment, it was subject to the rights which had accrued from the anterior interpleader proceedings. I find nothing in the "Assignments and Prefer-

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ences Act" (10 Edw. VII. (O.) ch. 64, which deprives the contesting execution creditors of the statutory privilege which their activity had secured to them — nothing which restores to the other creditors rights of which the "Creditors' Relief Act" by reason of their inaction had deprived them.

Mr. Justice Meredith, I venture to think, misses the point when, he says of the statutory privilege acquired by the contesting execution creditors, that it was

> a lien which, of course, their executions alone gave them; there could be no other.

After the determination of the interpleader issue in their favour the successful execution creditors, in virtue of the statutory right conferred by the "Creditors' Relief Act," occupied a much stronger position than that of mere execution creditors. Elsewhere the same learned judge speaks of the creditor in whose behalf the present proceedings are taken as

> one who * * * never had the opportunity of joining in the contest.

It would almost seem that he had overlooked the provisions of sections 7 *et seq.* of the "Creditors' Relief Act," 9 Edw. VII. ch. 48 — particularly that of subsection 3 of section 10. Neither can I agree with him that

> it is quite clear that the goods in question have always been, as against creditors and the assignee, the property of the debtors.

The learned judge writes as if he were under the impression that a conveyance which is fraudulent as against creditors is absolutely void. As pointed out in numerous cases under the Statute of Elizabeth, notwithstanding that such a deed is there declared to be "clearly and utterly void, frustrate and of none

effect," it is good *inter partes* and not absolutely void, but only voidable at the instance of creditors.

Till made void by "creditors and others," it is a valid deed, and one by virtue of which the legal estate vests in the grantee, subject to its being divested. (See May on Fraudulent Conveyances, 2 ed., pp. 316-7, 325.)

It may be that these premises account in part for the conclusion of the learned appellate judge, who differed from his colleagues, that the 14th section of the "Assignments and Preferences Act" "very plainly covers this case."

Except as against the contesting execution creditors the conveyance to Atkinson had not been avoided when the assignment to Martin was made; nor has it since been avoided. On the contrary, as has been pointed out in the courts below, the re-conveyance from Atkinson, under which the assignee Martin now asserts title, proceeds on the assumption that the debtor's property had passed to and was vested in Atkinson.

I respectfully concur in the opinions expressed in the provincial courts by the learned judges who held that the Martin assignment cannot prevail against the rights of the respondents and would dismiss this appeal with costs.

BRODEUR J.—I concur in the opinion expressed by Mr. Justice Davies.

Appeal dismissed with costs.

Solicitors for the appellant: *DuVernet, Raymond, Ross & Ardagh.*

Solicitors for the respondents: *Watson, Smoke, Chisholm & Smith.*

IN THE MATTER OF THE AUTHORITY OF THE PARLIAMENT OF CANADA TO ENACT A PROPOSED MEASURE AMENDING "THE MARRIAGE ACT."

1912
*May 27-31
*June 17.

REFERENCE BY THE GOVERNOR-GENERAL IN COUNCIL.

Constitutional law—"Marriage and Divorce"—"Solemnization of Marriage"—Jurisdiction of Parliament—Jurisdiction of legislature—Federal validating Act—Religious belief—Cannonical decrees—Civil rights—"B. N. A. Act" (1867), *ss.* 91 *and* 92—*Arts.* 127 *et seq. C.C.*

The parliament of Canada has no authority to enact a bill in the following form:—

1. The "Marriage Act," chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

"3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony.

"(2) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever"(**).

Per Idington J.—The retrospective part would be good as part of a scheme for concurrent legislation by Parliament and legislatures confirming past marriages which, probably, neither effectively

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

(**) Affirmed by Privy Council, 29 July, 1912.

can do. The prospective part, so far as possible to make it an effective prohibition of religious tests, may be good, but doubtful, and the probable purpose can be reached by a better bill.

Per Davies, Idington and Duff JJ.—The law of the Province of Quebec does not render null and void, unless contracted before a Roman Catholic priest, a marriage in such province between two Roman Catholics that would otherwise be binding. Anglin J. contra. Fitzpatrick C.J. expressing no opinion.

The law of Quebec does not render void, unless contracted before a Roman Catholic priest, a marriage otherwise valid where one party only is a Roman Catholic.

The Parliament of Canada has no authority to enact that a marriage between Roman Catholics, or a "mixed marriage," not contracted before a Roman Catholic priest and whether heretofore or hereafter solemnized shall be valid and binding(*).

Per Idington J.—Parliament has power to declare valid such a marriage heretofore solemnized to be concurred in by the legislature of the province concerned, and the like power as to a marriage hereafter to be solemnized if and when the province fails to provide adequate means of solemnization.

REFERENCE by the Governor-General in Council of questions respecting the marriage laws of Canada for hearing and consideration pursuant to section 60 of the "Supreme Court Act."

The questions so submitted are as follows:—

P. C. 424.

A REPORT OF THE COMMITTEE OF THE PRIVY COUNCIL, APPROVED BY HIS ROYAL HIGHNESS THE GOVERNOR-GENERAL ON THE 22ND FEBRUARY, 1912.

The Committee of the Privy Council, on the recommendation of the Minister of Justice, advise that, pursuant to section 60 of the "Supreme Court Act," the following questions be referred to the Supreme Court of Canada for hearing and consideration, namely:—

1. (*a*) Has the Parliament of Canada authority to enact in whole or in part, Bill No. 3 of the First Session of the Twelfth Parliament of Canada, intituled, "An Act to amend the 'Marriage Act' "?

(*) Affirmed by Privy Council, 29 July, 1912.

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IN RE MARRIAGE LAWS.

The bill provides as follows:—

"1. The 'Marriage Act,' chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

"'3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony.

"'(2) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province in Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever.'"

(*b*) If the provisions of the said bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority?

2. Does the law of the Province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,

(*a*) between persons who are both Roman Catholics, or,

(*b*) between persons one of whom, only, is a Roman Catholic ?

3. If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages whether,

(*a*) heretofore solemnized, or,

(*b*) hereafter to be solemnized,

shall be legal and binding ?

Counsel on behalf of the promotors of the bill: *Wallace Nesbitt K.C., Eugène Lafleur K.C., Christopher C. Robinson.*

Counsel on behalf of those denying the jurisdiction of Parliament to enact the bill: *P. B. Mignault K.C., I. F. Hellmuth K.C.*

Representing the Attorney-General of Canada: *E. L. Newcombe K.C.,* Deputy Minister of Justice.

Counsel for the Province of Quebec: *R. C. Smith K.C., Aimé Geoffrion K.C.*

Counsel for the Province of Ontario: *Edward Bayley K.C.,* Solicitor to the Attorney-General of Ontario.

THE CHIEF JUSTICE.—I am requested by Mr. Justice Brodeur to say that he does not intend to take part in the hearing of this reference owing to

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the fact that he was a member of the Government when, speaking for the Government, the then Minister of Justice, Sir Allen Aylesworth, said the Dominion Parliament was not competent to pass such legislation. Mr. Justice Brodeur feels that he is to some extent responsible for that opinion and, consequently, he thinks he should not take part in this hearing.

Newcombe K.C.—I appear for the Attorney-General of Canada to present and explain to your Lordships the question which has been referred, the circumstances of the reference, and the dispositions which the Government has made for the argument of the case before your Lordships. As your Lordships are aware, the bill which is the subject-matter of the first question referred, was introduced in the House of Commons during the early part of the recent session and, when it became a subject of debate, the Government, owing to the very great importance of the subject and the interests affected by the measure, and having regard, moreover, to the somewhat doubtful constitutionality of the bill, considered it expedient in the public interest to obtain judicial advice upon the power of Parliament to give effect to the proposed enactments, such as they are, before determining its policy upon the merits. In fact, I may say it would be premature, in view of the differences which were expressed upon constitutional grounds, for Parliament to consider and determine its action upon the bill in the absence of better assurance of its enacting authority than the occasion seemed to produce. Consequently, the Government adopted the policy of referring the bill to the court with the question stated so that the views of the various interests might

be fully submitted and argued. The Government permitted the promoters of the bill to name the counsel who should appear before this court to uphold the jurisdiction of Parliament to enact. Counsel were named accordingly and Mr. Nesbitt and Mr. Lafleur represent the promoters. They have filed a factum which your Lordships have before you. At the same time the Government named counsel to submit the reasons which seemed to exclude the proposed legislation from Dominion powers and my learned friends Mr. Mignault and Mr. Hellmuth are arguing that view. Then, each Attorney-General of each province was notified so as to give each province an opportunity of appearing and presenting such arguments as it might deem wise. The provinces have acknowledged the notice. We have communications from the Province of Prince Edward Island and from the Yukon Territory that they do not intend to appear upon the hearing. What course the other provinces are taking will develop, I suppose. As it will be necessary to read these questions in the argument as the case proceeds, perhaps your Lordships do not require to hear them read now as a mere formal matter of submission. Therefore, with these observations, I propose with your Lordships' permission to leave the matter in the hands of the court to be discussed under the arrangement which the Government have made for the argument.

R. C. Smith K.C.—When we last had the honour of appearing before your Lordships I stated that on behalf of the Attorney-General of the Province of Quebec we should enter a respectful objection to the jurisdiction of this court, upon the ground of the doubtful

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constitutionality of the Act referring such questions. The Judicial Committee of the Privy Council on the 16th of this month rendered a decision in the case which was then pending(1), and I suppose I must say frankly that, with regard to the absolute question of jurisdiction, we must accept it as disposing of the question of jurisdiction and upholding that such a reference is constitutional. On behalf of the Attorney-General of Quebec, however, I think it proper to direct your Lordships' attention, especially to a few observations of the Lord Chancellor in rendering that decision and I do so especially with reference to question No. 2. I may say that we think question No. 2 is actually involved in question No. 1. We therefore do not propose to raise any further objection to the jurisdiction of this court, considering it finally decided by their Lordships of the Privy Council. It is specially with reference to question No. 2 that I desire respectfully to invite your Lordships' attention to some of the observations that fell from the lips of the Lord Chancellor. The second question reads as follows:—

"2. Does the law of the Province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province:

"(*a*) between persons who are both Roman Catholics, or,

"(*b*) between persons one of whom only is a Roman Catholic ?"

(1) *In re References by the Governor-General in Council* (43 Can. S.C.R. 536; [1912] A.C. 571).

The Attorney-General of the Province of Quebec respectfully objects to the submission of that question and respectfully asks your Lordships either not to answer it, or before answering it to make representations to the Government as suggested by the Lord Chancellor(1). Their Lordships of the Judicial Committee first set out that the real point raised in this important case — that is the "Companies Act" — is whether or not an Act of the Dominion Parliament authorizing questions either of law or of fact to be put to the Supreme Court, and requiring the judges of that court to answer them on the request of the Governor-General in Council is a valid enactment within the powers of that Parliament. Of course, my Lords, the question in that case was not really one between the legislative jurisdiction of the provinces and that of the Dominion, but it raised the broader question whether or not any power whatever existed to ask such questions. Their Lordships determined that the full ambit of legislative power has been conferred by the British North America Act, that is to say, that the legislative power covering every species of matter or subject concerning the internal Government of Canada had been committed. I may say to your Lordships that that is perhaps the first judicial decision which has in so plain terms acknowledged the absolute legislative independence of the countries. Then, after referring to the various questions upon which appeals have been taken to their Lordships, the Lord Chancellor goes on to say:—

"In all cases the appeal was entertained; in some cases the answers of the Supreme Court were modified by their Lordships; and in one case Lord Hers-

(1) [1912] A.C., at p. 589.

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chell, delivering the opinion of the Board, declined to answer some of the questions upon the ground that so doing might prejudice particular interests of individuals."

There we have an express authority for this court declining to answer this question if private interests be involved in that question. The Lord Chancellor further on says:—

"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."

The decision of His Lordship concludes:—

"It is sufficient to point out the mischief and inconvenience which might arise from an indiscriminate and injudicious use of the Act, and leave it to the consideration of those who alone are lawfully and constitutionally entitled to decide upon such a matter"(1).

His Lordship, as I take it, refers with approval, inasmuch as no disapproval is expressed, of the decision of Lord Herschell(2), to which I ask your Lordships' attention, and, he further lays down the principle that the Supreme Court has full jurisdiction to make any representations to the Government requesting the question submitted.

The first case to which the Lord Chancellor is referring is the case of *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia*(2). This is the "River and Lake Improvement"

(1) [1912] A.C., at p. 589. (2) [1898] A.C. 700, at p. 717.

case, where a number of questions were submitted with respect to an Act passed by the Province of Ontario (Revised Statutes, Ontario, 1887, ch. 24, sec. 47), with reference to the power of the Province of Ontario to deal with the beds of rivers and lakes. I need not trouble your Lordships by referring to all the questions submitted, but the 17th question submitted was this (page 704) :—

"Had riparian proprietors, before confederation, the exclusive right of fishing in navigable non-tidal lakes, rivers, streams and waters, the beds of which has been granted to them by the Crown?"

At page 717, Lord Herschell, rendering the decision of the Board, dealt with that question in these words :—

"Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper in determining the respective rights and jurisdictions of the Dominion and provincial legislatures to express an opinion upon the extent of the right possessed by riparian proprietors."

There, we have an absolute refusal to answer that question because it involves private rights and rights of persons who are not represented in the litigation, nor represented in any manner whatsoever before the tribunal. There was the subsequent case of *Attorney-General for Ontario* v. *Hamilton Street Railway Co.*(1). This was an appeal from the judgment of the Court of Appeal for Ontario rendered on a reference by the Government of Ontario to that court

(1) [1903] A.C. 524.

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under a provincial statute which is similar in character to the section of the "Supreme Court Act" in question.

I shall raise two principal grounds of objection, (1), that this is a question which prëeminently affects private rights and private interests, the interests of persons who are not represented here; and (2), that in order to determine whether or not the Dominion Parliament would have any legislative power to deal with the subject-matter at all, it being a preconfederation law, the first question would have to be determined as to whether it related to marriage or whether it related to solemnization of marriage. If it related to solemnization of marriage the Dominion Parliament would have no power whatever to deal with it so that I shall in the second place ask that that question should be deferred until the main question is determined, or otherwise, it is putting a purely hypothetical question before the court when it is not at all clear that if the state of the law required any amendment the Dominion Parliament would be competent to deal with it at all.

THE CHIEF JUSTICE.—You say it does not go to our jurisdiction; if it goes only to our discretion you might postpone your argument on that point.

Mr. Smith.—As long as we have an opportunity of pointing that out I have no objection, if that is the view of your Lordships.

THE CHIEF JUSTICE.—Now that you have drawn attention to the difficulty, Mr. Smith, we will take a note of it and expect you to discuss it at a later stage

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The Chief Justice.

of the proceedings. Will you proceed with the argument, Mr. Nesbitt.

Nesbitt K.C. (after reading questions submitted).—Your Lordships will observe that in one point of view, the proposed bill which I have just read is capable of being predicated on the ground that the provincial legislation requires the marriage ceremony to be performed by some officer, and, that if performed before such an officer, no matter who the parties may be who seek the services of that officer, the marriage is valid. Question 3 will probably involve the broader question: that the Dominion has within its jurisdiction, the whole subject of marriage as such which would include the contract of marriage, and, that, under the term "solemnization" the evidence of that marriage and the machinery by which that marriage is evidenced is the power of the province, and that the extent of its power is not to affect the actual contract of marriage but solely to impose such penalties for the non-observation by the parties of the provincial legislation, as the province may see fit. As for instance, although the parties would be validly married, unless they have entered into that marriage with such form or solemnity that the province may require before its own particular officer, I suppose that the province could say that the wife should be deprived of dower, or that there should be no right of succession, or that the parties contracting the marriage should be subject to fine or the like. That is so, in order to enforce the provincial legislation in reference to the forms that ought to be observed to evidence the contract after the Dominion has said who may make such a contract. Then, as to the second

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part of the question, namely, as to the rights and duties of married persons, that part of the bill may still be treated as valid even if the first part should be held as infringing upon provincial legislation, as it affects simply the status of the parties and their children, such as their right of citizenship as legitimate persons and the like, which cannot be said to fall in any way within "solemnization." Referring again to the first part of the bill, if the contention of my learned friends on the other side is to be adopted, that clandestinity is an impediment, then we may argue that the first part of the bill is *ultra vires* as removing that impediment.

If clandestinity, as to a Roman Catholic's marriage before any person except a priest, is an impediment under the Roman Catholic doctrine on that point, and if that should be held to be an impediment, clearly the Dominion has the right to legislate with respect to that impediment, and the first part of the bill would be, to that extent, a repeal of article 127 of the Civil Code. That would be our submission. Now, to come to questions No. 1 and No. 3, treating them for the moment together, the right of the Dominion is, of course, set out in section 91, sub-section 26, of the British North America Act, and by section 91 the exclusive power is vested in the Dominion on all matters embraced within the sub-heads and that is so "notwithstanding anything in section 92." Notwithstanding anything in section 92 the widest legislative power is vested in the Dominion in relation to sub-head 26 in section 91, namely "Marriage and Divorce." All that is left in the province is, under sub-section 12 of section 92 "the Solemnization of Marriage in the Province" and our submission is that everything must turn upon

what is meant by the term "solemnization" when read in conjunction with the fact that under section 91, sub-section 26, the whole subject of "Marriage and Divorce" is vested in the Dominion. Our contention is that the line of division is the line between the contract of marrage and the accompanying formalities by way of solemnization; that the Dominion has sole power over the first while the provincial jurisdiction extends only to the second; that the provinces may require, for purposes of publicity and evidence, such formalities accompanying or subsequent to the contract as they may see fit, and may enforce their requirements by penalties upon the solemnizing official, and upon the parties, but that they cannot make compliance with these requirements a condition of the validity of the marriage contract, nor dissolve, nor annul, nor empower any provincial court to dissolve or annul, any contract of marriage otherwise valid, merely because the provincial requirements have not been complied with; and that, therefore, the Dominion has power to pass the bill referred for the purpose of protecting the contract of marriage against any such invalidating provincial legislation.

There is nothing new in the two distinctions involved in this contention, those, namely, (1) between the contract on the one hand and the solemnization on the other, and (2) between the nature of these requirements as on the one hand essential to the validity of the contract and on the other as merely evidentiary, so that, in the one case, non-compliance renders the marriage void, and, in the other, merely exposes those concerned to penalties without affecting the validity of the contract. On the contrary, both

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these distinctions are to be found throughout the whole history of the subject. Under the canon law, until the Council of Trent, a mere contract *per verba de præsenti* constituted a valid and binding marriage — it was *ipsum matrimonium* — and this was also the law of Scotland, and, according to the better opinion of England until the time of the "Marriage Act" of 1753.

Perhaps I had better briefly refer to one or two of the authorities on that subject. The first is the case of *Dalrymple* v. *Dalrymple* (1), at page 62 (commencing at the words "Marriage being a contract" down to *"appellavit"*); that is the leading case up to that date. Then I refer to *Beamish* v. *Beamish* (2). I cite it in the first place because it contains nearly all the learning on the subject, and I also wish to shew what the view of the House of Lords was as to the case to which I shall next refer. I refer especially to page 334.

Then at page 336, the chief ground of this decision (*The Queen* v. *Millis*) (3) was the ordinance of a Saxon King, in the year A.D. 940, requiring that at nuptials there shall be a "mass priest who shall by God's blessing bind their union."

Accordingly, following that, it was held by the House of Lords, in the judgment of an equally divided court, 3 against 3, that by reason of that Saxon ordinance, there was, so to speak, express legislation which made the ceremonial a part of the contract of marriage, and avoided the contract without that ceremonial.

(1) 2 Hagg. Cons. R. 54. (2) 9 H.L. Cas. 274.
(3) 10 Cl. & F. 534.

That brings me then to the case of *The Queen* v. *Millis*(1). What I have read from *Beamish* v. *Beamish* (2) was to make good the point that the law of Europe and the law of Scotland was as stated in the passages which I have read to you from *Dalrymple* v. *Dalrymple*(3). The *Millis Case*(1) turned entirely upon the point that by the act of one of the Anglo-Saxon Kings, in A.D. 940, the ceremony was made part of the contract, and the whole contract, therefore, was null unless the ceremony was performed. Then, in the case of *The Queen* v. *Millis*(1) I pass to the judgment of Lord Brougham to which I desire to draw your Lordships' attention at pages 701, 702, 718, and 723.

Will your Lordships note Howard's History of Matrimonial Institutions, vol. 1, pp. 295, 314, 339, 376. Now, following that, let me just point this out: That in the colonies, as shewn by an article in 5 Law Quarterly Review 44, at page 57, to which I will also give your Lordships the reference, Sir Howard Elphinstone, a very great authority on such a subject, points out that the case of *The Queen* v. *Millis*(1) was not supposed to be applicable to the colonies; indeed, it was held in two cases, one in Upper Canada and one in Lower Canada, prior to the "British North America Act," to be inapplicable. The first case is *Breakey* v. *Breakey*(4), and the other is the celebrated judgment of Mr. Justice Monk in *Connolly* v. *Woolrich*(5), at page 224, where it is again stated to be inappli-

(1) 10 Cl. & F. 534.
(2) 9 H.L. Cas. 274.
(3) 2 Hagg. Cons. R. 54.
(4) 2 U.C.Q.B. 349.
(5) 11 L.C. Jur. 197.

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cable to the colonies. I cite these cases for a statement of the law, but it is better put by Sir Howard Elphinstone in this article in 5 Law Quarterly Review where the decisions shewing *The Queen* v. *Millis* (1) to be inapplicable are also collected.

My contention in a word is just this: that you have to read the word "marriage" with the word "divorce" as I understood His Lordship Mr. Justice Idington to point out; the two are interrelated. I ask my friends on the other side where, in the language "solemnization of marriage in the province," do you find any possible authority to declare invalidity; to declare that, as part of the contract of marriage over which the Dominion has complete jurisdiction, the province might interpose something the absence of which would render null and void that which the Dominion has exclusive authority to legislate upon? The province may, as I say, insist upon any form of ceremony it may see fit.

The province may say it is against public policy to have no solemnization at all and it may prevent certain of the results of such a marriage, and it may impose penalties upon persons who see fit to take advantage of their rights under Dominion legislation to contract a relationship which is indissoluble but which relationship the province declares, as a matter of public policy, should be evidenced.

My submission to the court is that the subject of marriage, those who may marry, at what age, who may not marry, the regulation as to the degrees of consanguinity with which persons may marry, the persons to contract and their capacities to contract, are undoubtedly within Dominion jurisdiction.

(1) 10 Cl. & F. 534.

Solemnization of marriage does not, in the natural sense of the word extend to such matters as capacity. Some attention has to be paid to that language because if the Dominion can enact a general law for the whole Dominion declaring what shall constitute a marriage, surely there cannot be an invalidity in that respect in any province; you cannot be obliged to carry a surveyor's rule with you, to see which province you are in.

As to the civil effect of the contract — rights to property, for instance, succession, dower and the like, — I should imagine that the province, not under the head of "solemnization of marriage" but under the head of "property and civil rights" might impose such penalties as would make people careful. They have the right to impose conditions with respect to the subsequent relations that will exist between husband and wife as to the property; as, for instance, in reference to community of property in the Province of Quebec.

"Property and civil rights," enables the province, possibly, to legislate upon anything that may flow from the contract of marriage — the rights of the parties as to property, the rights as to succession, the right of dower and the like.

The meaning of "marriage," in the "British North America Act," may, perhaps, be said to be ambiguous, but it must mean, as used in that Act, the contract alone, that is, as opposed to the solemnization. The meaning of the words "solemnization in the province" is what you have to consider. The words "in the province" indicate that the provinces have no jurisdiction over the contract, since if they legislate upon that their legislation becomes, from the nature of the

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case, effective all over the Dominion. The object of the framers of the "British North America Act" must have been to have uniform legislation upon the essentials of the contract. The result of a contrary construction would be to give the provinces all the power and the Dominion really none. Complete jurisdiction over the contract is essential to effective Dominion legislation. The legislation in question is not an infringement upon the power of provincial "solemnization" properly understood. Nor can the province say that power to nullify the contract is necessary to the exercise of their jurisdiction over the solemnization. I contend that the effect of *The Queen* v. *Millis* (1), and all the authorities is, that unless you find express legislation dealing with the subject of the contract of marriage, which makes some use of the evidentiary machinery of solemnization essential to its validity, the contract is perfectly valid. You must have that requirement imposed as it was held to have been by the English legislation. There is nothing of the kind upon the subject here except legislation by the provinces attempting to legislate under the guise of solemnization. I say that such provincial legislation cannot nullify a contract which the Dominion declares, or has the right to say — and that is the third question — is a valid marriage. The provinces cannot say that power to nullify the contract is necessary to the exercise of their jurisdiction over the solemnization. I contend that the doctrine of necessarily implied powers has no application to the provinces which have not the benefit of the words "notwithstanding anything in this Act," nor of the last paragraph of section

(1) 10 Cl. & F. 534.

91. I am free to admit that has never been expressly decided by the Judicial Committee. The best observations on that your Lordships will find in Lefroy's Legislative Power in Canada, at page 454. I repeat that the doctrine of necessarily implied powers has no application to the provinces, which have not the benefit of the words, "notwithstanding anything in this Act." Your Lordships will remember that it has been held in various cases where Dominion legislation was concerned that where there is a subject expressly given to the Dominion, like railways, powers properly incidental to that subject are also given; that doctrine has no application to any of the sub-heads of section 92. If I am right about that, then you get a narrower construction of "solemnization," and any power claimed must be found expressly within these words, not by reading in implied powers such as are read in under the sub-heads of section 91 because section 92 has not the language, "notwithstanding anything in this Act." This must be so, *a fortiori,* in this case where the entire remainder of the subject is assigned to the Dominion. In any case, I say that the whole history of the matter, as discussed above, shews that such a power is not necessarily implied.

I contend, moreover, that the annulment of the contract of marriage is an infringement of the exclusive jurisdiction of the Dominion over divorce. Attention has to be drawn to that. When you come to deal with the provincial authority how could a province declare, under the guise of solemnization of marriage, that a contract of marriage, which the Dominion has said may be made, is not a marriage at all.

I follow that up by saying this: strictly speaking, annulment and divorce are different, the one

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meaning to declare a marriage void *ab initio*, the other to dissolve an existing marriage, but the word "divorce" is here used apparently as meaning every means of getting rid of the marriage tie. And, even when a provincial court annuls the marriage, it does dissolve an existing *de facto* marriage, which would otherwise remain good and would become unassailable on the death of either party. You will find that running through it all. There is a very good definition in Murray's Dictionary of the meaning of the word "divorce;" it gives it the wider meaning. You cannot give a restricted meaning to the word "divorce" because, as is to be inferred from what was said by the Lord Chancellor, whom I quoted this morning, the Dominion Parliament is given the most sweeping power, the absolute power on the subject of divorce, and, therefore, you have to give the widest meaning to the word "divorce." It results from the judgment of Lord Brougham which I read this morning that every conceivable legislative power is vested under the "British North America Act" under these two words. The whole subject of divorce, in its widest possible aspect, is, therefore, in the Dominion, and would include both annulment and divorce for cause.

This is a point I want to drive home. If the marriage tie is declared to exist and the provinces declare it is non-existent, then they are stepping within the jurisdiction of the Dominion. The provinces cannot interpose and legislate upon the contract at all without having the effect of an annulment; they cannot interfere with the contract.

To declare that the marriage does or does not exist must come under the all-embracing word

"divorce" which covers the whole question of the validity of a marriage, *de jure* or *de facto*. I quote from Bishop on Marriage and Divorce, vol. II. sec. 786:— "A suit to declare a marriage null is held to be within the term of divorce suit," etc. That is the meaning in which I say the word is used in the "British North America Act." I refer to Murray's Dictionary, sec. V. "Divorce," "Legal dissolution of marriage by the courts * * * evidence accepted by the courts." It is in the first sense that it must be taken in this Act, because the Dominion is given the sole jurisdiction relating to the whole subject-matter of divorce and I submit that it must be given the widest possible meaning. I submit that it covers all three of the jurisdictions, vested by the English Act now in the divorce courts, whether it is separation from bed and board, a decree of nullity, or a regular divorce in the common strict meaning of the word.

MR. JUSTICE IDINGTON.—I cannot understand how we can escape any one of them under the statute and especially the first and third questions. The other question might have been left out until question No. 1 and question No. 3 were determined.

Mr. Nesbitt.—Will your Lordships let me examine the language of the first section of the bill a little more closely? (The learned counsel reads the section.)

To bring it to a concrete case, the evil that was supposed to have arisen was a limitation of the express language of article 129 of the Civil Code, which stated that marriage might be performed — I am paraphrasing it — by any one of several officers;

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which, it was supposed, gave the right to any citizen, not falling within the prohibited decrees, to appear before these parties and have the ceremony performed. The bill pre-supposes the right of the province to declare that marriage shall be performed by certain officers, at certain hours, and so on, and the evidences that are to be observed about the marriage.

The bill hits squarely at article 127 C.C. in this, that it says, that no matter who is married before any person, when the provincial law declares to be the proper officer to marry, if they comply with all the provisions of the provincial law, then notwithstanding any difference in their religious faith, that contract shall be good.

If your Lordships answer question 2 in the affirmative, as I said to your Lordships early in the discussion, in all probability that will be the end of the whole matter because there will be nothing more to discuss. Now, my Lords, if the provinces have no power to nullify, the Dominion must have the power to confirm. Apart from the question of power to nullify the contract, the Dominion has admittedly exclusive jurisdiction over the capacity of the parties. Differentiation between persons of different religions as to the manner of solemnization affects their capacity and is beyond provincial powers.

The real object of question 3 seems to be to ascertain whether or not, if the bill referred does not accomplish the desired object, it can be accomplished by some other legislation. If the contention as to the first question be correct, then plainly it stands, so that the two questions run into one another so far as the argument is concerned. Or, if the distinction between the contract and its solemnization be incor-

rect, the Dominion can still pass the legislation under (1) power over divorce, (2) power to define marriage.

I submit, therefore, that question 3 must be answered in the affirmative because, even if the bill referred does not accomplish the alteration of that law, it could be done by the Dominion by a proper enactment.

I desire only to add, my Lords, a few words in reference to the meaning that is to be given to the word "marriage" in section 91. My submission is, that as it is used in conjunction with the words "and divorce" the same wide meaning that is given to the word "marriage" must necessarily be given to the word "divorce" subject to the qualification that nothing is carved out of divorce while the solemnization of the marriage tie is carved out of the word "marriage."

Now, in reference to one or two observations, which fell from the court, as to the doctrine of civil rights. Just as in the case of banks and banking, just as with railways, and so forth, whenever the doctrine of civil rights has impinged upon the wide jurisdiction given to the Dominion Parliament in section 91 "civil rights" has had to give way.

You have the whole subject of marriage, you have that whole field of legislation given expressly to the Dominion, and over-riding civil rights or anything that may interfere with it. All that is incidental, all that is ancillary to it, all that is impliedly necessary to create the tie of marriage, is vested in the federal jurisdiction, subject only to whatever may be said to be carved out of it in the solemnization or evidence of that marriage which is vested in the provinces, and nothing else. Therefore, if I have been understood in the argument this morning, to admit that the pro-

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vinces, under the doctrine of civil rights, can take away from any legislation which the Dominion may see fit to pass in this respect, I have been misunderstood. If the doctrine of civil rights impinges upon whatever is impliedly necessary in the opinion of the Federal Parliament fully to carry out the object of their legislation relative to marriage, then the doctrine of civil rights must give way.

Lafleur K.C.—May it please your Lordships, I intend to ask your Lordships' attention to the second question on this reference which is:—

"2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,

"(*a*) between persons who are both Roman Catholics, or

"(*b*) between persons one of whom, only, is a Roman Catholic ?"

I do not know whether I should preface my remarks by pointing out to your Lordships the utility of answering this question. I understand my learned friends on the other side no longer contest that you have the power and the duty, subject to the exercise of your proper discretion, to answer question No. 2, but they do submit that you should exercise your discretion or decline to answer that question in its present form, because they say — at least I understand they are going to say — it may affect the rights of private parties. It is just as important for Parliament in the exercise of its right of legislation to know what the law of the province is upon this subject as

it is that it should know the extent of the field of legislation that is open to it. Parliament in legislating upon the subject of marriage will necessarily inquire, first, as to the ambit of its own powers, and in the second place as to what grievances, if any, exist, which it is proposed to redress by the promoters of the bill. Now, it is of the first importance, therefore — when you get over the first difficulty, when you ascertain that Parliament has legislative authority over the subject-matter — to ascertain whether the law of the province is in such a condition as in the opinion of Parliament requires redress or relief. As my learned friend, Mr. Nesbitt, put it this morning, if this question is answered in our sense, if it is held that these marriages are valid and binding, then *cadit quaestio.* Therefore, it seems to me, it is just as important for Parliament to know what the law of the Province of Quebec is on that subject as it is for Parliament to know the extent of its own powers to legislate over the subject-matter.

As to interference with the rights of private parties who may not be represented here, I suppose that is an objection that may be made to almost any sort of reference of this kind. It is impossible for your Lordships to decide any general question of this nature without in some way affecting private rights, but not judicially affecting them, because your pronouncements upon this, as upon all other matters referred to you in the same way, are merely opinions. Your functions are advisory, and, therefore, you do not preclude the parties — although, of course, it would be absurd for me to contend that your opinions would not be regarded by the courts as important on the subject. I think your Lordships

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have even said that you would not be bound by your own opinion given on a reference.

It is a little bit perplexing to know what view is ultimately going to be taken on the subject. Take, for example, the "Insurance Reference" which was before your Lordships for adjudication; that was referred by the Government in consequence of a judicial decision in the Province of Quebec upon a prosecution under the "Federal Insurance Act." If your Lordships are to hold that because there is a pending case you should not answer a question then the "Insurance Reference" should not be heard at all. And, in the present instance, if because there is a case pending in court, that of Hébert(1), in which the second question on this reference is to be decided, your Lordships do not give an opinion on that question, then, of course, I do not know how far it would be useful for me to go on with the argument. I do not know whether your Lordships intend to decide that before hearing us on question 2, but I submit that it is almost impossible to answer upon any reference at all without the possibility of your affecting private rights prejudicially or otherwise. I submit that the last amendment to the statute requires the court to answer the question.

I think I have said all I need say for the present upon the discretion which your Lordships should exercise. It seems to me that on a large question of this kind it is of vast importance to the people throughout the whole Dominion that an answer should be elicited in this inquiry. It is quite obvious that any number of marriages may be affected in the same way as this Hébert marriage, and the fact that this case has come before the courts does not mean that there

(1) *Hébert* v. *Cloutre* (Q.R. 41 S.C. 249).

are not dozens, and perhaps hundreds, of cases in which the status of the parties if not attacked to-day may be attacked next year, or ten years hence. It is impossible to consider any question of this kind without necessarily affecting private rights.

The question which is submitted to your Lordships depends, in my humble opinion, upon the construction of a number of articles of the Civil Code of the Province of Quebec. I should like to say at the outset that, while I anticipate a very elaborate historical argument will be made by my learned friend Mr. Mignault on the other side, and I understand he relies upon the judgment of Sir Louis Jetté in *Laramée* v. *Evans* (1), which was based on what I may call the historical argument, it seems to me that all that is entirely beside the question. The question of the law as it stood before the Code it is not necessary for us to consider, because, in my humble opinion, the Code is perfectly clear upon the subject. I need hardly do more than refer to a couple of cases which are well known to your Lordships where the principle of construction was clearly laid down in such cases. There is the case of the *Bank of England* v. *Vagliano Brothers* (2), at page 144, in which Lord Herschell, speaking of the very elaborate argument which had been presented as to the state of the law before the "Bills of Exchange Act," said:—

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably

(1) 25 L.C. Jur. 261. (2) [1891] A.C. 107.

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intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If the statute, intended to embody in the Code a particular branch of the law, is to be proved in this fashion, it appears to me that its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated."

He goes on to say that he is far from saying that resort may never be had to the previous state of the law, but that, on the contrary, it is justifiable to refer to it when the provisions of the actual law are of doubtful import or when words are used which had previously acquired some technical meaning. But in this case that seems to me immaterial because we have an enactment which, in my opinion, is clear and free from any ambiguity, and if that is so any examination of the anterior state of the law is only misleading.

It seems to me that article 129 of the Civil Code has stated the law so clearly that no possible reference to the previous state of the law is useful or necessary. Let me first read article 128, which says that marriage must be solemnized openly by a competent officer recognized by law, and also article 129.

Article 128 says:—

"128. Marriage must be solemnized openly by a competent officer recognized by law.

"129. All priests, rectors, ministers, and other officers, authorized by law to keep registers of acts of civil status, are competent to solemnize marriage.

"But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs."

Wherein is there any ambiguity in the first paragraph of that article? The language is perfectly general. The authority to celebrate marriage is conferred upon rectors, ministers, and other officers authorized by law to keep registers of acts of civil status, and they are the persons who are competent to solemnize marriage. Is not the only thing to be ascertained, who are the persons who are authorized to keep registers of civil status, in order to answer the question who are competent persons to celebrate marriage. Is there any indication at all that the functions of these officers of civil status are to be in any way restricted? Is it not obvious, on the contrary, that the second paragraph of that article, which says they are not compellable, shews that they may receive applications from all kinds of people, belonging to all kinds of faiths, and that this provision was made for the protection and ease of their own conscience. But, does not that imply the idea that they are not exclusively concerned with marriages of their own parishioners, and that their authority and jurisdiction is general. Otherwise, what would be the use of making them non-compellable? If their functions were restricted to their own flocks, if, as is contended, the priest or the minister has to marry those of his own congregation, and if article 127 C.C. makes the rules of that religious community binding upon the members of that community, then it would be no use saying that the minister or priest is not compellable, because, manifestly, he could not be compelled to celebrate what would be an invalid marriage between persons who would be governed by the rule of their own church, which would be his church. Does not the second part

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of that article, on its face, shew that the jurisdiction of these officers of civil status was general and not restricted ?

Another thing to which I would like to call your Lordships' attention is that the article does not contemplate that this jurisdiction or that these functions shall be exercised solely by ministers of religion. It says, all priests, rectors, ministers, and other officers authorized by law to keep registers; it contemplates the possibility of other persons than priests or ministers being authorized by statute to keep registers.

There is one provision in the Code in regard to the keeping of acts of religious profession, articles 70 *et seq.* of the Code. In every religious community in which profession is made by solemn and perpetual vows, registers are kept, and my adversaries argue from that that it is not every one who can keep registers of civil status who are competent to celebrate marriage. But, manifestly, what article 129 means is that these persons can celebrate marriage, who are authorized to keep registers of civil status generally, not merely persons who may be authorized to keep registers of deaths or of religious profession. It means those who have the general power to keep registers of civil status—that is, as to all acts of civil status—and these persons are competent to celebrate marriage. And, if the Province of Quebec to-day empowers an individual, not a clergyman, to keep registers of civil status, that person is a competent person for the celebration of marriage. Whatever may be the case as to births and deaths, as to marriage the Code expressly provides that a person, other than an officer of civil status in the domicile of the party, can be the celebrant. Take article 63:—

"63. The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties."

Is not that plainly saying that the person solemnizing or celebrating the marriage need not be the functionary to officiate in the parish or domicile of these parties? The only obligation imposed on an outsider who celebrates a marriage is the verification of the identity of the parties, and, of course, all these solemnities are provided in order to prevent clandestinity. The banns themselves are simply protection taken to enable the officiating clergyman to ascertain that there are no impediments. The whole object of this provision is to prevent clandestinity, but the jurisdiction is manifestly not restricted to the officer who is in the place inhabited by the parties, either by one of the parties or by both, because an outsider may marry them, although he must make sure that there are no impediments existing. As your Lordships will see, if he does not publish the banns, he must see that the banns have been published elsewhere. It is even provided that, when the parties have not been for a certain period in the jurisdiction, the officer must ascertain whether the banns have been published in the foreign jurisdiction, and if they have not, then he must assure himself of the non-existence of any impediment. Articles 131 and 132 deal with that:—

"131. If the actual domicile of the parties to be married has not been established by a residence of six months at least, the publications must also be made at the place of their last domicile in Lower Canada.

"132. If their last domicile be out of Lower Canada and the publications have not been made there,

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the officer who solemnizes the marriage is bound to ascertain that there is no legal impediment between the parties."

In the case of dissenting Protestant congregations the banns are published by the minister who performs the marriage, and he may or may not be the minister who is the minister of the parties. They have never regarded the jurisdiction as being restricted and they have never considered that there was any incompetency on the part of any of the functionaries who are created by article 129 of the Code. Therefore, that question has not arisen in the case of marriages of Protestants. I may add that it has never arisen in the case of a marriage between a Protestant and a Catholic. No doubt has ever been cast, so far as I know, in any judicial proceeding upon the validity of marriages between Protestants and Catholics, whether celebrated by a priest of the Roman Catholic faith or by a Protestant minister. I do not think any suggestion has been made of the invalidity of these marriages. Now, if you take the wording of article 129, what reason is there for making any restriction in the case of one of these functionaries and not in the case of the other one? And if you say that each of these is subject to the same restriction — because that cannot depend upon the practice of the different congregations; it cannot depend upon what they are in the habit of doing or of the opinion they have as to the law of the land — if there are any restrictions as to the jurisdiction of any one of these, they must be derived from law. I submit that you cannot say there are restrictions as to some of these functionaries which do not exist as to the others. If you were to restrict the power of these officers of civil status to

the persons who are in their congregation under their spiritual charge, where would any authority be given to any one to marry non-Christians or the numerous immigrants who come to our shores and settle in our cities, and who are not organized into congregations? If that interpretation were given to it, then these people would be absolutely without any provision for their lawful marriage. You cannot say that a Protestant minister has any greater authority to celebrate such a marriage than a Roman Catholic priest has. If you once get beyond the flock or the congregation of the clergyman or the priest, then where are you going to stop with the jurisdiction. You cannot stop, there is no halting place at all, unless you consider that by a previous article (127) there exists an impediment in the case of people professing the Roman Catholic faith. I will contend later on that there is no such impediment, that such an impediment would not import nullity in any event, and that it is a misapplication of article 127 to say that it could have any influence at all upon the competency of the public officers who are created by article 129.

Before I leave the construction of article 129, I desire to ask your Lordships' attention to an argument that is advanced by my adversaries in their factum. I am considering now article 129 *per se* without any assistance from article 127. In their factum, my learned adversaries say that article 129 is far from clear and that it is subject to notable limitations, and they say, in the first place, that under article 70, which I have mentioned a moment ago, certain religious communities are authorized to keep registers of civil status, and yet these communities are not authorized to celebrate marriage. I point out that these communities are not authorized

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to keep registers of civil status; they are authorized to keep a certain kind of register of a certain kind of religious status; that is, solemn and perpetual vows taken in their community. But, that is not authority to keep registers of civil status, and so I contend that does not qualify the article at all.

Then my adversaries say that another important limitation of article 129 will be admitted. They say:

"Another most important limitation of article 129 will also be admitted. Are priests, rectors and ministers competent to solemnize marriage whether they are authorized or not to keep registers of civil status, a construction which the general terms, if construed literally, of article 129 would justify, or can marriage be solemnized only by such priests, rectors, or ministers who are authorized to keep registers of acts of civil status."

I do not think you can give that restriction to the article. Do the words "authorized to keep registers of civil status" apply to the priests, rectors and so forth, or only to the other officers ? It does not matter from my point, whether you adopt one construction or the other. There is a curious article of the Code, which is referred to by my learned adversaries in their factum, and that is article 53(*b*), which would seem to imply that there may be persons — although I have never seen them and I do not know who they are — who, without keeping registers of civil status may celebrate marriages. The article says:—

"53. (*b*) Every person authorized to celebrate marriages, or to preside at burials, who is not authorized to keep registers of civil status, shall immediately prepare, in accordance with the provisions of the Civil Code, an act of every marriage which he celebrates, etc."

My learned friend, Mr. Mignault, thinks this was intended for a congregation of Jews in Quebec. I have not been able to discover what that particular congregation was that this article is intended to assist, but it is a peculiar disposition of the law.

23 Vict. ch. 11 refers to Quakers, and it requires them to keep registers. I do not think 53(*b*) can refer to the Quakers, because before that article was passed this legislation as to Quakers was in force and they had the necessary authority and duty of keeping registers of civil status.

It may well be that the proper construction of article 129 is that priests and rectors and ministers, even if they do not keep registers of civil status, may celebrate marriage, and that, in addition, other officers who are authorized by law to keep registers of civil status may also celebrate marriage. That is not, however, what I should think to be the natural construction of that article. I should have said — independently of the provisions of article 53(*b*) and whatever provisions may be made for the unorganized districts — that this article meant on the face of it that priests, rectors, and other officers, all of whom are authorized to keep registers of civil status, are competent to celebrate marriage. I think that is the plain meaning of that article. Article 53(*b*) I cannot explain in any way.

That statute is authority to keep registers of civil status, and it is conferred upon a person because he has a congregation, and it is within the discretion of the legislature to give to some congregations or the heads of some congregations the right to keep registers of civil status. That all points to the construction of the article, as I have been reading it, that it is only

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those persons who keep registers of civil status who can celebrate marriage. Sometimes the authority is to individuals by name and sometimes it is the head of the congregation. They are statutes to afford relief to certain religious congregations. I shall deal with that when I am giving the history of the law, and I intend to notice it although I submit it is not necessary for the construction of the article. Still, I cannot neglect it, because my learned friends base an argument upon it. You will see that by these statutes which preceded the Code (with, I think, one or two exceptions), they did not in terms confer authority to celebrate marriage, but simply authority to keep registers of civil status.

My contention is that the civil law has nothing to do with the internal government of these religious communities. The civil law creates these persons officers to register acts of civil status. It is often said that we have no civil marriage in this country. What I understand by civil marriage, in the sense in which it is ordinarily used, is that the officiating person is not a clergyman or a priest, but is a public functionary like a mayor, or a registrar, or a justice of the peace, but the religious character of the person who registers the act of civil status does not change the character of the act. It is a civil act altogether; it is an act of the representative of the State, who, by the authority of the State, gives authenticity to his records. But, whatever may be the religious character of these officers of civil status, when they are officiating as officers of civil status they are not acting in a religious capacity at all. They may accompany their celebration of marriage with any religious ceremony they may choose, but they are still *pro hac vice* purely officers of civil status.

That is my argument as to the jurisdiction and authority conferred on these persons by article 129. I submit there is nothing there which suggests the idea that they must necessarily be of clerical character. What is the meaning of these words, "and other officers authorized to keep registers"? The only requirement is that they be authorized to keep registers, and it is quite competent for the State to empower by proper authority a justice of the peace, or a registrar, or any one else of similar character, to keep these registers of civil status and to celebrate marriage.

Another limitation which is referred to by my learned friends is one which I have noticed already. They say that another limitation is that the priests, rectors, and ministers can only solemnize marriages in the place where they are authorized to keep registers of civil status. I submit that is not so. You have article 63, which clearly shews that the celebration may be made by a clergyman who is not at the domicile of the parties.

They say:—

"By article 63, under the general rule, marriage is solemnized at the place of the domicile of one or other of the parties. This rule is no less a general rule, because the article asks that, if the marriage be solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties, so that the latter provision can only refer to exceptional cases, such as those of vagrants or of persons domiciled outside of the province; otherwise, it would have been useless to say that the marriage was solemnized at the place of the domicile of one or other of the parties. Therefore, since the general rule requires the solemnization of the marriage at the place of the

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domicile of one or other of the parties, it follows that priests, rectors, and ministers, authorized to keep elsewhere registers of acts of civil status, are not competent to solemnize the marriage, either at the place of the domicile of one or other of the parties, for they are not there authorized to keep registers of civil status, nor in the place where they do keep these registers, for the parties are not there domiciled."

It is the general rule, but not the invariable rule, that marriage shall take place at the domicile. The cause of an exception may be the desire of the parties to be married elsewhere as often happens. There is nothing which prevents them from exercising their liberty in that regard. The law has laid down the rule as to publication of banns and formalities and the assumption is that the general rule is that the domicile of the bride is generally the place where the marriage is celebrated. But it has also provided for a case where the parties do not choose to follow the general rule, and it says then what it is incumbent on the officiating clergyman to do in order to prevent clandestinity.

The publication of banns is an entirely different thing; the publication is made in their own church or else the parties get a license; they get a license if they wish to exercise their freedom to be married before some person they select. The minister gets the license of the Lieutenant-Governor to celebrate that marriage and the license is granted on proper security shewing there is no impediment. In the Catholic Church, they may be dispensed by the bishop from publishing the banns. The license does not apply to the parties, it applies to the officiating minister and he can get a license from the Lieutenant-

Governor, and when the parties present him with one he is licensed upon receiving that document to celebrate the marriage between the two people. The license is to the minister, not to the parties. There is no such thing as licensing the parties. It dispenses with the publication of the banns by the officiating clergyman, whoever he may be, but there is no restriction as to the clergyman who may celebrate the marriage, provided he has a license. The only difference is that with regard to Catholic priests they cannot get a license, they have to get a dispensation from their ecclesiastical head, and as to Protestant ministers they must get a license, but there is no permission given to the parties, it is to the functionary of the State to dispense with certain formalities which would otherwise be required.

There is another objection which is made by my learned adversaries. They say that our interpretation of article 129 cannot be sustained because the Code of Procedure, in articles 1107 *et seq.*, provides for an opposition to marriage and requires that the opposition should be served upon the functionary called upon to solemnize the marriage. They say, further, that article 61 of the Civil Code requires that the disallowance of the opposition be notified to the officer charged with the solemnization of the marriage. They ask if it is contemplated that the opposition to a marriage should be served on perhaps two or three hundred clergymen in Montreal, for example, in order to prevent a marriage from taking place. My submission is that the expression "called upon to celebrate a marriage," or, "charged with the celebration of a marriage" means a

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clergyman or a priest who is selected by the parties to celebrate a marriage. It does not mean an officer who is competent, because there may be more than one. Even on their own theory there must be two, if the parties reside in different parishes. And, in the case of Protestants where there is no such thing as an impediment on the ground of clandestinity, and when they may select any one of two or three hundred persons to cement the union, they say it would be impossible that all these functionaries could be served with the opposition or notified of the difficulties that existed. What the article means by "charged with the celebration of a marriage" or "called upon to celebrate a marriage" is the clergyman who is selected by the parties to celebrate their marriage, and there must be only one, and that one is the one who is to receive the opposition.

Now then, my Lords, another objection which is made is that, in the Province of Quebec, marriage is essentially a religious ceremony. They say there is no such a thing in the Province of Quebec as a civil marriage, as the term is generally understood, and as they say would result from the wide construction sought to be placed on article 129.

Now, is it true that in the Province of Quebec marriage is essentially a religious ceremony? A religious ceremony, in connection with a mixed marriage, for example. I have always understood there was no religious ceremony performed there but that the priest merely acted as a witness and that there was no ceremony at all. There cannot be any religious ceremony, when non-believers or Mahommedans, or Hindus, are married in the Province of Quebec; there is no religious ceremony in their case. There is an authenti-

cation of their marriage by the priest or officer of civil status, but it is wrong, I submit, to say that a Quebec marriage is necessarily and essentially a religious ceremony. It generally is accompanied, no doubt, by a religious ceremony, but my submission is that the only part of the ceremony which concerns the law is the authentication of that marriage by the officer of civil status who generally happens to be, who always happens to be now, a clergyman of some church. But, in exercising this function, he is exercising purely a civil function. I would submit that the creation of the officers of civil status to celebrate marriages is merely the exercise of authority by the State to enable these officers of civil status to exercise a purely civil function. The fact that they happen to be ministers of religion in addition to that does not alter the case at all. The words "celebration of marriage" found in our law are used by the European codes where the only legal marriage is celebrated before a public officer, who is not a priest or a minister of religion. You go before the mayor and he celebrates a marriage. The parties afterwards, if they so desire, may repair to their own church and get what is called the nuptial benediction, but that is entirely distinct from the ceremony of marriage. The ceremony of marriage is celebrated by a public officer, and I say that here you have both done by the same officer.

Then, of course, all the decrees recognized the possibility of a valid marriage where a priest could not be obtained, so that it is not essential that there should be a ceremony. There may be, resulting from the religious belief of the parties, a ceremony in their sense of the word, but so far as the law is concerned

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there is no ceremony. There is nothing there but the consent of the parties and their agreeing to be husband and wife, before a person, who is recognized by the law, as capable of exercising that function. All these decrees provide that, while it is desirable that a priest should celebrate the marriages of Catholics, it is not absolutely essential, because if a priest cannot be procured that does not prevent the celebration of a valid marriage. I, therefore, submit that you cannot say that a "ceremony" is of the essence of a marriage. It is imposed upon the parties as a religious duty in most churches, but that is a religious obligation only, it is not one which is required by the law of the country. In the last decree, the *Ne Temere* decree itself, you will find that article VIII. says:—

"VIII. Should it happen that in any district a parish priest, or the ordinary of the place, or a priest delegated by either of them, before whom marriage can be celebrated, is not to be had, and that this condition of affairs has lasted for a month, marriage may be validly and licitly entered upon by the formal declaration of consent of the contracting parties in the presence of two witnesses."

It is submitted in this connection that article 65 of the Code, which provides what is to be set forth in the act of marriage, does not in any way refer to the religious belief of the parties; but simply states the day on which the marriage was solemnized, the names, quality, occupation and domicile of the parties, and so forth, whether married after publication of banns, or dispensation, or license; whether it was with the consent of the parents, and whether there has been any opposition. That excludes the idea of anything but a purely civil ceremony, so far as the legality of the marriage is concerned.

I will have occasion, in referring to the previous legislation, when I come to that part of the case, to shew your Lordships that in all the statutes which are enabling, or authorizing or relieving ministers of congregations there is no restrictive language of any kind, there is no limitation to their jurisdiction ever imposed by any of the previous statutes; they are generally authorized to keep registers of civil status, and whenever they are authorized to celebrate marriages, in a few cases in which express authorization is given to celebrate marriages, there is no restriction in any of the statutes which I have been able to find.

The Act of 1795 expressly authorized and required the Catholic Church and the Anglican Church — that is the construction put on the Act — to keep registers of civil status. The other denominations began to complain that they were not entitled to keep registers of civil status. The Church of Scotland complained, and the Methodist Church complained, and the Baptist Church, and so on, and they all had extended to them the right which was given by the statute of 1795, to the Catholic Church and to the Anglican Church, of keeping registers of civil status. Now if it were so that the Jews could only celebrate marriages between Jews, and the Quakers between Quakers, and the Presbyterians between Presbyterians, and the Methodists between Methodists, then there would be no officer competent for the celebration of marriages between unbelievers, or Buddhists, or even the people of the Orthodox Greek Church, or in the case of these numerous immigrants who are coming to our shores every day. I do not think anybody has ever disputed the validity of the marriages of these persons. My learned friends on the other side would

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have to go to the length of arguing that there is no officer of civil status to celebrate the marriage of these people, if they restrict the power of each functionary to the members of his own congregation. There is no greater reason for doing that in one case more than in the other, apart from the provisions of article 127 which have been discussed, and apart from the two statutes which restrict the powers of the Quakers and of the Jews. If you are going to restrict any of these functionaries, you must restrict them all in the same way. There is no halting place, and you must come to the conclusion that a large proportion of our present population in the large cities is under the absolute disability or incapacity of getting lawfully married at all.

Now, my Lords, I come to the consideration of article 127. It is contended, on the part of my adversaries (and it has been held in the cases which have been decided in accordance with that view) that whatever may be the jurisdiction of the functionaries enumerated in article 129 — other than those of the Roman Catholic religion, in the case of Catholics at least, by reason of article 127 — there is an impediment which prevents Catholics from being validly married by any other than their parish priest or a priest delegated by the parish priest or by the bishop. I am dealing with the meaning of the word "impediment" in article 127. May I point out incidentally, that, if it be true that what is called clandestinity is an impediment in the proper sense of the term, the bill can hardly be said to be *ultra vires* of the Parliament, because, in so far as impediments to marriage are concerned, the legislative jurisdiction of Parliament clearly extends to all matters of that kind. It

extends on the subject of marriage to the capacity to contract marriage, to the impediments to marriage, and to all that goes to constitute a valid marriage, except the solemnization. Now, if it is true that what is called clandestinity is an impediment in the proper sense of the term, then the object of the bill is really to affect and amend article 127, by declaring that no matter what the religion of the parties or of the officiating clergyman may be, that will not prevent the validity of a marriage, otherwise regular, under the provisions of the law of the province. Now, is it not clear that that bill has for its object the removal of that impediment and the modification of article 127 if that article creates any such impediment as is contended? I would submit that it does not create such an impediment, because I think it is a misuse of the word "impediment" to apply it to the competency of the officer who is about to celebrate the marriage. It seems to me that the only proper meaning of the word impediment, and more particularly its meaning in article 127, must be an impediment of the same nature as those enumerated in the chapter. The whole chapter in which that article is found is called: "Of the qualities and conditions necessary for contracting marriage." These are the qualities and conditions in the parties themselves, and the next chapter deals with the competency of the officer for the celebration of that marriage. I submit that it is a subversion of all correct ideas, to say that the incompetency of a civil officer constitutes an impediment to marriage. If it is an impediment to marriage in the sense of article 129, I do not see how my learned friends on the other side can escape from

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the conclusion that the bill is *intra vires* of Parliament because Parliament can unquestionably repeal article 127. It can remove all these impediments, it can say what shall be the natural impediments to a marriage, and upon the theory that it is an impediment, called the impediment of clandestinity, then the object of that bill is to remove that impediment and it does accomplish that purpose if you consider clandestinity to be in the nature of an impediment. I do not want to elaborate this. I refer your Lordships to the *considérants* of the judgment of Mr. Justice Charbonneau in *Hébert* v. *Clouâtre*(1), where your Lordships will find the whole subject discussed with great lucidity and force. I do not think I could add anything to what Mr. Justice Charbonneau says.

The judgment of Mr. Justice Jetté in *Laramée* v. *Evans*(2) is one of the most interesting on the whole subject because it reproduces what may be called the historical argument, and I desire to say a word about that point without anticipating too much what may be advanced on that head by my adversaries. But I do understand the proposition as laid down by Mr. Justice Jetté to be somewhat like this: He says at the time of the conquest there was in England an exclusive jurisdiction on behalf of the Anglican clergy, and there was in France the same exclusive jurisdiction on the part of the Roman Catholic priesthood, to celebrate marriage; they were each exclusive, they recognized no other authority for celebration of marriage. Now, at the time of the capitulation there was nothing said in the articles of capitulation which could affect that situation, nor indeed, I submit, is

(1) Q.R. 41 S.C. 249. (2) 25 L.C. Jur. 261.

there anything in the "Quebec Act" of 1774 or in the "Constitutional Act" of 1791, and it was not until the statutes began to be passed with reference to the keeping of registers of civil status that we find the subject is dealt with at all, and Mr. Justice Jetté puts this question — he says: "What was the effect of the conquest upon this state of things?" he says you had a jurisdiction claimed by the Anglican clergymen on the one hand and an exclusive jurisdiction claimed by the Roman Catholic clergy on the other, and his presumption is that by the very force of things each claimed exclusive jurisdiction as to its own congregation. Now I am quite unable to follow that line of argument. It may be the fault of my logic, but it seems to me that if there was going to be any result produced by the juxtaposition of these two conflicting powers it would mean that they would have concurrent powers as to the celebration of all marriages, or else there came about the predominance of one over the other. If we take the view of Chief Justice Sewell in the case of *Ex parte Spratt*(1) that this was a function of the State which came from the Crown, we can hardly escape the conclusion that the right to celebrate marriages and to give authenticity to registers derived from the Crown became vested in the clergy of the conquering nation at the time of cession. We find this opinion expressed by him in this case of *Ex parte Spratt*(1) at page 95.

It was held in that case that a dissenter was not included in the terms of the Act of 1795 and it was further held that the exercise of this office depended upon the Crown. If that is good law — and the auth-

(1) Stu. K.B. 90.

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orities he cited are very strong on that point — then the effect of the conquest was to confer to the Anglican Church the sole authority for the celebration of marriages. It is clearly suggested, and even held expressly in that case, that the source of authority must be from the Crown. However, what I am submitting is that the deduction drawn by Mr. Justice Jetté in *Laramée* v. *Evans*(1) is not a proper deduction if you consider the legal effect of the conquest. I submit that as a matter of logic and inference you can not come to the conclusion that Mr. Justice Jetté does, that each church preserves its rights and functions and jurisdiction but only within its own sphere. If you admitted they were both exclusive of everything else, how could you come to the conclusion that they were restricted to their own parish or their own flock after the conquest? I cannot follow that reasoning at all. Therefore, my submission is that that historical argument does not advance you one bit.

The Anglican parochial organization was established almost immediately after the treaty.

In 1795, shortly after the conquest, an Act was passed for the keeping of registers of civil status by ministers of that church. The curious thing is that these marriages were not confined to the Roman Catholic church nor to the Anglican church for we find that justices of the peace were celebrating marriages then, and without the slightest apparent authority. I have never been able to find authority for the celebration of marriages by justices of the peace at that time, or since for that matter. I am

(1) 25 L.C. Jur. 261.

told, I do not know that it is true, that the United Empire Loyalists who came back to this country after a sojourn of some length in the United States had got accustomed to marriages before justices of the peace and that they imagined, wrongly imagined I should think, that our justices of the peace had the same power and jurisdiction and that that accounted for the celebration of these marriages by justices of the peace.

The Act 44 Geo. III. ch. 2 provided that all marriages solemnized since the 30th of September, 1779, by any minister of the Church of Scotland or by any person reputed to be a minister of the Church of Scotland, or by any Protestant dissenting minister, or by any person reputed to be a Protestant dissenting minister, or by any justice of the peace, shall be held to be valid in law, and 1 Geo. IV. ch. 19 validated similar marriages in Gaspé.

My Lords, the only additional reference I desire to make to the law before the Code is to two or three of the statutes relating to marriages celebrated by dissenters.

My submission is that these statutes, which conferred the power to keep registers of civil status by necessary implication confer the power to marry. None of these persons who were permitted to keep registers of civil status were authorized to celebrate marriages but these Acts have always been construed as authority to celebrate marriages in consequence of their being authorized to keep marriage registers.

There seems to be nothing before the Code which directly conferred competence on officers of civil status to celebrate marriages, with one exception. I may be wrong as to that, and perhaps my learned

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friends have discovered some other statute, but I have only discovered one and that is the one referring to the ministers of the Church of Scotland. It uses language different from the language of the other statutes which merely authorized the keeping of registers of civil status and it is the only instance I find as to the dissenting ministers.

This is the authority that is given:—

"Be it therefore further enacted by the authority aforesaid, that all marriages which have heretofore been or shall hereafter be celebrated by ministers or clergymen of, or in communion with the Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever, anything in the said Acts or in any other Act to the contrary notwithstanding"(1).

The inference from that is that it was taken for granted that the Anglicans and the Catholics could celebrate marriages, and it seems to have been taken for granted also that justices of the peace could celebrate marriages. It does not shew that there was any lawful authority for doing that but it shews that that was the state of the practice. Now, it is quite possible that in so far as the celebration of marriage by the priest or by an Anglican clergyman is concerned it resulted necessarily from the effect of the cession. That is quite possible, but what I say is that there is no legislative authority at any time given to them, before the Code, either to Anglicans or to Roman Catholic priests. At all events I cannot find any, although, perhaps, my learned friends may have

(1) 7 Geo. IV. ch. 2 (L.C.).

discovered something that has escaped my notice. This is the only statute which, before the Code, appears to confer power to celebrate marriage.

It has been suggested that the "Hardwicke Act" was introduced into Canada and persisted in notwithstanding the "Quebec Act." It seems to me that, so far as the law of marriage was concerned, the introduction of the French law — the law of Canada, — by the terms of the cession and the "Quebec Act," would *pro tanto* repeal any provisions of "Lord Hardwicke's Act" that were applicable otherwise to the colonies. Your Lordships will remember that the free exercise of the Catholic religion was always subject to the King's supremacy. You have to read all these things together. It makes up a very perplexing situation and all I can say is that the inhabitants of Lower Canada at the time took it for granted that the Anglican clergymen could celebrate marriages and that portions of the Catholic clergy could celebrate marriages, and they even seemed to believe that justices of the peace could do the same. That being the case, the first Act that was passed relating to marriages of Catholics and Protestants was the Act of 1795.

As to the common law right of justices to celebrate marriages, how could it persist, and how could the jurisdiction of the justices of the peace continue after the "Quebec Act," which introduced the law of France into the Province of Quebec. The only limitation I would suggest would be this: That if you regard the authority to celebrate marriages as Chief Justice Sewell regarded it, as a function which derives its authority from the State, then, of course, the effect of the cession would be to abolish all the authorities that emanated from the French Government,

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and the source of all authority in that respect would then be in the King of England, and that would require new commissions, new instructions, and new authorities. I have always thought that this Act of 1795 was intended to confer the power to celebrate marriage because it is impliedly contained in the power to keep registers of marriages and to enter therein all marriages celebrated by the clergymen. If that is not so, how could you construe the subsequent legislation in regard to the dissenters, which, with the single exception of the one relating to the clergy of the Church of Scotland, did not confer power to celebrate marriages at all but simply conferred power to keep registers, and put them all under the general Act of 1795. Is it not clear that the meaning of the legislature at that time must have been to confer upon those dissenters (who certainly did not have any power to celebrate marriages by any tradition or any antecedent authority) the power to celebrate marriages by giving them the authority to keep registers of civil status? That would be my construction of that statute, or otherwise you would have to come to the conclusion that, until the Code, all these dissenters for whom all this special legislation was passed really could not celebrate marriage at all; they could keep registers, but they must have some other authority outside the statutes to celebrate marriages. That seems to be inconceivable and it seems to me we must construe that legislation as by necessary implication conferring the power to marry.

I wish to refer to two more statutes which are mentioned by my learned friends on the other side. One of them, 9 & 10 Geo. IV. ch. 75 (L.C.), relates to the Jews. My learned friends were not quite right

in their statement about this, because, while it is true there is a restriction, it does not appear to me, under the words of the Act, to be a restriction as to their power to celebrate marriage. The Act, (sec. 7,) says: Every Jewish minister is to keep "a register in duplicate of all marriages and burials performed by him, and of all births which he may be required to record in such register by any person professing the Jewish religion." It is manifest that the Jews did not celebrate baptism, but they did celebrate marriages and they did officiate at burials, and their power does not seem to be restricted as to marriage or as to burials. But it is restricted as to the case of births which are presented to them to be recorded. I do not know whether that was really the intention of the legislation, possibly they expressed themselves badly, because I do know that in England the acts relating to Jews restricted their power to marriages within their own congregation. I say that this Act has not, in terms done it. The only other statute of this kind to which I will refer, is that respecting the Quakers, 23 Vict. ch. 11 (Can.). The restriction in this Act is not quite so extensive as my learned friends on the other side contend, but it does say:—

"1. All marriages heretofore solemnized in Lower Canada according to the rites, usages and customs of the Religious Society of Friends, commonly called Quakers, and all marriages hereafter to be solemnized in Lower Canada, between persons professing the Faith of the said Religious Society of Friends, commonly called Quakers, or of whom one may belong to that denomination, shall be held, and are hereby declared to be valid to all intents and purposes whatsoever."

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I say this special legislation was due to the fact that the Quakers did not appear to have any ministers over their congregation. They are a society who are very much impressed with the personal equality of all members of the congregation, and they refuse to elect or to recognize any one at their head, and consequently it was in the nature of things that a separate legislative provision should be made for the Society of Friends. With these exceptions, and to the extent of these exceptions, all the legislation appears to be directed to authorizing dissenting congregations to keep registers of civil status, but never in terms, except in the one case of the Church of Scotland, authorizing them to marry.

There is just one other observation I wish to make before I leave this part of my subject, and that is that it is a very doubtful question whether article 127, if it be relied on, creates a nullity of marriages celebrated in contraversion of the terms of that article. It may be — and I suggest this is a very reasonable construction of the language of that article — that, while it recognizes the religious impediments established in the different communities of Christians, it merely leaves the contravening parties to the penalties which may be imposed by their respective churches. The article simply says that the other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remains subject to the rules hitherto followed in the different churches and religious communities; the right likewise to grant dispensation from such impediments, appertains, as heretofore, to those who had hitherto enjoyed them. If you compare that article with article 152 which

enumerates the nullities resulting from a violation of the articles of the Code, you will find that any marriage contracted in contravention of articles 124, 125, 126, may be contested either by the parties themselves or by any of those having an interest therein. But, nowhere in the Code is it said that a marriage celebrated in contravention of article 127 of the Code can be set aside. No nullity is pronounced by the Code as to that, and you cannot infer it from the language of 127 which simply says that the impediments recognized in the different religious communities remain subject to the rules which have hitherto prevailed. Nowhere do you find any article in the Code annulling such marriages. If that be the case, then all the force of the argument derived from the application of article 127, as establishing an impediment to clandestinity, disappears. That is a part of the argument, which I have already had the honour to submit, that it is not an impediment within the meaning of article 127.

Now, my Lords, I pass on to the second branch of the question which I shall deal with very briefly, because a great deal of what has been said on sub-question (*a*) applies to sub-question (*b*) necessarily, these two overlap.

Now, this question says:—

"2. Does the law of the Province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province;

"(*b*) between two persons, one of whom, only, is a Roman Catholic."

My submission is briefly this: by the terms of article 129 all priests, rectors, ministers and other

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officers authorized by law to keep registers of civil status are competent to solemnize marriage. The construction which is put on this article by my adversaries is that the jurisdiction of each of these enumerated officers of civil status is restricted to a certain class of persons. As I understand them, they contend that a Roman Catholic priest is authorized to celebrate marriages between Roman Catholics, and that Protestant ministers are authorized to celebrate marriages between Protestants, and that that results from the cession and from the delimitation of powers which necessarily resulted. I understand that to be the contention of my adversaries. It is the theory which is propounded by Mr. Justice Jetté in *Laramée* v. *Evans*(1). He says that at the time of the cession there were these two mutually exclusive jurisdictions and that the result of their juxtaposition, without any legislation at all on the subject, was necessarily to render them competent each within its own sphere.

The question is: what is the limit of the jurisdiction of these functionaries; and is there any limitation? Of course, if you impose limitation in one case, there is no reason for not imposing it in the other. How could you say that, in the case of all these enabling acts, these various persons who are authorized to keep registers of civil status, and in the case of ministers of the Church of Scotland, who are authorized to celebrate marriages — how could you say there is any restriction ? The Act giving power to the ministers of the Church of Scotland says that all marriages celebrated by them shall be valid hereafter. That is not qualified by any restriction of any kind.

(1) 25 L.C. Jur. 261.

It is not to be supposed that the ministers of the Church of Scotland were given any authority less than that which was vested in the clergymen of the Anglican Church; it could not have been supposed that greater authority was given to them. My submission is, that there is no restriction, but my friends on the other side say there is some necessary restriction upon all these functionaries to celebrate marriage within their own parishes and among persons of their own flock. They do not admit in their factum but they will probably admit in their argument that that extends further than their own flock, and these functionaries have the authority to marry, providing one of the parties applying to be married is of their flock.

Now, where is the law for making that distinction? How can you find such a distinction in any of the legislation before the Code; where can you find it in the Code? The whole historical argument, as I understand it, goes to this: that the jurisdiction of each of these functionaries is exclusive and restricted, but where do you find any suggestion as to that in any law upon the subject. And the necessary result of that theory would be, it seems to me, that in order to celebrate a mixed marriage, as it is commonly called, it would require the presence of two officiating clergymen and by the very nature of things each would be without jurisdiction in the parish of the other. Suppose, the two parties, the Roman Catholic and the Protestant, belonged to different parishes, — what would happen? We will take, for simplicity's sake, the case of an Anglican where there is a parochial division, living in one parish, and a Catholic living in another parish, — how are you going to get concurrent

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action on the part of the clergyman and the priest? The clergyman has no jurisdiction in the parish of the priest and, *vice versa,* the priest has no jurisdiction in the domicile of the other. It seems to be a *reductio ad absurdum* to say that two ministers could by joint operation validly effect one marriage. Where do you find any authority for saying that the priest has any authority to marry beyond his own flock; or that the Anglican minister has any authority to go outside his own congregation; unless you adopt the perfectly plain and natural meaning of article 129 that there is no restriction whatsoever. To go a step further, how can you celebrate a marriage between a Christian and a Chinaman; by what possible combination of officers of civil status can you validly effect such a marriage; how could you validly effect a marriage between two unbelievers who have no parish and belong to no religious community; how could you marry two Chinese or Hindus or Turks; and we have all of these people in our midst. If you say that there is a restriction there according to the historical argument that is made, which confines the power of each to his own congregation, you are disfranchising, so to speak, this large part of our population, because you will see that there is no officer of civil status competent to marry them. I am only using this argument to shew the improbability of our codifiers having, at the end of article 129, intended to create any such ridiculous restriction as that, which would make it impossible for a large proportion of our population in the large cities to get married at all.

Now, I submit it is contrary to reason and to common sense to adopt such a construction of article 129. In so far as the construction of that article is

concerned, even if the commissioners supposed that they were reproducing the disabilities of the old law, the question is not what they intended to do but what they have done by that language. I submit that they have in the clearest manner established the power to celebrate marriage without any of the restrictions which may have existed prior to the Code. I cannot find any law which gives the authority for the celebration of a mixed marriage, either by a Catholic priest or by a Protestant minister, unless you adopt my construction of the Code, and of all the previous statutes, that the power to celebrate marriage is not restricted to any particular community of Christians or of citizens, and that any persons authorized to marry can marry generally, unless, as in the case of the Quakers, there is a restriction, and that exception proves the rule, and it was a necessary restriction in the case of the Quakers because they do not have any minister, and people would not go to them to get married unless they were members of the Society of Friends and joined the congregation. Marriage was celebrated among the Quakers by the consorts getting up in the middle of the congregation and saying they took each other for man and wife, and there was no priest or minister involved in it. There was no official of any kind, and as soon as they were put under the operation of the Act of 1795 they had to have a registry officer and keep a register of civil status. But there was no one who performed the marriage. That officer attended as a member of the congregation, and, as I say, there was this restriction necessary in the case of the Quakers because of the peculiar constitution of their religious society. I wish to give your Lordships one more reference upon the construction

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of the Code, and I wish to refer to the *Canadian Pacific Railway Co.* v. *Robinson*(1). And I wish to add the case of *The Bank of England* v. *Vagliano Bros.* (2). This is an English case, decided in the Privy Council. I refer to the judgment of Lord Macnaghten, in *Norendra Nath Sicar* v. *Kamalbasini Dasi*(3), at p. 26. It re-affirmed the rule which was laid down by Lord Herschell in *The Bank of England* v. *Vagliano Bros.*(2), and applied it to the "Indian Succession Act"; it entirely approves of the principle that was laid down in that case.

In regard to mixed marriages, as the Chief Justice has pointed out, the question has not been raised in any judicial proceeding, and I am not aware it is a matter of doubt in our province, and so there is no grievance or anything of that kind that requires to be redressed. I am bound to say that. But I do consider that the argument upon that question is of the highest value in assisting you to interpret article 129, because I think, when you reflect over the question of a mixed marriage, you must come to the conclusion, my Lords, that it is the *reductio ad absurdum* of the historical argument. It seems to me to lead to consequences which are repugnant to reason and to a proper interpretation of article 129. As to its being a question of moment in our province, it is not so far as I know.

Mignault K.C.—My Lords, I do not think, especially at this late stage, that there can be any doubt as to the construction which should be put on the Civil Code of Lower Canada, and more especially as to the

(1) 19 Can. S.C.R. 292; (1892) A.C. 481.
(2) [1891] A.C. 107.
(3) 23 Indian Appeals 18.

canons of construction which apply. The question has come up in its general form through some remarks made by my learned friend, Mr. Lafleur, both in his factum and in his argument. I conceive that it is beyond question that the Civil Code is mainly declaratory of the law as it existed in 1866.

If your Lordships will look at the sections of the Act; the instructions given by the legislature to the codifying commissioners was, in every case, to express the existing law, and where they thought proper to suggest an amendment it should be indicated as an amendment suggested. My main purpose in referring to this is to state that our Civil Code is mainly declaratory of the existing law. It is not a new law; it is not a law like the "Bills of Exchange Act" in England, which, in some ways, may have been a codification, but I think was not so in many respects. I am speaking with all due deference, because I am not as familiar with that as I am with our own laws. But I take it that in the case of the "Bills of Exchange Act" there were many, — what I may call reforms, — which were effected by the new legislation. I think that is beyond question. I think that certainly my learned friends will not disagree with me that, mainly, the Civil Code of the Province of Quebec is declaratory of the existing law. It is in no wise — or if it is I humbly confess that I have not grasped its meaning — an ordinary statute; it is a body of laws; it is a concise expression of the entire system comprising the whole law of the province as mainly derived from the Coutume de Paris and from several of the old ordinances with the additions which came

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from certain customs. So that our Civil Code, when construed, must be considered in the light of a declaratory law.

We have the reports of the codifiers to guide us. My learned friend in his factum objects to the use of these reports and he cites certain judicial opinions where it has been suggested that it was not proper to refer to reports. There have been Royal Commissions and these Royal Commissions recommended a change in the law and judges have sometimes, and I think in some instances very properly, refused to be controlled by the report of the commissioners in construing a law. But between our case and those cases, I submit, there is no parity whatever. Our courts have been in the habit, rightly or wrongly, and I think rightly, of referring to the reports of the codifiers, and their Lordships of the Privy Council have also referred to them in the case of *Symes* v. *Cuvillier*(1). In that case they referred to them on the question as to the old law and they said that the reports of the codifiers were entitled to the very greatest weight, the greatest respect, but were not to be considered as judicial utterances. But, for purposes of comparison, and that is my point, they have always been considered by our courts as throwing light on the meaning of the articles of the Code. They have been incidentally cited in such cases; they have been cited by your Lordships, they have been cited by every court, and on this point specially is it necessary to refer to them because I will shew to your Lordships that article 129 is not clear, as has been stated, by my learned friend; that there are very serious limitations, and

(1) 5 App. Cas. 138, at p. 158.

that, considering the whole subject, it raises questions of construction in which certainly your Lordships can be aided by reference to the codifiers' reports. We have certain rules which have plainly been applied in the construction of our Code as well as in the construction of the French Code. As the Chief Justice has pointed out, Laurent has always been a source of authority as to the meaning of the law in France. These reports have always been referred to before our courts, and I am not aware that the practice of referring to these interpretations has ever been considered as worthy of reprobation. I may say, further, that we have distinct rules in our Code covering construction, which are mainly taken from the French Code. I refer to the familiar rule laid down by article 1020 of the Civil Code which refers to the construction of contracts but which equally applies to the construction of any statute. Article 1020 says:—

"1020. However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract."

I say that rule applies to the construction of a statute and I find laid down in Beal on Legal Interpretation, 2nd edition, 1908, page 311, under the title of Restriction of Language, the following utterance of Lord Herschell:—

"It cannot, I think, be denied that for the purpose of construing any enactment it is right to look not only at the provision immediately under construction, but at any that is found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not in-

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tended to be applied without some limitation." *Cox* v. *Hakes*(1).

My learned friend, Mr. Lafleur, to some extent has, so to say, isolated article 129, his argument being that there is no restriction whatever in the terms of article 129, and consequently, that it is to be given the widest application. I propose to consider article 129 — I think I am right in doing so — in connection with all the provisions of the law covering both marriages and the case of registers of civil status, the two subjects being branches of the one general subject. Article 129 is in the following terms; and paragraph 1, which I will consider now, reads:—

"129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage."

My learned friend says there can be no doubt about the meaning of this, that it is a general provision to which is to be given the widest possible effect. I have to contest that doctrine in regard to article 129; I think it cannot be given general effect according to its terms. I have to suggest, first, one limitation as to which, to my mind, there can be no doubt, and that is in respect to the words: "and other officers authorized by law to keep registers of civil status." My submission is that these general words must be restricted so as to extend merely to officers of the same category as priests, rectors, and ministers. Otherwise, I submit, that superiors of religious communities would have the right, according to the contention of my learned friend, to solemnize marriage. Mr. Lafleur says that all superiors of religious communities are

(1) 15 App. Cas. 506, at p. 529.

not authorized to keep registers of civil status, but that is not what article 129 says. Article 129, if you give it general effect, says, "all officers authorized by law to keep registers of acts of civil status," and that according to its general meaning would mean any act of civil status. Consequently, if you give general effect to article 129 it is undoubted that superiors of religious communities are authorized to keep acts of civil status; acts of religious profession, which are acts of civil status. Consequently, here is one indication that the terms of article 129 cannot be followed and so we must begin to look at it with that notable restriction.

Now, there is a second restriction to the general meaning of article 129 and it is a most important one. Are priests, rectors and ministers competent to solemnize marriage whether or not they are authorized to keep registers of civil status? If general effect be given to article 129 the affirmative might be predicated. I submit that it is evident, by all the provisions of this law, that here again we must restrict article 129 to priests, rectors, and ministers who are authorized to keep registers of civil status. This being granted, then there is the further limitation that priests, rectors and ministers are competent to solemnize marriage only in those places where they are authorized to keep registers of civil status, because elsewhere they have not that authority, and, consequently, priests, rectors and ministers can only solemnize marriage where they are authorized to keep registers of civil status. Then we come to article 63 of the Code.

I desire to point out to your Lordships that the canons of construction which my learned friend, Mr.

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Lafleur, would apply to the interpretation of article 129 cannot apply because they omit material provisions which require to be applied in the construction of this particular law. We have article 53*b* and my learned friend, Mr. Lafleur, practically admitted that he could not say what officers it applied to. Now, I say, that by article 63 and as a general rule marriage must be solemnized at the place of domicile of one or other of the parties, but here is an article which requires construction. This law is not so clear as has been stated. Article 63 says:—

"63. The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties."

My learned friend, Mr. Lafleur, says that marriage can be celebrated anywhere, and consequently the first part of article 63 is useless. I say that the first part of article 63 lays down the general rule, and that the reference to marriage being celebrated elsewhere in the second part of the paragraph refers to exceptional cases. But it is evident that, between us, article 63 must be construed and consequently we have an indication which I submit to your Lordships as having, in my humble opinion, very great force. Therefore, this article requires construction, and I will shew your Lordships that article 129 requires construction, when combined, as it must be combined, with another article of the Code. Article 63 indicates that, as a general rule, marriage must — I use the word must — be solemnized at the place of domicile of one or other of the parties. I have been at some pains to verify this, and I have referred to the authorities cited by the codifiers, but have derived no light from that.

Article 63 says that the marriage is solemnized at the domicile of one or other of the parties, but according to the old law, as laid down by Pothier, the marriage should be celebrated where the bride lives, but with the permission of the parish priest of the domicile of the bride the marriage could be celebrated at the domicile of the husband. That is what was laid down. But, under article 63, the marriage could be solemnized in the place of the domicile of either party.

The second part of the article says:—

"If solemnized elsewhere the person officiating is obliged to verify and ascertain the identity of the parties."

I think we can help ourselves in construing that portion of article 63 by reference to article 132 which uses practically the same phraseology. Article 132 of the Civil Code says:—

"132. If their last domicile be out of Lower Canada, and the publications have not been made there, the officer who, in that case, solemnizes the marriage is bound to ascertain that there is no legal impediment between the parties."

Your Lordships will notice that the language of the two is very similar. In article 63 it is stated that if solemnized elsewhere the person officiating is obliged to verify and ascertain the identity of the parties, and in article 132 it is said that the officer who solemnizes the marriage is bound to ascertain if there is no legal impediment between the parties. I would take the case mentioned in article 132 as being one of the exceptional cases to which the latter part of article 63 refers. There is another case in point. Under canon law, it was a vexed question as to where vagrants, who had no domicile at all, could be mar-

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ried. It was conceded that they could marry, but the question arose as to whether they should go to the parish priest of their domicile of origin and there be married. The decision of the canonists was, and it was laid down authoritatively by the commission of cardinals entrusted with the construction of the decrees of the Council of Trent, that they could marry anywhere, but before marrying them the priest was bound to ask the permission of the ordinary, that is to say, of the bishop, and also to make an inquiry in order to discover whether there was any impediment between the parties. I would refer your Lordships, on this question of the marriage of vagrants, to Esmein, Le Marriage en Droit Canonique. I submit to your Lordships that this case of vagrants is one of the things to which the exception in article 63 would apply. I know of no other case and I would say that outside of these exceptional cases, unless you deprive of any effect the first part of article 63, marriage must be celebrated at the place of residence of one of the parties.

With regard to Roman Catholics, "place of residence" undoubtedly it is the parish; with regard to other religions I am possibly not sufficiently informed to state. Article 63 was considered by this court and by the Privy Council in the case of *Wadsworth* v. *MacMullen*(1) and as I understand the decision it was stated that article 63 referred to residence and not necessarily to domicile.

I am not prepared to say with regard to other religious congregations, but I believe in the case of the Anglican Church there is a parochial organization. I am not aware whether a parochial organization,

(1) 14 App. Cas. 631.

that is to say, a distinct territory, exists for the ministers of other religions, but in the statutes which we have printed, there is some reference to a "circuit."

There is article 133 which reads:—

"133. If the parties, or either of them, be, in so far as regards this marriage, under the authority of others, the banns must also be published at the place of domicile of those under whose power such parties are."

The point I am making, and from which I have somewhat wandered, is, that article 63 lays down the general rule and that in consequence of this rule article 129 must receive no limitation, and as it would only apply to the priest, rector or the minister of the domicile of the parties, no other could, without the permission of the parish priest or rector of the parties, solemnize marriage either at the domicile of the parties, because they are not there authorized to keep registers of civil status, or elsewhere, because, as a rule the marriage must be solemnized at the domicile of the parties. Consequently, I say we have no limitation to the terms of article 129. There is another article of the Code, which I think your Lordships should consider in connection with the construction of article 129. I refer to the second paragraph of article 44. Article 129, as we know, authorizes priests, rectors, ministers and other officers, authorized by law to keep registers of acts of civil status as competent to solemnize marriage, and the second paragraph of article 44 says:—

"In the case of Roman Catholic churches, private chapels or missions, they are kept by any priest authorized by competent ecclesiastical authority to celebrate marriages or administer baptism and perform the rites of burial."

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On the one hand, according to article 129, priests who are authorized by law to keep registers of acts of civil status are competent to solemnize marriage; on the other hand, by the second paragraph of article 44, Roman Catholic priests who are authorized by competent ecclesiastical authority to celebrate marriage are authorized to keep registers. The juxtaposition of the two articles shews this: that because priests are authorized by competent ecclesiastical authority to solemnize marriage, they are by the civil law authorized to keep registers, and because they are authorized to keep registers according to article 129 they are declared competent to solemnize marriage. I submit to your Lordships that these two articles must be considered together, and it is perfectly obvious, that in view of these articles the wide construction claimed for article 129 is impossible with regard to Roman Catholic priests. My learned friend states in his factum that there is no distinction between Roman Catholics and non-Catholics in article 129, whereas he concedes a sharp distinction between Roman Catholics and other religions under articles 42, 43, and 44. But I take it, my Lords, that so far as Roman Catholics are concerned, articles 129 and 44 must be read together. I am referring to what my learned friend says in his factum. He says:—

"Articles 128 and 129 are in sharp contrast in this respect to articles 44, 49, 53*a*, 59*a*, which refer expressly to the Roman Catholic church and distinguish between its priests or members and those of other religions."

My point is that, so far as the Roman Catholics are concerned, articles 128 and 129 and 44 must be read together, because article 129 says that all priests

who are authorized by law to keep registers of acts of civil status are competent to celebrate marriage and, when we inquire who are the priests who are authorized by law to keep registers of acts of civil status, we find the answer in the second paragraph of article 44, that they are those priests who are authorized by the competent religious authorities to solemnize marriage. Consequently, I submit that the title of the priest is the authorization given him by the bishop. I am referring to nothing else now than the provisions of the Civil Code, and it is because he is authorized by the bishop to solemnize marriage that he is authorized by the law to keep registers, and it is because he is authorized to keep registers that he is declared competent to solemnize marriage. It is not claimed to give him the power, it is said he is competent to solemnize marriage, and, consequently, I say that the title of the priest is the authorization of the competent ecclesiastical authority, so that in the final analysis, according to these articles of the Civil Code, the priest derives his authority, his right to solemnize marriage, from the authorization of the bishop. If there is any other construction that could be placed on the construction of these articles of the Code, I would be happy to hear it from my learned friend. I see no escaping from my contention and I would submit that it was done deliberately. There was never a doubt, I am speaking perfectly frankly, before the decision in *Delpit* v. *Côté* (1), that Roman Catholics could only be married before their own parish priest. My learned friend has referred to the case of *Burn* v. *Fontaine* (2), but

(1) Q.R. 20 S.C. 338.

(2) 15 L.C. Jur. 144; 3 R.L. 516; 4 R.L. 163.

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that is not a case in point because in that case there was no action to set aside the marriage. It was pretended that the first marriage was null *ipso facto* and that a second marriage had been contracted, and the wife — I am speaking from memory, but it is to be found in Revue Légale, vol. 4, — the wife claimed marital rights or alimony or something of that kind, and it was alleged that one of the marriages, I think the first, was an absolute nullity. The natural position is that the court would not assume the marriage to be null, in the absence of any action taken to set it aside. That case was merely an application of the doctrine of the presumption of the validity of the marriage until the marriage was set aside. As I have said, there never was a doubt before the decision in *Delpit* v. *Côté*(1), as to what the law of the Province of Quebec was. It is conceded by Mr. Justice Jetté, *Laramée* v. *Evans*(2); Justice Papineau had, in that very same case, decided the same thing on demurrer(3). There never had been any question before.

It was argued in the case of *Laramée* v. *Evans*(2) that the marriage was good. To be perfectly frank I should say that one of the earliest commentators on the Code expressed the opinion that, under article 129, such marriages could be celebrated, but Mr. Justice Loranger, in his treatise on the civil law, and Sir François Langelier, in his course of lectures at Laval University, which have been published, agree that marriages of Roman Catholics must necessarily be celebrated before their parish priest. I was saying that I considered the words used in article 44 were used advisedly. It was never doubted in the Province of Quebec that the authority to solemnize

(1) Q.R. 20 S.C. 338. (2) 25 L.C. Jur. 261.
(3) 24 L.C. Jur. 235.

marriage, *quoad* Catholics and *quoad* a Roman Catholic priest, came from the church, and that it was a part of the jurisdiction which he received from his superior. We find this idea stated in article 44. My argument on this would be extremely simple: authorization of the bishop, I submit, is the title of a priest to solemnize marriage. This authorization is necessarily restricted to people of the same communion as the Roman Catholic priests, that is to Roman Catholics. If it were held, under article 129, that the competency of these ministers and rectors extended to all marriages, without any distinction, then the power and authority of the non-Catholic priests would be wider than those of the Catholic priests, and that would be contrary to the principle of equality. I take it that article 129 applies to the religious belief, in so far as the Roman Catholic clergy are concerned, and, to my mind, it would be extremely difficult to otherwise satisfactorily construe article 129 with the second paragraph of article 44.

I think, that it is also possible to discover the true meaning of article 129 by reference to some other provisions of the law. I would direct your Lordships' attention to the provision concerning opposition to marriage. I may say generally that the chief object of the law in enacting articles 128 and 129 was to secure the publicity of marriage and to prevent clandestine marriages. This was, of course, a consideration of public order, and, consequently, they provided for a procedure for the taking out of oppositions to marriage. I do not know that there is a similar procedure in the English law, but in accordance with our law a marriage might be prevented by reason of an opposition. For instance, the father or the mother

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or the tutor or a prior consort of one of the parties, in order to prevent a marriage which would be null according to law, might take proceedings. Some construction must be put on article 129 to meet the provisions of the law concerning opposition to marriage. For instance, when an opposition is taken out by article 1107 of the Code of Procedure, it must be served upon the functionary called upon to celebrate the marriage; by article 1109 of the same code service of nonsuit of the opposition must be made upon the person called upon to solemnize the marriage. Article 61 of the Civil Code requires that the disallowance of the opposition be notified to the officer charged with the solemnization of the marriage. My argument is that there must be some officer, some priest or minister, who, in the intendment of the legislature, is charged with the solemnization of marriage. Take the case of a marriage about to be celebrated in the City of Montreal where there are probably fifty Roman Catholic parishes including the suburbs, and perhaps three times that number of non-Catholic congregations. A marriage is about to take place and that marriage may be stayed by means of an opposition. The law requires that the opposition to marriage be served on the officer charged with the solemnization of the marriage. It seems to me obvious that there must be some particular officer before whom the marriage must be celebrated or otherwise effect could not be given with respect to these provisions as to opposition. There is another important article, article 65 of the Civil Code which states what the acts of marriage must contain. That article, 65, sets forth that the act of marriage must set forth that there has been no opposition or that any opposi-

tion there may have been has been disallowed. How could a priest or minister make this entry that there had been no opposition to this marriage unless he is the only person on whom such an opposition could be served. I know the point taken by Mr. Lafleur in his argument, and it is that under article 65 of the Civil Code there is no requirement or mention of the religious faith of the parties to be married. He says that, if the competence of the officer solemnizing the marriage depends in any way upon the religious faith of the parties, it is most extraordinary that mention of the religious faith of the parties is not required in the act of marriage. My submission is, and it is a complete answer, that all that is required in the act of marriage is the mention of those facts which go to make out the status of the married people, such as their names, the day on which the marriage was solemnized, whether they are of age or minors, whether they were married after publication of banns, whether with a dispensation or license and whether it was with the consent of their father or mother, tutor or curator, or with the advice of a family council when such consent or advice is required, the names of the witnesses, and whether they are related or allied to the parties, and if so on which side and in what degree. Finally, it must be stated in the act of marriage, that there has been no opposition, or that, if there has been any opposition instituted, it has been disallowed. All these facts go to make up the status of the parties. There is nothing in the act of marriage referring to the competence of the person solemnizing the marriage. It is not necessary, at least article 65 does not require, that his name should be given; it merely states that he will sign. All the facts

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mentioned in this act of marriage are facts which go to make out the status of the parties as married people, and certain facts relating to the witnesses and to the consent of the parents or guardians in case these parties be minors. But my submission is, that the law evidently contemplated that there should be one special officer or priest or minister, out of perhaps many thousands, who is called upon to celebrate the marriage. I think that is most important from the point of view of the construction of article 129, because the argument of my learned friend, Mr. Lafleur, if it has any force, would shew that a person could be validly married anywhere in the Province of Quebec, from Vaudreuil on one side to Gaspé on the other. For instance, a minor might go to any one of the hundreds of clergy in the City of Montreal and produce a marriage license and be married without there being any means of preventing the marriage. Now, the law provides a means for preventing such a marriage, and says that the opposition which is taken must be served upon the person who is called upon, or charged, with the solemnization of the marriage. I say, therefore, that there must be, in article 129, one out of many thousands, who alone is competent to solemnize marriage.

I have said that in my humble opinion, the provisions respecting opposition to marriage shew the construction which must be placed on article 129. I would say the same as to the banns of marriage. By article 130 banns are directed to be published in the church to which the parties belong and article 57 states that the officer who is to perform the marriage must be furnished with a certificate establishing that the publication of banns required by law has been

duly made, unless he has published them himself. What would be the object of publishing banns in a church to which the parties belonged if the marriage could be celebrated one hundred miles away? Why, the object of the law would be absolutely defeated. I submit, with confidence, that taking into consideration nothing outside the provisions of these two titles, — "Of Acts of Civil Status" and "Of Marriage," — the limitation for which I am contending must necessarily be placed on article 129 so far as the Roman Catholics are concerned.

I will now take up the second question which I propose to discuss; and first, as to the prior state of the law. I think it is very material on this question to refer to the prior state of the law, and I wish to say a few words on the statute of 1795, 35 George III. ch. 4. The title of that Act is:—

"An Act to establish the forms of registers of baptisms, marriages and burials, to confirm and make valid in law the register of the Protestant congregation of Christ Church, Montreal, and others which may have been informally kept, and to afford the means of remedying omissions in former registers."

If your Lordships will look at section 10 of the Act, there is a reference to a petition which had been presented to the House of Assembly from the churchwardens:—

"From the Church Wardens and Vestry of the Protestant congregation of Christ Church, Montreal, praying the interposition of the Legislature to legalize the register of baptisms, marriages and burials of the said congregation, which have not been kept agreeable to the rules and forms prescribed by the law of this province, and which, etc."

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Through the courtesy of Dr. Roy of the Dominion Archives, I have been able to find the text of that petition which I think should be made a part of my argument. I will cite from the Journal of the House of Assembly of Lower Canada, from the 11th of November, 1793, to the 31st of May, 1794, both being inclusive. It is published in Quebec by order of the House of Assembly in the year 1794. At page 62 — the text is in the two languages, French on one side and English on the other — at the foot of the page I find the following:—

"The petition of the Church Wardens and Vestry of the Protestant congregation of Christ Church, Montreal, was presented to the House by Mr. Richardson and read in both languages, setting forth that the keeping, depositing and preserving in regular and due form and due manner registers of baptisms, marriages and burials, in their parish, most essentially concerns the rights of families and of individuals and that the not keeping and depositing of registers of baptisms, marriages and burials of the Protestant congregation of Christ Church, Montreal, according to the rules prescribed by the law of this province since the first day of May which was in the year of our Lord, 1775, unless provided against and remedied, may be attended with the greatest prejudice to the rights of the families and individuals of the said congregation. And, therefore, praying that leave may be granted to bring in a bill for legalizing the register of baptisms, marriages and burials of the said congregation of Christ Church, Montreal, and for the better keeping, depositing, and preserving the same hereafter.

"The House was then moved by Mr. Richardson, seconded by Mr. Frobisher, and it was resolved that

the petition of the Church Wardens and Vestry of the Protestant congregation of Christ Church, Montreal, be referred to the consideration of a committee of three members, two whereof shall form a quorum, to examine the matter thereof and report the same as it shall appear to them to the House, with power to meet and to adjourn to such time and place necessary and to send for persons, papers and records.

"Mr. Richardson also moved the House, seconded by Mr. de Rocheblave, that he be exempt from being nominated on the said committee as he will not be present at Montreal when the information necessary will most probably be taken, which, upon the question being put, passed unanimously, and Mr. Richardson was accordingly excused by the House from being on the said committee.

"Ordered that Messrs. McGill, Frobisher, McBeath do compose said committee."

And I find at page 220 of the same volume the report of the committee:—

"Mr. McGill, chairman of the committee, to whom the petition of the Protestant congregation of Christ Church, Montreal, relative to the method of keeping the register of baptisms, marriages and burials of His Majesty's British subjects of the City of Montreal, was submitted, reported that the committee had examined and inquired into the allegations of the said petition and had directed him to report their proceedings therein, which he was ready to do when the House should be pleased to receive the same. Ordered that the report be now received."

And he read the report in his place and afterwards delivered the same in at the clerk's table where it was

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once read throughout in both languages, whereof the following is an abstract:—

"The committee met at Montreal on Friday, the 10th day of January last. The Reverend Dr. Delisle and Mr. Tunstall, assistant clergymen attended, also Messrs. Antill, Davidson, Hughes, Edwards, Finley and Winter, church wardens or parishioners. Dr. Delisle produced the book entitled 'Copy of the Register of the Protestants of Montreal, made by me, David Chabrand Delisle, Rector of the Parish and Chaplain of the Garrison, on the 31st December, 1763,' and informed the committee that he had made up that register from notes and memorandum occasionally taken by himself and the parish clerks who had been employed in that office; and that he had not in his possession nor did he know of any other register that had been kept by any Protestant clergyman of Montreal preceding his arrival in this country in 1766. The committee then proceeded to peruse and consider the copy of the register which they found to contain a list or register of christenings, marriages and burials in the following order:—

"*Marriages.*

"They begin 22nd November, 1766, and end in 1793, and a copy of the register contains a list of marriages celebrated by the Reverend Dr. Delisle and Mr. Tunstall during that time, the names of the parties married, but the avocations or places of abode not being inserted, or of the witnesses who were present. The better to judge thereof the committee esteemed it proper to subjoin a copy of the first and last entries of marriages as a sufficient specimen of the whole.

"1. 1766. Mr. Peter Paul Souberiau and Miss

Catherine Félicité Chaumont were married by publication on the 20th November.

"Last. 1793. 22nd December, Mr. John Turner and Mrs. Mary Knowles, widow, were married by license.

"Christenings.

"The register of christenings is perhaps more regular as it appears that when there were sponsors their names are inserted. The first is in 1766 without sponsors; the second is of the same year and with sponsors in the following manner:—

1. Ann, daughter of Mr. Lawrence and Mrs. Jemima Ermatinger, born 16th October, baptized 5th November; sponsors, Mr. Horace Oakes, Miss Moore Oakes, Miss Margaret Oakes.

"The last is as follows in 1793: Abagail, daughter of Samuel and Mary Brown, born 25th October and baptized 8th of November.

"Burials.

"The first appears to have been in 1767 and is entered in the following words:—

"Isabella Holmes, died 24th of May and was buried the 25th.

"The last is in 1793: Margaret Wraser, died the 4th of December and was buried the 5th. And there is no mention of the parents or other relations or places of abode.

"The committee esteem it proper to add that they desired the vestry men and parishioners who are present at the perusal of the copy of the register to examine it and see whether in their recollections there had been christened, married or buried any persons

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whose names were not therein inserted; Major James Hughes remarked that in the list of christenings no less than three persons in his own family had been omitted, namely, his sons Charles and William and his grandson James Walker; from that circumstance it is inferred that an omission as well as of marriages and burials as of christenings.

"Upon the whole your committee is of opinion that it is with reason the petition referred to states that the register of baptisms, marriages and burials of the Protestant congregation of Christ Church, Montreal, have not hitherto been kept in the manner prescribed by the law of this province, which may be attended with great prejudice to the right of families and individuals. The committee conceive it their duty to observe that they have reason to believe that marriages, baptisms and burials have been solemnized by other Protestant ministers as well, Episcopalian, and Presbyterians, at other parts of the province without any register whatever having been kept of them. Your committee, therefore, submit whether a law to remedy these and such other like defects should not be passed as soon as convenient, that the mind of His Majesty's Protestant subjects and others their relations may be quieted and a mode pointed out for the due and legal keeping and registering of all baptisms, marriages and burials of His Majesty's Protestant subjects in the future."

The point I desire to make from that is this: The question was put by one of your Lordships this morning to my learned friend Mr. Lafleur, as to what was the law as to the solemnization of marriages in keeping the registers before 1795. Your Lordships will see by section 10 of the Act referring to the petition I have

just read, it is stated that these registers at Christ Church, Montreal, had not been kept agreeable to the rules and forms prescribed by the law of the province. At the end of the same section, it is provided that a copy be made of this register and that it be compared by a judge of the Court of Queen's Bench at Montreal, that the copy, therefore, shall have the same force and effect to all intents and purposes as if the same had been kept in accordance with the rules and forms prescribed by the law of the province.

Section 11 of this Act is also material. It says:—

"11. And whereas there may be other registers which have been kept in this province, not strictly agreeable to the rules and forms prescribed by law; and be it further enacted by the authority aforesaid, that any register of baptisms, marriages and burials which has been informally kept and not deposited as the law directs before the commencement of this Act, by any rector, curate, vicar or other priest or minister of any parish or of any Protestant church or congregation, and which before the expiration of five years after the passing of this Act, shall be presented along with an exact duplicate or transcript thereof to one of His Majesty's Justices of the Court of King's Bench, or provincial judge of the district wherein such register was kept, in order that the original and the duplicate or transcript thereof may be by him, the said justice or judge, compared, certified and signed. And notwithstanding any defect in point of form or otherwise regarding such register, duplicate or transcript, the same shall severally be received as evidence in all courts of justice of the truth of the entries therein contained, according to the true intent and meaning thereof, and shall have the same force and

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effect to all intents and purposes, as if the same had been kept according to the rules and forms prescribed by the laws of this province."

Then, by section 15 of that Act it is further enacted:—

"15. And be it further enacted by the authority aforesaid, that so much of the twentieth title of an ordinance passed by his most Christian Majesty, in the month of April, in the year one thousand six hundred and sixty-seven, and of a declaration of his most Christian Majesty of the ninth of April, one thousand seven hundred and thirty-six, which relates to the form and manner in which the registers of baptisms, marriages and burials are to be numbered, authenticated or paraphé, kept and deposited, and the penalties thereby imposed on persons refusing or neglecting to conform to the provisions of said ordinance and declaration, are hereby repealed, so far as relates to the said registers only."

My submission is that prior to 1795 the law of the province was the old ordinance of France, and, so far as the registers are concerned, more particularly the 20th title of the ordinance of 1667 and the declaration of the month of April, 1736. That is clearly shewn by the statute of 1795 to have been considered as the law of the province.

The question of instructions to the Governor is a rather complicated question to discuss, but your Lordships have read the instructions contained in the books of Drs. Shortt and Doughty and you will have noticed that there were public instructions and secret instructions. I may refer generally to the report from the pen of Chief Justice Hey, which is published in the appendix to the first volume of the Lower Canada

Jurist and which touches on all these questions. On the 2nd of October, 1763, the famous proclamation of George III. was issued by virtue of which it was claimed that English law has been introduced into the Province of Quebec. Governor Murray acting by virtue of certain instructions — my impression is that they were not the public instructions, but secret or confidential instructions — passed two ordinances which are referred to in the "Quebec Act." These ordinances purported to introduce the English common law into the Province of Quebec. They are discussed at length in the report of Chief Justice Hey to which I have referred, and they are also discussed and the whole question most exhaustively treated in the opinion of Chief Justice Lafontaine in the case of *Wilcox* v. *Wilcox*(1). The point taken as to the proclamation of 1763 was that it did not introduce, *proprio vigore,* the English law into Canada, but provided means by which it might be gradually introduced by means of a legislature to be summoned and which legislature was never summoned. The point as to the ordinances of Governor Murray was that they were beyond his power, that he could not by his own authority introduce the English law into the Province of Quebec.

The provisions of the old French ordonnances refer to the solemnization of marriages by the proper curé. Now, with all due deference, I would say it is possible that these provisions may have been construed as being applicable in the case of Anglican clergymen and Roman Catholic clergymen. This is a subject with which I am not absolutely familiar and I speak with hesitancy. I take it that the same parochical

(1) 8 L.C.R. 34.

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organization existed in the Anglican Church as in the Roman Catholic Church, and that the provision of the law requiring the solemnization of marriage by the parish priest could be applied in the case of the Anglican Church the same as in the case of the Roman Catholic Church. I say that, with hesitancy, because so far as I am aware there is nothing absolutely conclusive as to the authority on which marriages were solemnized by the Anglican community prior to the Act of 1795. My learned friend, Mr. Lafleur, has stated that there is no statutory authority authorizing the solemnization of marriages by ministers of the Church of England prior to the Civil Code.

Section 16 of the Consolidated Statutes of Lower Canada, for the year 1860, which is a consolidation of 35 Geo. III., reads in this way:—

"16. The Protestant churches or congregations intended in the first section of this Act, are all churches and congregations in communion with the United Church of England and Ireland, or with the Church of Scotland, and all regularly ordained priests and ministers of either of the said churches have had and shall have authority validly to solemnize marriage in Lower Canada, and are and shall be subject to all the provisions of this Act."

Quoad the Roman Catholic Church there never has been provision by legislation prior to the Civil Code which could be construed at conferring on priests the authority to solemnize marriage. I take it as an incontrovertible truth that the provisions of the old ordonnances of the French Kings, which were in force in the Province of Quebec, were preserved in operation under section 2 of the "Quebec Act," and that continued to the Civil Code and there was no necessity

for any provision in the laws of Lower Canada authorizing the Roman Catholic priest to solemnize marriage.

As to the Anglican Church any authority its ministers had to solemnize marriage would be an authority derived from the old French law which continued to be in force. At all events that would strike me as the better view. That will come up more particularly under what I may describe as the question of repugnancy, which in two words is this — it is referred to in my learned friend's factum and is somewhat extensively treated of in the judgment of Mr. Justice Archibald in the case of *Delpit* v. *Côté*(1) — and it is, that these provisions for marriage were repugnant to the ideas and principles of the victors and, consequently, did not remain in operation after the conquest. I submit it as an unquestionable fact that the whole body of the French civil law, including these ordonnances, was maintained in force in the Province of Quebec after the conquest, that at no time did the English common law have any effect in the Province of Quebec, and that it is possible to construe these ordonnances as conferring sufficient official authority to any parish priest to solemnize marriage. That, however, is a question that I discuss with a great deal of deference. It may be that authority was assumed by the ministers of the Anglican Church; it may be, as I thought my learned friend suggested, that they assumed they had authority under the law in "Lord Hardwicke's Act." But I would say this: that undoubtedly the whole body of the civil law was in force, and my submission is that there is nothing therein that could be considered repugnant. The question of repugnancy is an absolutely new one; it was never suggested at any

(1) Q.R. 20 S.C. 338.

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time that the provisions of the French law were repugnant and would have been abrogated by the effect of the conquest.

The subsequent special laws I will ask your Lordships briefly to look at, because it is contended by my learned friend, Mr. Lafleur, that they conferred a general authority to solemnize marriage. They were all special laws; they were adopted to come to the relief of certain congregations. I would submit that all these laws which were enacted after the statute of 1795 with respect to different religious communities are merely special laws and do not confer any authority to the ministers outside of their own congregations. I submit that as the proper construction of these laws.

Your Lordships will observe section 17, of chapter 20, C.S.L.C.:—

"17. This Act extends also to the several religious communities and denominations in Lower Canada, mentioned in this section, and to the priests or ministers thereof, who may validly solemnize marriage, and may obtain and keep registers under this Act, subject to the provisions of the Acts mentioned with reference to each of them respectively, and to all the requirements, penalties and provisions of this Act, as if the said communities and denominations were named in the first section of this Act, that is to say:" (Here the communities, etc., are enumerated.)

Your Lordships will see, therefore, that the Act refers to each special statute in which authority is given. Going back to these statutes, if your Lordships will look at 1st Wm. IV. ch. 56 (L.C.), an Act intituled "An Act to afford relief to a certain Religious Congregation at Montreal denominated Presbyter-

ians," the sixth line of which says that they are authorized to solemnize and register all such marriages, baptisms and burials as may be performed or take place under the ministry of such minister or clergyman. The words "under the ministry" I submit refer to the ministry exercised in regard to his own congregation, because the petition they forwarded to the legislature was:—

"That the Reverend George W. Perkins, their present minister, or the person who hereafter may have the pastoral charge of the congregation to which they belong, should be duly authorized to solemnize marriages, administer baptism and inter the dead, and to keep registers authenticated in due form of law for that purpose."

The minister is authorized to keep registers of marriages, baptisms and burials which may be performed or take place under his ministry. Your Lordships will find practically identical language in the other statutes. In 3 Wm. IV. ch. 27, which enables the regularly ordained minister of the United Association Synod of the Secession Church of Scotland, to keep authenticated registers, this is the language:—

"It shall be lawful for every regularly ordained minister of the United Association Synod of the Secession Church of Scotland, having a permanent and fixed congregation, to obtain, have and keep * * * registers duly authenticated according to law, of all such marriages, baptisms and burials as may be performed or take place under the ministry of such minister or clergyman."

I make the point that in each of these particular statutes authority is given of a limited nature. The

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authority is prayed for in regard to the purposes of the congregation; it refers to baptisms, marriages or burials under the ministry of the minister and I submit the whole effect of the statute is that it never was conceived that any authority was given to these ministers outside of their own church so far as it might affect the rights of other denominations. Your Lordships will find by verification that that is the effect of the statute. I have stated that with respect to one statute and I can state it with respect to all.

Well now, I come to consider the objections which have been taken to the construction which I have put on article 129. There is an objection which is founded on the second paragraphs of article 129. It is stated, in the first place, that recognizing that the Roman Catholic priests could only celebrate the marriage of their own co-religionists would be to recognize special privileges in the Roman Catholic Church. I respectively submit that that would not be the effect. At all events, to my mind, it would not be a serious argument and I need not do more than mention that objection. The second argument which is of more technical nature is founded on the second paragraph of article 129, which says that none of the officers thus authorized can be compelled to solemnize a marriage to which impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs. The objection is that this provision would be senseless if Roman Catholic priests could only marry their own parishioners. Mr. Justice Archibald states that it would be of no use because then a person against whose marriage an impediment existed could go to another church where such an impediment was not recognized. I think the effect of the second

paragraph of article 129 favours the view that Roman Catholics can only be married before their own priests, because it is stated that none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists. My best submission would be that this recognizes an impediment according to the religious belief of the church to which both the parish priest and the parties belong. To my mind, it does not favour the view that Roman Catholic priests have not exclusive authority *quoad* their parishioners. On the contrary, if there is no impediment, then surely, under the construction of the second paragraph of 129, the celebration of the marriage can be completed. If there is an impediment, then the law recognizes that impediment because it provides that the priest cannot be compelled to solemnize the marriage. I submit that that is the clear and true meaning of the second paragraph of article 129. It does not go to the length of saying that then somebody else could celebrate the marriage, because if there is an impediment to the marriage I would submit that it cannot be solemnized by anybody. If there is no impediment then the Roman Catholic priest could be compelled to solemnize it. It seems to me that that is a perfect answer to my learned friend's argument, which is founded on the second paragraph of article 129.

Another objection is founded upon the question of marriage licenses. Marriage licenses are issued by officers appointed, in the Province of Quebec, by the Lieutenant-Governor, and the whole object of the marriage license is to dispense with the publication of banns. The granting of marriage licenses in the Province of Quebec is left to certain persons who are ap-

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pointed or delegated by the Lieutenant-Governor. In order to obtain the issue of a marriage license it is necessary to give a bond, by two sureties being householders to the extent of $800, stating that no impediment exists to prevent the marriage. The whole object of the marriage license is to dispense with the publication of banns. The Roman Catholic bishop, on the one hand, and the Crown on the other, can both dispense with the publication of banns. The Roman Catholic permission is called a "dispensation"; the permission of the Lieutenant-Governor is called a "marriage license," but, the dispensation either of the bishop or the license of the Lieutenant-Governor cannot affect the solemnization of the marriage; in other words, the license does not confer the authority on the officer solemnizing the marriage and, if there be an impediment, the marriage license will not save the marriage from being declared non-existent. Consequently, no sound objection, to my mind, can be founded upon this. But I think there is a distinction made here, the effect of which is significant. The distinction is made between marriages of Roman Catholics and of non-Roman Catholics. As to non-Catholics a license can be obtained; as to Roman Catholics the dispensation is required before the publication of banns can be omitted. But, the license of the Crown cannot relieve the Roman Catholic priest from the necessity of publishing banns any more than the dispensation of the Roman Catholic bishop can relieve the Protestant clergyman from liability from the solemnizing of a marriage without the publication of banns. I take it that no argument of my learned friend can be founded on this, and I submit that it shews a distinction between marriages between Roman Catholics and non-Catholics.

There remains one question that I should treat on this branch of the subject and it is this: Assuming that a marriage between Roman Catholics must be celebrated before a Roman Catholic priest; — what is the effect of the solemnization of a marriage between two Roman Catholics before a non-Catholic priest? In answer to this, my submission is, that the marriage is non-existent and that there is no valid marriage. The objection is taken that article 152 of the Civil Code refers to marriages contracted in contravention to articles 124, 125, 126, and does not mention article 127, to which I will refer in a moment. I take it that under article 156 such a marriage could be set aside. Article 156 provides:—

"156. Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by those who have an existing and actual interest, saving the right of the court to decide according to the circumstances."

The saving clause has been referred to by both Mr. Justice Charbonneau and Mr. Justice Archibald. I submit that that is taken from the old law. The codifiers, on article 156, refer to Pothier, numbers 361, 362, and 451. The doctrine of Pothier, in a few words, is, that a marriage which is not celebrated before the curé of a party is always null, but that in some cases the courts have been of opinion that the plaintiff was unworthy of being heard and that it was presumed that the priest who had solemnized the marriage had received permission of the parish priest of the parties. That I submit is the effect of the saving clause in article 156. It is taken from Pothier, and Pothier states that the marriage, not celebrated before the

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curé of the parties, is always null, but that in certain cases the plaintiff has been put out of court being considered unworthy to be heard. So I submit that, if the marriage be solemnized before another than the proper official, the marriage is null.

Now, article 161 is cited and 161 says:—

"161. When the parties are in possesison of the status and the certificate of their marriage is produced, they cannot demand the nullity of such act."

That, by all the authorities, is held to refer merely to the certificate of marriage, that is, to the act of marriage; but it does not prevent one of the parties from attacking the marriage itself. It is a mere reference to the act of marriage.

Now, I shall take up very briefly the provisions of article 127, submitting this point of my case as subsidiary to the first.

I would like to cite as part of my argument and as bearing on the construction of article 129 the codifier's report on the title of "Marriage," at page 41, the last paragraph of which reads:—

"With the view of preserving to every one the enjoyment of his own usages and practices according to which the celebration of marriage is entrusted to the ministers of the worship to which he belongs, several provisions are inserted in this title which, although new in form, have nevertheless every source and every cause of existence in the spirit if not in the letter of our legislation."

They were considered to be new in form, but they carried out the spirit of the previous legislation. I also wish to cite to your Lordships an article published by the late Mr. Justice Girouard in the Revue Critique, vol. 3, p. 241. This article is a very exhaus-

tive treatise on the whole subject and contains valuable information, and the learned author construed article 129 as I have done.

It seems to me extremely important, in view of the very great gravity, may I say, of the question submitted for your Lordships' determination, that I may insist once more upon the reasons which underlie the provisions I have quoted. The object of the legislature was to secure, so far as it could be secured by legislation, due publicity of the marriage. The fundamental article under the title of "Marriage" is article 128, which I have referred to and which states that marriage must be solemnized openly by a competent officer recognized by law. The codifier states, and I have cited the reference in the factum at page 7, that the publicity required by the former part of article 128 is with a view of hindering clandestine marriages which are, for reasons, condemned by all systems of law, and they add that the word "openly" has a certain elasticity which makes it preferable to all others, being susceptible of more or less extension. It has been used so that it might be suited to the various interpretations that the various churches and the different religious congregations of the province may require of it according to their customs and usages and the rules peculiar to them upon which it is not wished in any way to innovate. All that was wished was to prevent clandestine marriages.

Therefore, a fundamental principle of our law of marriage is that the marriage must be celebrated openly, that clandestinity is a radical vice annulling marriage, and, for the purpose of securing the publicity of marriages and the prevention of clandestinity,

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the law provides ample safeguards requiring the publishing of banns of marriage in the church to which the parties belong. My contention is that the only way to prevent clandestinity is to secure the celebration of the marriage in the place where the parties are known. I do not desire to repeat unnecessarily what I said yesterday, but, as it is so important, I must say again that there would be no object in requiring the publication of the banns in the church to which the parties belonged if the parties could afterwards go to a different part of the province and have their marriage celebrated.

I must put before your Lordships a statement of the legislation of the Province of Quebec on the subject, up to the present date. We see every day the passage of statutes authorizing religious bodies to keep registers of civil status. Here is a list I compiled from the year 1900 to the year 1911 and I find there no less than 15 statutes passed, all declaring that church bodies shall have the power to keep registers of acts of civil status. I have here the statute of 1900, and in that year no less than five of those statutes were passed by the legislature. They comprise all kinds of bodies. These are Roumanian Jews and other Hebrew organizations, the Free Methodist Church of the Province of Quebec, the Syrian Church, calling themselves the Greek Orthodox Church. The following is the list:—

"List of special statutes passed by the Legislature of the Province of Quebec since the year 1900 authorizing religious congregations to keep registers of acts of civil status.

"1900—Congregation of Roumanian Jews, 'Beth David,' of Montreal, 63 Vict. ch. 107.

"1901—Congregation, 'The Chevra Kadiska, of Montreal,' 1 Edw. VII. ch. 86.

"1901—The Free Methodist Church of the Province of Quebec, 1 Edw. VII. ch. 87.

"1902—Congregation, 'Beth Hamedrash Haddodol Chevra Shaas,' 2 Edw. VII. ch. 96.

"1903—Congregation, 'Beth Israel,' 3 Edw. VII. ch. 114.

"1907—The Congregation, Temple Solomon, of Montreal, 7 Edw. VII. ch. 120.

"1908—The Congregation, 'Beth Budah,' of Montreal, 8 Edw. VII. ch. 151.

"1908—The Congregation, 'Bais Israel,' 8 Edw. VII. ch. 153.

"1909—The Greek Orthodox Church Evangeliamos, of Montreal, 9 Edw. VII. ch. 141.

"1910—The Saint Nicholas Syrian Greek Orthodox Church, of Montreal, 1 Geo. V. ch. 99.

"1910—The Syrian Greek Orthodox Church of Saint Nicholas, of Canada, 1 Geo. V. ch. 10.

"1910—The Congregation, 'Kehal Jeshurin,' 1 Geo. V. ch. 101.

"1910—The Jewish Congregation, 'Beth Israel,' of Lachine, 1 Geo. V. ch. 102.

"1910—The Jewish Congregation, 'Nusach Hoaari,' of Montreal, 1 Geo. V. ch. 103.

"1911—The Congregation, 'Chavayria Hall Yisrael,' 1 Geo. V., second section, ch. 115."

I know nothing of the circumstances which led up to the passing of these statutes. I could venture no opinion which would not be an absolutely rash one as to how long these people were in the country and

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whether they had suffered under or complained of any of the disabilities referred to. But I do know, and this is the answer to the contention of my learned friend, that so soon as anybody went to the Legislature of the Province of Quebec and asked for these powers the powers were granted.

Mr. Lafleur has made an argument, and insisted on it with much earnestness, that under my construction of article 129 a lot of people could not lawfully contract marriage in the Province of Quebec, but I desire to point out, and this is only secondary to the object for which I cited the statutes, that whenever a religious body desires to get these powers to keep registers they went to the Legislature of Quebec and obtained them.

Any argument I have made, based on the fact that these people obtained these powers from the Legislature of Quebec, would be in favour of my contention, and an answer to the objection of my learned friend that, under my construction of article 129, people are arriving on our shores every day and that these immigrants cannot get married. I will take up the case of persons who belong to no church in a moment, but what I wish to point out is, and that is why I cited these statutes; what I wish to emphasize to the court is that at the present time a vast number of bodies have obtained and are obtaining from the Legislature of the Province of Quebec authority to keep registers. My argument still is, and I insist on it with all the earnestness I can bring to bear, that all these statutes are special statutes, that general powers are not given, that any powers which these bodies have are restricted to the persons who belong to these bodies; that the intention of the legislature was not

to give them any wider competence than that necessary to register births and celebrate marriages for people who belong to the bodies themselves.

(Pursuant to questions from the Bench the learned counsel discusses the effect of the conquest on the prior law.)

I rely on the distinction between the public and the private law. I say the private law remains. The public law is to a certain extent superseded and it is certainly superseded so far as it belongs to the political branch, but I would cite to your Lordships, and I will supplement the authorities I am now citing by others I shall, of course, communicate to Mr. Lafleur; I would cite Salmond on Jurisprudence.

On the question of the abrogation of the laws concerning religion I will submit with absolute confidence the capitulation and the treaty. Whatever may be the doctrine of international law as to laws concerning religion, in the present case by reason of the capitulation and treaty stipulations the principles of such international law as is suggested could not be applied here, even though they were adverse to my contention.

I would ask your Lordships to listen to a quotation from Salmond. He gives the distinction between public and private laws as follows:—

"Public law comprises the rules which specially relate to the structure, powers, rights and activities of the state; private law includes all the residue of legal principle. It comprises all those rules which specially concern the subjects of the state in their relations to each other together with these rules which are common to the state and its subjects."

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Consequently, private law comprises all these rules which specially concern the subjects of the state in their relations to each other. I would say that laws of religion belong to private law; at least, under our principles it would be an undoubted doctrine to-day. I would also like to refer your Lordships to Holland's Jurisprudence. At page 168 he treats of marriage as classified under private law. I would also cite to your Lordships on the general question, Halleck's International Law, vol. 2, p. 516, 4th edition.

I will read the passage:—

"'The laws of a conquered country,' said Lord Mansfield, 'continue in force until they are altered by the conqueror; the absurd exceptions as to pagans mentioned in Calvin's case, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian era and in all probability arose from the mad enthusiasm of the Crusaders.' This refers to the municipal laws of the conquered country, but not to its political laws or to the relations of the inhabitants with the Government. On the transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the Government which has acquired their territory; the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State. This is a well-settled rule of the law of nations: its provisions are clear and simple, easily understood; but it is not so easy to dis-

tinguish between what are political and what are municipal laws, and to determine when and how far the constitution and laws of the conqueror change or replace those of the conquered."

I, therefore, take it to be an undoubted principle that the private law is not changed by the effect of the conquest. Coming down to the particular case of the Province of New France, after the capitulation of Quebec and Montreal, the law officers of the Crown were frequently consulted and expressed the opinion that the laws of the Province of Quebec had not been changed by the effect of the conquest. The criminal law was introduced and Attorney-General Thurlow criticized the introduction of the criminal law, but apparently it was done by consent. I submit very confidently, and I can send a list to your Lordships without lengthening unduly the argument, that the law officers of the Crown conceded on every occasion when they were consulted that the conquest had not abrogated the laws and customs of Canada.

The law officers of the Crown in England when consulted with reference to the plans of government for Canada expressed the opinion that the King could not by the exercise of his Royal prerogative exempt the Protestant inhabitants of the Province of Quebec from paying tithes to the Roman Catholic clergy. This was cited in the opinion of Chief Justice Lafontaine in *Wilcox* v. *Wilcox*(1). I have a copy of the answer by the law officers of the Crown in my hand; the document was, I believe, only found recently. It is referred to in the collection of Short and Doughty, but it was stated that the document had not then been found. Here is what they state on that point:—

"As to so much of the 22nd article as exempts Pro-

(1) 8 L.C.R. 34.

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testants from paying to the Romish clergy tithes and ecclesiastical dues, we conceive that if by the law and usages of Canada the tithes and dues should belong to the persons who are professing the Roman Catholic religion, His Majesty cannot by his Royal prerogative deprive them of their right to receive or exempt the Protestant inhabitants from the obligation to pay such tithes or other dues."

That document is signed by Sir James Marryat, who was the King's Advocate, William De Grey, who was Attorney-General, and E. Willis, who was Solicitor-General and afterwards Chief Justice.

I cite that, of course, as illustrating what I am claiming, that it was never suggested that the laws of the Province of Quebec on a subject of this nature or on a subject concerning religion had been abrogated.

On the other question as to whether the establishment came into force by the effect of the conquest I will first cite to your Lordships the decision of the Privy Council in the *Guibord Case*(1) :—

"Nor do their Lordships think it necessary to pronounce any opinion upon the difficult questions which were raised in the argument before them touching the precise *status,* at the present time, of the Roman Catholic Church in Canada. It has, on the one hand, undoubtedly, since the cession, wanted some of the characteristics of an established church; whilst, on the other hand, it differs materially in several important particulars from such voluntary religious societies as the Anglican Church in the colonies, or the Roman Catholic Church in England. The payment of *dimes*

(1) *Brown* v. *Les Curé, etc., de Notre Dame de Montréal,* L.R. 6 P.C. 157, at p. 207.

to the clergy of the Roman Catholic Church by its lay members; and the ratability of the latter to the maintenance of parochial cemeteries, are secured by law and statutes. These rights of the church must beget corresponding obligations, and it is obvious that this state of things may give rise to questions between the laity and clergy which can only be determined by the municipal courts. It seems, however, to their Lordships to be unnecessary to pursue this question, because even if this church were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, courts of justice are still bound, when due complaint is made that a member of the society has been injured as to his rights, in any matter of a mixed spirtual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury.

"In the case of *Long* v. *Bishop of Cape Town*(1), their Lordships said:—

"The Church of England, in places where there is no church established by law, is in the same situation with any other religious body — in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them."

That authority, I submit confidently, is that the Church of England was not an established church in the colonies. It was never an established church in Canada. I submit that the opinion of their Lordships in the *Guibord case*(2) supports that view. There are no documents which can be cited which

(1) 1 Moo. P.C. (N.S.) 411, at p. 461. (2) L.R. 6 P.C. 157.

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would shew that there was an establishment in Canada of the English Church. There are certain instructions issued by the Crown to the Governors who were sent out here to govern Canada. There were two kinds of instructions, and probably your Lordships have read the report of Chief Justice Hay, the second Chief Justice of Quebec under the English rule, on the whole question. Your Lordship will find the report or opinion of Chief Justice Hey in the appendix of the first volume of the Lower Canada Jurist. The Royal instructions are there referred to. There were the private instructions and the instructions under the sign manual which constituted letters patent and which were destined to be published. The former category, or the private instructions, had no force of law and could not be relied upon. The other instructions were of a different character. Now I would say this, that I have read these instructions and, outside of what I stated yesterday, they contain nothing that is of any direct character. They were undoubtedly instructions sent to the Governor to endeavour to do certain things if it were possible or if it were thought advisable, but there is no clause in them, I submit, that would go the length of establishing the English Church in Canada.

As to the jurisdiction of the Bishop of London in Canada I will read paragraph 37, which is to be found at page 140 of the volume of Constitutional Documents by Shortt and Doughty:—

"37. And to the end that the ecclesiastical jurisdiction of the Lord Bishop of London may take place in our province under your Government, as far as conveniently may be, we do think fit, that you give all countenance and encouragement to the exercise of the

same, except only as collating to benefices, granting licenses for marriage and probates of wills which we have reserved to you, our Governor and to the Commander in Chief of our said province, for the time being."

Undoubtedly, the granting of licenses for marriages was reserved to the Governor of Canada.

While we are on this point I wish to make it doubly clear that there is nothing in this article 37 that points to the establishment of the English Church in Canada.

Paragraph 32 says:—

"You are not to admit any ecclesiastical jurisdiction of the See of Rome or any other foreign ecclesiastical jurisdiction whatever in the province under your Government."

But that has no bearing on the point. The ecclesiastical jurisdiction of the See of Rome could be excluded without there being any established church in Canada.

I will take up the question as to what the English law at the time as to marriage was. Assuming for the sake of argument that the English law concerning marriage was introduced either it was "Lord Hardwicke's Act" or the English common law. According to the English common law as defined in the case of *Reg.* v. *Millis* (1), the marriage had to be celebrated before a priest.

Taking the other side of the argument, that under English law at that time marriage *per verba de præsenti* was considered a valid marriage then, if the English law was introduced into the Province of Quebec by the effect of the conquest, a marriage in a certain form would be valid if the parties were Protest-

(1) 10 C. & F. 534.

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ants and a marriage in another form would have to be resorted to if the parties were Catholics. I am submitting, if it is held that the English law was introduced, that there would be endless confusion. I would understand the logic of the proposition that the whole English law was introduced as to the old inhabitants as well as to the others, but there were the treaty stipulations which prevented this law being applied to the old inhabitants of the colony. Then, I say, that, in the absence of anything shewing that the English law was introduced, with the single exception of marriage licenses, that we are bound to assume that there was no English law introduced on the subject.

The license system could not be applied in view of the stipulations to the Roman Catholics. It was at most a dispensation of the necessity for publishing the banns. The subject of marriage licenses is not unknown; I think it can be traced far back in the history of England. Dispensations were granted by the Pope prior to the Reformation and afterwards by a statute which was passed, I think, in the reign of Henry VIII., the authority was granted to the Archbishop of Canterbury. The Crown has exercised the jurisdiction to grant marriage licenses as part of the Royal prerogative, but it does not shew that the English law of marriage was introduced into this country. There is nothing to shew that. We have absolutely no documents and no decision under the English law upholding the contention that the English law was introduced here. The first decision that can have any bearing on the subject is the decision of Chief Justice Sewell in *Ex parte Spratt*(1). That was after the statute of 1795 and it was on a question whether dis-

(1) Stu. K.B. 90.

senting ministers had the right under the statute of 1795 to obtain registers of acts of civil status, and he decided that they had not for the reason that they were not in holy orders. The reason I refer to the decision is that it is the earliest on the subject which could have any relation to marriage and the authorities he quotes therein are all French authorities. It may be that looking carefully into old court registers something may be discovered, but certainly nothing has ever been published up to this date.

Then, my Lord, if that be the case, I would rely on the general principles of international law, that the private law is not abrogated by the effect of the conquest. I point out to your Lordships, as extremely significant, that my learned friends on the other side who are interested in setting out any authority pointing to the introduction of the English law, have not done so, outside of the judgment of Mr. Justice Archibald, who merely expresses an opinion and who is not in any better position than we are to determine the question. I would say, therefore, and I believe I am warranted in saying so, that under the general rule we cannot assume that the English law as to marriage was introduced.

Then, looking at the treaty stipulations, it has never been doubted that I am aware of that they secured absolute independence — I am using that word advisedly — to the Roman Catholics and to their clergy. Whatever doubt there may have been on account of certain answers made by General Amherst, on some points which were put to him at the time of the capitulation of Montreal there is no doubt as to the guarantee of the free exercise of the Roman Catholic religion. The wording of the capitulations is

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worthy of attention. I refer to the articles of the capitulation of Quebec, and the articles of the capitulation of Montreal. The articles of the capitulation of Quebec, 1759, read:—

"*Articles de Capitulation de Québec,* 1759.

"Articles de capitulation demandés par M. de Ramzay, Lieutenant pour le Roy commandant les haute et basse villes de Québec, Ch. de l'Ordre Royal & Militaire de St. Louis, à son Excellence Monsieur le General des troupes de sa Majesté Britanique.

"The capitulation demanded on the part of the enemy, and granted by their Excellencies Admiral Saunders and General Townshend, etc., etc., etc., is in manner and form hereafter expressed."

"*Article* 2.

"Que les habitans soient conservés dans la possession de leur maisons, biens, effets et privileges.

"Granted upon their laying down their arms.

"*Article* 6.

"Que l'exercice de la relligion Catholique, apostolique et romaine sera conservé; que l'on donnera des sauvegardes aux maisons des ecclésiastiques, relligieux et relligieuses, particulièrement à Mgr. l'Evèque de Québec, qui rempli de zèle pour la re relligion et de charité pour le peuple de son diocèse désire y rester constamment, exercer librement et avec le décense que son état et les sacres mystères de la relligion Catholique, apostolique, et romaine exigent, son authorité episcopale dans la ville de Québec lorsqu'il jugera apropos, jusqu'à ce que la possession de Canada ait été decidée par un traité entre S. M. T. C. et S. M. B.

"The free exercise of the Roman religion is

granted, likewise safeguards to all religious persons, as well as to the Bishop, who shall be at liberty to come and exercise freely and with decency, the functions of his office, whenever he shall think proper and until the possession of Canada shall have been decided between their Britannic and most Christian Majesties.

"Que la présente capitulation sera executée suivant sa forme et teneur, sans qu'elle puisse être sujette à l'inexecution sous prétexte de represailles ou d'une inexécution de quelque capitulation précédente.

"Granted.

"Le présente traité a été fait et arreté double entre nous au camp devant Québec, le 18 Septembre, 1759.

"Chas Saunders.
"Geo. Townshend.
"De Ramzay."

The articles of the capitulation of Montreal, 1760, read:—

"*Articles de Capitulation de Montréal,* 1760.

"Articles de capitulation entre son Excellence le Général Amherst Commandant-en-Chef les troupes & forces de sa Majesté Britanique en l'Amerique Septentrionale, et son Excellence le Mis. de Vaudreuil, Grand Croix de l'Ordre Royal et Militaire de St. Louis, Gouverneur et Lieutenant Général pour le Roy in Canada.

"*Article* 27.

"Le libre exercise de la Religion Catholique, apostolique et Romaine, subsistera en son entier; en sorte que tous les estats et les peuples de villes et des campagnes, lieux et postes éloignés pourront continuer de

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s'assembler dans les églises, et de frequenter les sacramens comme cy devant, san estre inquiété en aucun manière, directment ou indirectment. Ces peuples seront obligées par le Gouvernement Anglais à payer aux prêtres qui en prendront soin les dixmes, et tous les droits qu'ils avoient coutume de payer sous le gouvernement de sa Mte. Très Chrétienne.

"Granted as to the free exercise of their religion; the obligation of paying the tithes to the priests will depend on the King's pleasure.

"Fait à Montréal le 8 de Septembre, 1760.

"Vaudreuil.

"Done in the camp before Montreal the 8th September, 1760.

"Jeff. Amherst."

You will see that there is no restriction as to the free exercise of their religion, and your Lordships will notice in what wide terms this was demanded by article 27, and it is granted without any restriction except as to the obligation to pay tithes to the clergy.

The word "estats" is used meaning, no doubt, "orders." The clergy were a distinct order as well as the noblesse. There were the three orders, the clergy, the noblesse and the tiers d'état, which swallowed up the two others. Now, take the Treaty of Paris, which is material in this connection. After saying that His Most Christian Majesty renounces all pretensions to Nova Scotia and Acadia and so forth, it says:—

" His Britannic Majesty on his side agrees to grant the liberty of the Catholic religion to the inhabitants of Canada; he will consequently give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Roman Catholic Church as far as the laws of Great Britain permit."

As to the restriction which has been referred to several times, there is abundance of opinion as to what effect the restriction could have.

I would take it, and I think I can say so, that my position, which I conceive to be founded on authority is, that the Treaty of Paris did not supersede the capitulation. I will be able to refer your Lordships to authority for that basis. What is stated is that the treaty is a contract between one Government and another Government, but the Articles of Capitulation is between a Government and the inhabitants of a country. I think your Lordship will find that in the case of *Campbell* v. *Hall*(1). The inhabitants of the country, in consideration of their laying down their arms, are granted certain privileges. To my mind it is an undoubted principle founded on reason that a treaty is between two nations and capitulation is a pact — I do not think I can choose a more proper term — between the conqueror and the inhabitants, so I will say that I am entitled to look at these three documents as forming the title for the free exercise of the Roman Catholic religion. I would think that the stipulations of the capitulation cover my point, that the free exercise of the Roman Catholic religion is guaranteed. I would say that it is guaranteed to the church as much as to the inhabitants. It was guaranteed to all orders of Canadian society. My position on this branch of the argument would be that marriage, according to the doctrine of the Roman Catholic Church, is a sacrament, and I would say the administration of the sacraments is exclusively attributed to the ministry of the priests of the Roman

(1) Lofft. 655; Cowp. 205.

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Catholic Church, and that if any interference with this administration of the sacraments were permitted it would be a violation of these stipulations. I submit that these reasons are fundamental and that they would cover the construction of the provisions which I have cited to your Lordships.

Then, I have shewn what the construction of these articles are; that article 129 must be restricted as I have stated and I shall not repeat what I have said on that subject.

Before I touch on article 127, I desire to say something which I began to say this morning, namely: that the object of the law is to prevent clandestinity of marriage, that if my learned friends' contentions are right, clandestinity is rendered not only possible but extremely easy, that some restriction must be put on the provisions of the law to secure the due publicity of marriage, and that the number of religious bodies obtaining statutory authority, as I have shewn, is increasing so rapidly that it becomes a fundamental necessity that the views of the codifiers and that the proper construction of article 129 be insisted upon. If my children wanted to contract marriage, in spite of my objection and in spite of the impediments that might be against it, it would not be possible for me to prevent it because some of these people might have a church or place of meeting in a back store, and if my learned friends' contention is right, that means they will have as much authority as anybody else, then there would be thousands of clergymen irrespective of locality, irrespective of religion, who could solemnize marriage. If that system is to be allowed under my learned friends' contention, then the law has failed in its main object to secure the pub-

licity and non-clandestinity of marriage.

Article 127 of the Civil Code provides:—

"127. The other impediments recognized, according to the different religious persuasions, as resulting from relationship or affinity, or from other causes, remains subject to the rules hitherto followed in the different churches and religious communities."

"The right, likewise, of granting dispensations from such impediments, appertains, as heretofore, to those who have hitherto enjoyed it."

Article 127 follows articles 124, 125, and 126 which prescribe what might be called the scriptural impediments to marriage as resulting from relationship in the Levitical degrees; marriage in the direct line, ascending or descending; marriage, between brothers and sisters; marriage between uncles and nieces, or between nephews and aunts. After these provisions, article 127 is introduced as a general provision purporting to cover all other impediments.

The codifiers at first drafted this article, so that it read:—

"The other impediments admitted according to the different religious persuasions as resulting from relation or affinity within the degree of cousins-german and other degrees, remain subject," etc.

The codifiers presented a supplementary report in which the words, "within the degree of cousins *germane* and other degrees" were stricken from the article, and the words, "or other causes" introduced. They explained why they did so. One of them, Mr. Justice Day, dissented. The explanation shewed clearly what the meaning, in the opinion of the codifiers, was to be placed on the article. The majority of the codifiers say:—

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"Two of the commissioners recommend a modification of article 11*a* in the title of marriage, in order to remove all doubt as to the intention to leave the subject in the same state as it is at present.

"Mr. Commissioner Day dissents from the proposed change, because, by the addition of the words 'other causes,' it has the effect of extending the grounds of impediment contemplated by the article as adopted, and appears to him to recognize, as legal impediments, certain obstructions to marriage, dependent upon ecclesiastical rules and discipline, and binding only upon the conscience of the parties whom they affect."

I understand my learned friends to take the position that the word "and other causes" must be controlled by the impediments mentioned in articles 124, 125, and 126 as being *ejusdem generis,* with the impediments mentioned in these articles. The intention of the codifiers would appear to have been entirely different, and further I would say that this rule cannot be applied for the following reasons: in the first place, the rule *ejusdem generis* does not apply where the genus is entirely exhausted or covered by the preceding words. For instance, if the words which precede exhaust the whole genus, then to give some meaning to the general words following it is necessary to give them more extension. It is only when the general words following such a word compel the enumeration of the special words that they can be restricted to things of similar nature to those mentioned by the special words in the statute. I take that to be the undoubted rule of legal interpretation. Well now, the very wording of the article shews that it was intended here to give a greater extension to the mean-

ing of the words "or other causes" because the first impediments were impediments which have been recognized at all times and I think in all systems by the civil law. Here it was proposed to introduce a new set of impediments which would vary according to the belief of each church. There is in article 127 an enumeration of all causes of impediment, that is to say, causes of impediment resulting from relationship or affinity, and I would say that that relationship or affinity comprises the whole genus of impediments which result from those causes. Then, there were other impediments recognized by different canonical systems which were different. There was the impediment resulting from holy orders, from perpetual vows; there were several impediments of a similar nature. I submit that the words "other causes" comprise all these impediments. They may vary according to the different churches, and it was so intended by the codifiers, and it was deemed by the codifiers impossible to make the enumeration that would be absolutely necessary. It was impossible to do so by reason of the number of religious societies which were in contemplation of the law, and it was necessary to provide by a general article for all these impediments which were recognized by each church, and which had received the passive, if not the express consent, of the members of each church to the rule which their church had decreed. My learned friends opposite say that these impediments are impediments recognized by the civil law. I confess I am unable to follow this argument. Ie seems to me self-evident that the impediments referred to here are impediments not already recognized under the civil law, because the different articles have enumerated the impediments of

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the civil law. I submit that these are canonical impediments; impediments that have been recognized by the different canonical systems.

I will discuss the argument which I understand is made, that these impediments referred to are not necessarily the impediments known to the civil law, but they must be impediments of a similar nature to those enumerated in the three preceding articles. I take issue with my learned friends on this point; I take issue absolutely with them and my submission is respectfully that their contention cannot be maintained, or otherwise article 127 would have absolutely no meaning.

If my learned friends suggest any impediment of the same nature as those enumerated or of a similar nature, that could be comprised by article 127, it would not be necessary to my argument to say that impediments resulting from more remote degrees of relation would be of a similar nature and would be comprised in article 127. But article 127 enumerates the impediments resulting from relationship or affinity, and consequently the words "or other causes" would have no effect at all. And, as it is necessary to give them an effect, I would say that the construction claimed by my learned friends cannot be sustained. My submission is that it was intended to recognize all canonical impediments without it being thought advisable to attempt any enumeration of them. The impediment of clandestinity was an impediment by the canon law; I think there can be no question about that. It was made in express terms an impediment by the Council of Trent. It greatly strengthens my point that clandestinity was recognized as an impediment by the civil law in France al-

though the decrees of the Council of Trent were not received in France. Nevertheless, the impediments resulting from clandestinity were recognized in France. The old ordinances of the French Kings were to the same effect on this point as the decrees of the Council of Trent. Some of your Lordships are no doubt familiar with the verse in which the canonical impediments were enumerated and among these there is a reference to the impediment of clandestinity. It was also recognized as an impediment; the Council of Trent made it one. This is the verse:—

"Error, conditio, votum, cognatio, crimen,
Cultus disparitas, vis, ordo, ligamen, honestas,
Aetas, affinis, si forte coire nequibis,
Si parochi et duplicis desit præsentia testis,
Rapta si sit mulier, nec parti reddita tutas,
Hæc facienda vetant connubia, facta retractant."

I think that would be absolutely beyond question now, and it has never been questioned by any writer on the French law; on the contrary, the authority is all the other way, that clandestinity was an impediment. I have given in the factum several references and these references enumerate clandestinity among the impediments which were recognized in France in spite of the fact that the decrees of Council of Trent had not been received there.

I have given in the factum several references to writers under the old French law, shewing that clandestinity was considered in France as an absolute impediment to marriage. I may, perhaps, read a few extracts.

Thus Durand de Maillane, Dictionnaire de Droit Canonique, "Empêchement," p. 305, 2nd column, says:

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"Le Concile de Trente a ajouté deux autres empêchements dirimants qui subsistent dans les lieux où ses décrets sont en usage; savoir, la clandestinité et le rapt."

Page 306, 1st column:—

"A l'égard des empêchements dirimants, nous admettons en France les douze qui précédaient le Concile de Trente, et les deux que ce Concile a ajoutés."

Page 314, 2nd column:—

"XIII. Empêchement, clandestinité, si parochi et duplicis desit praesentia testis. Voyez Clandestin, mariage."

Nouveau Denisart, V. Empêchement de mariage, vol. 7, p. 518:—

"XIII. 30. Le défaut de célébration du mariage en face de l'église par le curé du domicile des parties ce qui forme le dix-huitième et dernier empêchement dirimant."

These extracts will suffice for the purpose of my argument, the other references in the factum being absolutely to the same effect.

It seems to me it would be idle to say that such an impediment would be an impediment more in word than in essence because what article 127 intended to cover were the impediments recognized by the canon law, and if this is an impediment recognized by a canon law, as it undoubtedly is, it is covered by the terms of article 127: Mr. Justice Charbonneau (p. 117 of 18 R.L.N.S. and p. 267 of the Q.R. 41 S.C.) cites Pothier (ed. Bugnet, vol. 5, p. 45,) as considering as an impediment "une déqualification subjective, inherente à la personne des conjoints." But Pothier says, vol. 5, at page 42 (ed. Bugnet), No. 85:—

"Nous ne traiterons, dans toute cette partie, que des empêchements de mariage qui se rencontrent dans les personnes. Il y a d'autres empêchements qui naissent du défaut de quelqu'une des choses qui sont requises pour la validité des mariages; cette matière sera traitée dans la quatrième partie."

And in the fourth part of his work he treats of clandestinity.

It is to be observed that Pothier, in the part cited, stated that clandestinity was absolutely recognized theretofore as an impediment by the canon law. My submission is that, under article 127, consequently, this impediment would render a marriage between two Catholics, before any other than a Roman Catholic priest, impossible. A valid marriage between two Catholics, before any other than a Roman Catholic priest is impossible. The impediment being of the class of absolute impediments, would import nullity.

There is another point I should touch on and that is the effect of the impediment as casting a nullity on the marriage. The very nature of an absolute impediment creates nullity. The objection of Mr. Justice Charbonneau is that the nullity is not declared and he says that, by article 152, an action of nullity is given to all parties interested to set aside marriages contracted in violation of articles 124, 125, and 126. But there is no mention of article 127. My submission is that article 127 is comprised *quoad* an action of nullity. Then by article 156 of the Civil Code:—

"156. Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual in-

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terest, saving the right of the court to decide according to the circumstances."

Article 156 gives an action in nullity to the parties themselves and to all who have an actual interest. The action in nullity is given in each case to the same class of persons. So, I submit that Mr. Justice Charbonneau is wrong when he says that there is no action to have the marriage set aside by reason of the impediment of clandestinity. The decrees of the Council of Trent were published in the Province of Quebec. Of course, on this submission to this court, certain facts, if material, must be taken, I would not say as admitted, but as not contested. I have two certificates from the Vicars-General of Quebec and Montreal stating that the "Tametsi" decree of the Council of Trent is read once a year in every church of the Province of Quebec.

The following are the certificates:—

"WE, THE UNDERSIGNED, Vicar-General of the Archdiocese of Quebec, in the Province of Quebec, hereby certify that the decree *'Tametsi'* concerning the reform of marriage, adopted in the 24th session, 1st chapter, of the Council of Trent, was promulgated by Monseigneur de Saint-Vallier, Second Bishop of Quebec, in the *Rituel du diocèse de Québec* (edition of 1703) and moreover, that the ordinance requiring the said decree to be read once a year, contained in the said Rituel, judging by the invariable tradition, custom and practice regarding such ordinances, and a personal experience of forty years as regards the Basilica of Quebec, has been executed, and that the text of the said decree has been read in each parish of the Archdiocese of Quebec on the first Sunday

after Epiphany since its promulgation until the Decree of the Sacred Congregation of the Council, 2nd August, 1907, came into force.

"C. A. MAROIS, V.G.

"Seal.

"Archbishop's Palace of Quebec,
"April 29th, 1912."

"Montreal, le 25 avril, 1912.

"We, the undersigned, Vicar-General of the Archdiocese of Montreal, in the Province of Quebec, hereby certify that the decree "Tametsi" concerning the reform of marriage, adopted in the 24th session, 1st chapter of the Council of Trent, has, since the erection of the Diocese of Montreal and until the promulgation of the decree of the Sacred Congregation of the Council of the 2nd August, 1907, been read each year in each parish church of this diocese on the first Sunday after Epiphany.

"Given at Montreal, under the seal of the Archdiocese this 25th day of April, 1912.

"EMILE ROY, Canon.
"Vicar-General."

And the Benedictine Decree was introduced in Canada in 1764. It was published in 1741. The Bishop of Quebec, at the time of the cession, was Mgr. Pontbriand, and he died before Montreal was surrendered and the Vicars-General of Quebec administered the See of Quebec until his successor was appointed some six years afterwards, and questions were put to the court of Rome and the answer was given extending the Benedictine declaration.

My submission to the court is, therefore, that the answer to sub-question (*a*) should be in the affirmative.

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On sub-question (*b*) I will state frankly that I do not consider I have any satisfactory reason to give to the court under the construction of article 127. I think it will be sufficient for me to say that the Benedictine Decree concludes the matter.

That, my Lords, is the case and the argument which I have to lay before the court.

Hellmuth K.C.—I propose, my Lords, to deal with the first and third questions, both of which may be characterized as questions of jurisdiction.

The question of jurisdiction is necessarily, my Lords, an extremely important question, not only for the Dominion and the provinces, but in this matter, for, one might almost say, the people throughout Christendom generally, because for a great many years the *lex loci contractûs* has always been the law which, in one respect, governs the validity of a marriage. That is to say, if an Englishman, or a Frenchman, or a German, or an Austrian, came out to Canada and was married here, assuming that by his own law, the *lex domicili,* he and the woman with whom he desired to contract marriage were capable of contracting it, the absolute validity of that marriage would depend upon whether the parties had observed the form and ceremony prescribed by the law of the place of celebration. Therefore, it is a question whether the law of the place of celebration rests with the Dominion or rests with the individual provinces to enact. If it were to be held that under the "British North America Act" the law of the place of celebration is that of the province — whether it be in Ontario or Quebec or any other province — then any law that might be passed in this respect by the Dominion of

Canada would be entirely beyond its powers, and the parties who might assume that they had been married according to the law of the Dominion of Canada in regard to the mode of celebration, would find there had been no valid marriage at all. I say, at the very outset, that this question of jurisdiction involves not merely the rights of the provinces and the rights of the Dominion but the rights of people of other countries, who, although their domicile may be that of a foreign country, may come to the various provinces and be married.

Perhaps, at the outset, one should inquire what is necessary to constitute a valid marriage. Undoubtedly, consent is necessary, but following consent there are two absolute essentials, or, perhaps, I should say an essential and a requisite, because I think the words are used in that sense in some of the authorities. There must be, of course, capacity to contract and that is invariably governed by the law of the domicile, and, in the second place — I am differing here entirely from my friends on the other side — there must be, in order to constitute a valid legal marriage, a celebration or a going through of the form prescribed by the law of the place where the marriage is celebrated. That is covered by innumerable authorities. Dicey, on the Law of Domicile, at page 15, lays down this rule, Rule 44:—

"Subject to the exception hereinafter mentioned, a marriage is valid when (1) each of the parties has, according to the law of his or her place of domicile, the capacity to marry the other, and, (2) any one of the following conditions as to the form of celebration is complied with; that is to say: (1) if the marriage is celebrated in accordance with any form recognized

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as valid by the law of the country where the marriage is celebrated, called hereinafter the local form."

He goes on and deals with extra-territorial marriages, and so on, in embassies, and he lays down the requisites in these cases. At page 155, in relation to the subject, he says:—

"The result is that the validity of a marriage, with the right depending on its validity, is governed by two different laws, namely: (1) by the law of the parties' domicile which determines their capacity to contract; by the law of the place where the marriage is celebrated which determines in general the formal requisites of the marriage."

Then I cite a very old writer, Shelford, on Marriages and Divorce, at page 5 of the original, which we have not in the library, the page of the book in the library is 27. The heading of the article is: "Validity Depends upon Conformity to Law." I may say, my Lords, that I am not now in any way dealing with the question of church decrees or anything of that kind; I am dealing with the civil contract of marriage, if one can speak of marriage as a contract at all, which Mr. Bishop seems somewhat to doubt. Bishop says you may call a marriage a contract as you may call a locomotive a horse, because there are more things in which marriage differs from a contract than in which it complies with the terms of a contract. But, there is no doubt there is a portion of marriage which is a contract, it involves the consensual contract of the parties to it, but this is only the beginning of the creation of a valid marriage. Shelford says:—

"Marriage being a civil contract its validity depends on its having been celebrated in the manner,

and with the formalities required by law. In some countries only one form of contracting marriage is acknowledged; thus in England, after the "Marriage Act," with the exception of Jews and Quakers, all marriages were required to be celebrated according to the form prescribed by the Church of England."

That is to say, that people could not say in England: we desire to be married, we take one another for man and wife, we will go through all kinds of solemn forms; for the law says you must have an Anglican clergyman pronounce you man and wife or you are not married at all. The questions, when I shall come to them are entirely irregular in form, because it is not a question of declaring a marriage null and void; there is absolutely nothing creating the marriage status, no matter what form may be gone through, unless you comply with the requirements of the local law in regard to its celebration. I refer also to Hammick in "The Marriage Law of England," second edition, page 23; Foote, second edition, page 70; Eversley & Crays, Marriage Laws of the British Empire, pages 2 and 53; Ringrose, Marriage and Divorce Laws of the World, at page 18.

A marriage that might be perfectly good according to the forms of England, between parties capable of contracting, but which was celebrated in France where the English form has no force or validity, but where other forms and ceremonies were prescribed, would only be good if celebrated according to the forms prescribed in France, where the marriage is celebrated; except, of course, in exceptional cases when people get married at the embassies. I have the authority here of the House of Lords in regard to

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that matter, where in one case marriage was celebrated in Austria, between a Roman Catholic and a Protestant, according to the form, and the only form, in which marriage could be celebrated in Austria, which was by a Roman Catholic priest. Although that Protestant man, at that time, was, by the law applicable in Ireland, the place of his domicile, not entitled to marry a Roman Catholic by means of a Roman Catholic priest and could not have been so married in Ireland — the Roman Catholic priest would have been liable at that time to have been hanged or something of that kind, if he had celebrated the marriage — yet the House of Lords, not later than this very year, held that the marriage celebrated in Austria was a perfectly legal and valid marriage, because it had complied with the *lex loci celebrationis,* and that the law of the domicile could not be put beyond its territory. That is the case of *Swifte* v. *The Attorney-General for Ireland*(1). The House of Lords held in that case that the law in regard to Roman Catholics in Ireland was only territorial, and only applied, so far as the celebration was concerned, to the celebration of a marriage in Ireland. Indeed, their Lordships, in upholding the judgment of the courts in Ireland, adopted the reasoning of the courts there, and I ask your Lordships to see the reasoning of the judges in Ireland, because it is the latest case, practically, on this subject(2).

Then, the question may arise (and again I differ from my learned friend, Mr. Nesbitt): What was the common law of England either at the time of the conquest or at the time of the "British North America

(1) [1912] A.C. 276. (2) [1910] 2 I.R. 140, at page 151 *et seq.*

Act"? My submission to your Lordships is, that from the time of King Edmund, the Saxon King, A.D. 940, down to the time of the Reformation, the common law of England was that no person could be married in England, except a mass priest was present. And, after the Reformation, the common law of England was that no person could be married except either by a priest or a deacon. That that is so, has never been questioned since the decision in *Reg.* v. *Millis*(1). The old rule, as taken from Thorpe's edition of the Ancient Laws, page 505, is cited in the edition of Holmsted on the Marriage Laws of Canada. I cannot express my concurrence in what Mr. Holmsted says throughout by any means, but I quite accept his citation from Thorpe. Rule 8 of Thorpe — this is in the time of Edmund — says:—

"At the nuptials there shall be a mass priest by law who shall, with God's blessing, bind their union to all posterity.

"9. While, it is also to be looked to that it be known that they, through kinship, be not too nearly allied, lest they be afterwards divided, which before were wrongly joined."

We get some way back there and we find that after the *Millis Case*(1) in 1844, there was an equal division of opinion in the House of Lords as to whether that was or was not the common law of England, or whether it was not competent and sufficient for two persons who were capable of contracting, who had the capacity, to come together and solemnly *per verba de præsenti* declare that they were married. There was, as I say, an equal division of opinion in the

(1) 10 C. & F. 534.

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House of Lords as to that, and my learned friend, Mr. Nesbitt, read the very able and wonderfully researchful judgment of Lord Brougham. But my learned friend did not say that it was a dissenting judgment. It was a judgment that did not prevail because, the House being equally divided, the judgment of the court below, which held that the common law of England did require a priest to be present, was upheld, and Lord Campbell, who joined with Lord Brougham, in the dissent, was able, in *Beamish* v. *Beamish*(1), to frankly say that while his opinion as one of these dissenting in *The Queen* v. *Millis*(2) was an opinion that he might still hold, yet, that the decision in *The Queen* v. *Millis*(2) was absolutely binding upon him. He said:

"However, it must now be considered as having been determined by this House that there could never have been a valid marriage in England before the Reformation without the presence of a priest episcopally ordained, or afterwards without the presence of a priest or of a deacon."

One cannot find language, stronger, clearer, or more definite than that. The very judge, who had dissented in the previous case of *Millis*(2), says that what he formerly contended against must now be held to be the law of England.

Now, my Lords, I do not wish, at this stage, to take up time unnecessarily, but I think it is incumbent on me at least to point your Lordships to the authorities which render this view practically — I do not wish to use too strong language — practically unassailable. There is, in fact, I may say, no decision

(1) 9 H.L. Cas. 274. (2) 10 C. & F. 534.

to the contrary. One can find in some of the States of the Union expressions in regard to common law marriages, but they have no application to any country that is under English rule, in any shape or form. There is no such thing as a common law marriage in England or Canada; there is in Scotland.

In *Brook* v. *Brook*(1), dealing there with the matter of English subjects domiciled in England, but who had gone to Denmark to be married, and where the other side of the essential or requisite of marriage came up for consideration — that is, where the offence against the law of domicile could not be cured no matter how correctly the form had been followed — in that case a man went to Denmark with the view of marrying his deceased wife's sister, then a marriage incapable of being contracted in England. He was married according to the forms necessary in Denmark and according to the then law of Denmark it was a legal marriage. But, he had only gone there for the purpose of getting married, and he did not in any way abandon or give up his English domicile. The House of Lords in that case held that the marriage was invalid for want of capacity to contract it in such a case.

I refer to Lord Campbell's judgment, at page 207. It is laid down here that although the form of celebrating a marriage may be different from that required by the law of the country of domicile, that marriage may be good everywhere; but if the contract of marriage is such in essentials as to be contrary to the law of the country of domicile, and is declared void by that law, it is to be regarded as void in

(1) 9 H.L. Cas. 193.

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the country of domicile though not contrary to the law of the country in which it is celebrated. This qualification upon the general rule that a marriage valid where celebrated is good everywhere, is to be found in the writings of many eminent jurists who have discussed the subject.

I refer further to what Lord Campbell says, at page 218, and Lord Cranworth, at page 223, in discussing another marriage.

One more case I cite to your Lordships, the case of *Catherwood* v. *Caslon* (1), judgment of Baron Parke, at page 265.

That case goes to shew, as it is laid down, that the mere proof of ceremony is not enough; they must comply otherwise with the requirements of the law. A well-known case was cited here, from a judgment in Lower Canada, in the case of *Connolly* v. *Woolrich* (2), and your Lordships will find some remarks there quite apposite in regard to this very subject-matter. At page 244, in the judgment, it is said:—

"By what law is the validity of marriage to be decided?"

And then the judgment says:—

"Validity of marriage depends upon the *lex loci* of the place of solemnization."

And for that, several authorities are given.

Now, I challenge any possible dispute on the proposition that in order to constitute a valid marriage there must be a solemnization. That is, there must be a going through of such forms and ceremonies, whether those be of the most primitive character or of the most elaborate ritual, as are prescribed by the laws of the place where it is celebrated, and that there

(1) 13 M. & W. 261. (2) 11 L.C. Jur. 197.

is no such a thing in Canada, and never has been since the time of the conquest, any law by which there could be a marriage, merely on a consensual contract. But, my Lords, in this case, it is not at all an instance of the Dominion Parliament, by its bill, attempting to say — marriage may be celebrated, or a valid marriage may be created or constituted by the mere consent of the parties. The promoters of this bill have boldly come out and said — we propose to deal with the solemnization of marriage. They have, by the very language they have used in the bill, stated that in plain words. The bill says "every ceremony or form of marriage (that is, every solemnization of marriage) before or hereafter performed by any person authorized to perform any ceremony of marriage." Let me take a concrete illustration: Rabbi Jacobs, of Toronto — with great respect for him — is authorized to celebrate, by the laws of the Province of Ontario, a marriage between Jews of his congregation and professing his faith, and between nobody else, and two Christians go to Rabbi Jacobs and are married. The Dominion Parliament, under this bill, would say that, as Rabbi Jacobs is authorized to perform a certain ceremony between Jews, that ceremony of marriage which he has performed between Christians, and which he is not authorized by the Provincial law to perform, is perfectly good.

I think somebody has pointed out that the bill only says that a validly solemnized marriage is valid. I do not think that is arguable. Let me get it down again to a concrete case. If the Province of Quebec says a Roman Catholic priest is the only person who is authorized to perform a marriage between two Roman Catholics, if a Protestant of any denomination does

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perform that ceremony, the bill says it is valid. It cannot mean anything else. It simply means — we will amend your solemnization of marriage law and widen and broaden it. The Dominion, in effect, says to the province: you cannot say this person may solemnize this marriage, and that person may solemnize some other marriage, but if you give a man authority to solemnize any marriage, you must give him authority to solemnize all marriages. That is the meaning of that bill and I submit to the court that no other meaning can be taken out of it. And that being so, we have the Dominion at once stepping in to deal with matters exclusively assigned to the province, one of which is the solemnization of marriage. Why stop there; why not say — the province must authorize everybody to solemnize marriage; the province must put no limit in any respect in regard to the form ? My submission is, that the Province of Ontario to-day, or the Province of Quebec to-morrow, can alter in any way they see fit their laws in regard to the solemnization of marriage.

It comes simply down to this, that you say to the province: you may play with solemnization of marriage, you may enact penalties, but nobody need pay any particular attention to them; you cannot actually carry out what is admitted in regard to every other subject of legislation assigned to the province; you cannot carry the thing to its logical conclusion; you cannot say that a marriage not solemnized according to your power under the "British North America Act" is not valid. The bill means that, or there is nothing in it at all. The argument with regard to consensual contracts being sufficient is not open to my learned friends on the other side upon

this bill, because they boldly say that the solemnization which the province has laid down is not necessary, in certain cases, or else, this bill means nothing.

I am going to ask your Lordships, if you come to the conclusion that the Parliament of Canada has no power to enact this particular bill, if you think it necessary or wise or just that the second question should be answered at all. If the Parliament of Canada has no part or parcel in jurisdiction in regard to the solemnization of marriage, if the question of the solemnization of marriage does rest with the province, why then should the Dominion request your Lordships to answer what the law in any province is. If they cannot amend or alter it, should it require amendment or alteration, and if that must be done by the provincial legislature, is it not that legislature only which should ask your Lordships what is the meaning of their own laws. Can the Dominion, in relation to a subject in regard to which they have no legislative capacity — let us take some subject which is entirely within their jurisdiction beyond all question, such as contracts — can the Dominion ask your Lordships with regard to a contract, which is solely concerned with the sale of lands in the province, what the meaning of the legislation of the Province of Ontario is with regard to it? I think the only body that could come before your Lordships for any authority to ask for interpretation of that question would be the body that can, if necessary, amend or alter or change that law, and not a body that has no jurisdiction over it.

The power of the legislature as to "solemnization of marriage" is absolute and full, and the difficulty with this question is really not as great as it appears,

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because, under our system of government, we have had a lot of these constitutional questions up where the subject-matters have more or less been held in some instances to overlap and the rules have been laid down for construction. Your Lordships are familiar with all these cases; most of them you have taken part in, and in every case it has been held, where there is any overlapping, that the jurisdiction is as clearly defined and as capable of exercise by the province, in its own field, as it is by the Dominion.

Your Lordships have been referred to the memorandum of the law officers of the Crown in regard to what was covered under the head of "solemnization of marriage" in their opinion, and to the remarks, *obiter* though they are, of Mr. Justice Gwynne, in the *City of Fredericton* v. *The Queen*(1), at pages 568 *et seq.*, where he says, in dealing with another matter, that the solemnization of marriage, that is, the power of regulating the ceremony and the mode of its celebration, is a particular subject expressly placed under the jurisdiction of the local legislature as a matter which has always been considered to be purely of a local character.

In the Judicial Committee, in the case of the *Citizens Insurance Company* v. *Parsons*(2), Sir Montague Smith deals with the matter in much the same way. That view was not only taken by judges, but when at a later stage, the acts relating to the marriage of a man with his deceased wife's sister was discussed in Parliament, the Hon. Mr. Blake made a speech upon that bill which will be found in the Debates of the House of Commons of February 27th, 1880, at page 299. Whatever views one might have as to matters

(1) 3 Can. S.C.R. 505. (2) 7 App. Cas. 96.

which Mr. Blake advocated, he stood out before the whole of this Dominion, and the whole of the world practically, as a great constitutional lawyer; a man who was not likely in the Dominion Parliament to waive one jot of the powers of that Parliament at that time, and he then recognized that as one of the requisites to a marriage which rested with the province and in regard to which the Dominion has nothing to say.

The right to say who shall perform a marriage ceremony, between persons of different religions; how persons of different religions will have to be married as to ceremonial, is a matter which is not a marriage act in the sense of capacity to contract, but is purely a solemnization of marriage act. That is absolutely, I submit, beyond controversy at the present moment, and this court — whether it is sitting as a court or as an advisory board — is practically bound by the decision of the House of Lords in *Swifte* v. *The Attorney-General for Ireland* (1). The act there in question was absolutely such an act, dealing with religion — that is the religious belief of the parties — and dealing with the persons who might celebrate that marriage.

Now, a marriage contract, using that loose expression, is not an ordinary contract, it is what may be commonly called a solemn contract, that is, in order to be valid, it has to be entered into in a certain solemn form, and, can any one, looking at the division of jurisdiction between the Parliament of Canada and the legislatures of the provinces, doubt for one moment that the form, the solemnity of the form, is left entirely with the province. That is the point, I

(1) [1912] A.C. 276.

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respectfully submit, that has to be decided here. Is not the form of the contract, the solemnities which must follow that form, left entirely with the legislatures ? And if they choose to say to-day or to-morrow that all marriages between Roman Catholics must be celebrated in one way, or that all marriages between Anglicans must be celebrated in another way, that is absolutely, whether one approves of it or not, left to each individual provincial legislature, according to the will of people who return members to that legislature.

They have the right to draw the line as to beliefs for this reason. When the first Act that one can find dealing with matters of this kind in England was passed they drew the line there. Will your Lordships look at 4 Geo. IV. ch. 76, which is intituled "An Act for amending the Laws respecting the Solemnization of Marriages in England." The section therein relating to the publication of the banns set out everything in regard to licenses. It provides about parishes or extra-parochial places, and it provides for the consent of guardians and parents. Everything in relation to what the law officers of the Crown in their report think appertains to the solemnization of marriage, is contained in that Act. That is an Act specially dealing on its face with the solemnization and it goes a long way to shew what in England at that time was deemed to fall within solemnization. But that Act does not say one word in reference to capacity to contract; it does not say anything in regard to divorce; it is an Act to provide the form, the means rather.

Then, there is a very curious illustration as to what was done with regard to religious beliefs in the Act of 6 & 7 Wm. IV. ch. 85. By the second section

of that Act it was provided that the Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, might continue to contract and solemnize marriages according to the usages of the said society and of the said persons respectively, and every such marriage is hereby declared and confirmed good in law provided that the parties to such marriage be both persons of the said society or both persons professing the Jewish religion. Marriage celebrated according to the Jewish religion, I do not know so much about the Quakers, but according to the Jewish religion there was a very, very high ritual and ceremonial. It is a more elaborate ritual than either the Roman Catholic or the Anglican, and I am going to point your Lordships to what has to be done. If that high ritual was performed over a Christian and a Jew, there was absolutely no marriage. If the Rabbi performed the highest marriage ritual in the world over any one except two Jews it was absolutely null; they both had to be Jews. So that the Parliament of England recognized, even in 1836, and subsequently recognized by 19 & 20 Vict. ch. 119, sec. 21, a ceremony in regard to both Quakers and Jews. In regard to both the Parliament of England made the validity of the marriage depend upon two things, the religion of the persons to be married and the religion of the person who performed it, and yet, that all came under the solemnization of marriage.

Then I want to refer your Lordships, with regard to Dominion and provincial jurisdiction, to *The City of Montreal* v. *Montreal Street Railway Co.*(1), at page 343, the judgment of Lord Atkinson, where, dealing with sections 91 and 92 of the "British North

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

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America Act," he says to the Dominion, you must not, in a subject exclusively assigned to the provinces under section 92, encroach at all; and the solemnization of marriage is entirely within the exclusive jurisdiction of the province and upon that solemnization the Dominion, because they have marriage and divorce assigned to them, cannot trench. The solemnization is a part that is cut out and taken away entirely from "marriage and divorce."

(Counsel was asked as to the effect of the capitulation and treaty.)

That refers to the second branch of the case. Just in regard to that, it has struck me in this way, that the agreement that was made, the capitulation and the treaty, was not a mere guarantee to an individual Catholic at all. It was a guarantee to the conquered country. There is a very curious bit of advice which was given in 1722 and which will be found reported in 2 Peere Williams's Reports(1). It is headed: "An uninhabited country newly found out and inhabited by the English to be governed by the laws of England." I read from page 74:—

"Memorandum, 9th August, 1722, it was said by the Master of the Rolls to have been determined by the Lords of the Privy Council, upon an appeal to the King in Council from the foreign plantations,—

"1st. That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and, therefore, such new-found country is to be governed by the laws of England; though, after such country is inhabited by the English, Acts of Parliament made in England,

(1) 2 P. Wms. 74.

without naming the foreign plantations, will not bind them; for which reason, it has been determined that the Statute of Frauds and perjuries, which requires three witnesses, and that these should subscribe in the testator's presence, in the case of a devise of land, does not bind Barbadoes; but that,

"2ndly. Where the King of England conquers a country, it is a different consideration: for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But, until the conqueror gives them new laws, they are to be governed by their own laws, unless where these laws are contrary to the laws of God or totally silent.

"3rdly. Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact any thing that is *malum in se,* or are silent; for in all such cases the laws of the conquering country shall prevail."

That is to say, when a country is conquered, while a conqueror has the right to impose his own laws, the people are to be governed by the laws they have until the conqueror chooses to do so.

Then there is a very interesting article, in the report of the Canadian Archives, for 1891, from Richard Cartwright, Junior, of the 12th of October, 1792, dealing with this very question, and he speaks of the marriages which have taken place in Upper Canada without any clergyman being present (page 85). He says that officers have celebrated marriages and that some clergymen have subsequently come in, evidently being clergymen of the Anglican communion, and celebrated marriages.

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I will give a memorandum to your Lordships of *Reg.* v. *Roblin*(1), where Chief Justice Robinson says that under the Act of 32 Geo. III. ch. 1, the statute of 26 Geo. II. ch. 33, "Lord Hardwicke's Act," came into force: *Hodgins* v. *McNeill*(2); *O'Connor* v. *Kennedy*(3). Whether "Lord Hardwicke's Act' was in force or whether the common law of England was in force, or whether the French law with the treaty was in force, at all events at the time that the "British North America Act" came into force, there was no question that marriage could no longer be celebrated in any part of Canada — I am speaking of civilized Canada at that time — without some form or ceremony, in order to render it valid. So that it is not necessary to carefully delve into the question of whether it was "Lord Hardwicke's Act," or the common law of England, or the law of France as amended and introduced here, which brought into force at that time the decree of the Council of Trent, so far as Lower Canada was concerned, requiring the presence of a clergyman or priest; there had to be a ceremony or form of some kind used at that time; at all events there had to be, without doubt, at the date of the "British North America Act."

Bayley K.C. (for the Attorney-General of Ontario).—I wish to make a brief statement as to the position which the Province of Ontario takes.

While of opinion that it is difficult to give an unqualified "yes" or "no" to any one of the questions submitted in this case, and that the law on the subject is difficult to determine, the Province of Ontario favours

(1) 21 U.C.Q.B. 352, at pp. 354-5.
(2) 9 Gr. 305.
(3) 15 O.R. 20.

a uniform general marriage law for the Dominion if so framed that the legislative authority of the provinces in relation to the solemnization of marriage is not thereby violated, and the Province of Ontario adopts so much of the argument of counsel for the Dominion as is consistent with the view above expressed, and no more.

The Province of Ontario considers that an Act of Parliament which renders valid throughout the Dominion marriages performed in a province by persons legally authorized by such province would result in consolidating and perfecting provincial authority throughout Canada and, in this view, the passing of such an Act by the Dominion Parliament would enlarge rather than encroach upon provincial jurisdiction.

R. C. Smith K.C. (for the Attorney-General of Quebec).—My Lords, I come here under express instructions to discuss only the constitutional question, and not to discuss the merits of the second question that has been submitted. I will ask your Lordships' patience later to add several reasons why that second question should not be considered and answered, but, inasmuch as your Lordships' attention has been concentrated upon the constitutional questions submitted, I think it would be proper that I should add anything I have to say with regard to that branch of the case before referring to question No. 2 at all. It is not, my Lords, that I at all desire to trouble the waters if I refer to the terms of this reference. The difficulty which I encounter is that arising from the words in the bill "and duly performed according to such laws." I think it is perhaps common ground now, and we

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have all agreed to treat the bill as having some meaning, and as having been moved in pursuance of some definite intention, and the only intention that could possibly be evident by the bill as drafted, has been expressed by my learned friend, Mr. Hellmuth. It must mean, and I think it cannot mean anything else than this: that it is intended to legalize a marriage performed by a person or functionary, or solemnized by a person or functionary, who would, in the Province of Quebec, have authority to solemnize marriages between any persons or class of persons. That is to say, that it will be impossible, if this bill becomes law, that there should be a person capable of solemnizing a marriage in the province between any two persons without being equally capable of solemnizing a marriage between all persons. That is the evident intention.

I submit for your Lordships' consideration this: that the "British North America Act," when it was finally crystallized into legislation, was the result of a contract, and I say with all possible respect that those who desire the stability of Confederation, cannot preserve that stability better than by a conscientious and a frank and an honest interpretation of that Act, giving to each section the intention that the framers of the "British North America Act" would give it. I am going to argue this upon very narrow grounds indeed; I am going, I think, to shew your Lordships, as has been so eloquently and logically shewn by those who preceded me, that this bill deals exclusively — so far as it attempts to deal effectively with anything — with the quality and the character of the functionary solemnizing the marriage. And, if I have any difficulty in arguing that, it is because

the difficulty arises more from the disposition, which I cannot resist, to treat the matter as obvious. The very first words of the bill I submit, condemn it. It says: "Every ceremony or form of marriage," and that is what the bill deals with and, with all possible respect, it is what it was intended to deal with.

Now, before I come to discuss that would your Lordships allow me to refer to the second clause of this bill?

The second clause I do not think it is necessary for me to discuss, because I think if it legislated, or purported or attempted to legislate, effectively concerning what appears to be its subject-matter, it would open up a very wide subject as to the purview of the powers of the provinces with regard to property and civil rights, etc. The second clause of the bill uses the words "shall be absolute and complete." Now, my Lords, Parliament has never legislated with regard to questions of property, succession, or any questions of civil rights and property. I assume that when this bill says "these rights shall be absolute and complete" it must mean, in accordance with the laws of each province, because there are no other laws. So that section 2 of this bill, while it does declare absolute and complete rights, not only of the persons themselves, but of their offspring, it does not presume for one moment to decree what these rights shall be. I assume, as I am bound to do, that it would naturally mean these rights as defined by competent authority, which is the provincial authority. If it were to go any further it would very greatly broaden the scope of these rights and would involve a discussion even more extended than that to which your Lordships have so far listened. I do not pro-

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pose to discuss the second section of the bill as though it dealt with the rights of married people because I cannot conceive for one instant that the general authority to legislate upon the question of marriage, *quoad* marriage, involved the right in the Dominion to prescribe the social relations and the property obligations and everything of that sort, of married people. That would be giving to the word "marriage" a meaning which never could have been intended. It does not mean that because Parliament may legislate upon the subject of marriage, that Parliament can legislate with respect to every right of a married person. No, it has only the power to legislate upon marriage and, if it had power to legislate as to anything incidental it must be incidental to marriage *quoad* marriage and not to all the multifarious rights and interests, whether property obligations or otherwise, of the parties themselves. That would be an absolutely impossible view, so that, I do not feel on this reference, and with the particular wording of clause 2 of the bill, that I am called upon to go into any question so broad as that.

To revert to the question of jurisdiction to pass this bill, there is one part of the "British North America Act," and one part only, in which there is any power of remedial legislation. When the Imperial Parliament was considering the "British North America Act" it considered the question of remedial legislation and what remedial legislation should be conferred upon the Dominion, and in section 93 of the "British North America Act" we have that power of remedial legislation with respect to education alone, and only within the limits of certain circumstances and in so far as these circumstances should render it necessary.

I say respectfully that that is the only clause or section of the "British North America Act" that deals in any way whatever with remedial legislation, and the fact that we have such a section, shewing that the question of remedial legislation was considered by the Imperial Parliament, would be an absolute answer to the suggestion that, because a province exercised either inadequately, imperfectly or wrongly a power conferred upon it, Parliament would have remedial power. I say there is nothing in the "British North America Act" that could sanction such an inference or such an argument.

Now the marriage ceremony, the persons capable of solemnizing marriage, everything connected with the contract, so far as solemnization is concerned, has always been religious. The qualification of a person celebrating or solemnizing marriage is primarily derived not from civil authority but from ecclesiastical authority. In this, the whole history of France, as well as the whole history of England, agrees entirely. I do not think it can be challenged for one moment, as far as the solemnization of marriage is concerned, that that has been historically always religious, and it does not advance the argument one whit to say it may have been something else, that other functionaries may have been appointed by the State; that we might have had justices of the peace or other civil functionaries; I say it does not advance the argument one whit to say that their might have been other functionairies because the fact of the matter is that historically marriage has been always — and I need not go further than the two countries from which Canada has been peopled, France and England — marriage has always been a religious and not a civil cere-

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mony. The State took what was an established institution of the church and enacted laws concerning it. And here I think it is important and relevant to consider that even what is purely evidential was, I say, derived from the ecclesiastical authority originally, and not from the civil authority. Your Lordships have in the decrees of the Council of Trent provisions for the publication of banns and for the keeping of registers, and all the elaborate provisions of civil law which we have to-day respecting the keeping of registers of civil status were foreshadowed in ecclesiastical legislation long ago. The Council of Trent referred to the Council of Lateran and the Council of Lateran provided for the publishing of banns and the keeping of some register of civil status. Therefore, we have not only what relates to the solemnization as regards the persons before whom or by whom it is solemnized, but we have a provision for the publication of banns and the keeping of registers of civil status which we undoubtedly find to be of ecclesiastical origin.

As regards France, the first reference as to the keeping of these registers of civil status is found in the Ordonnance de Blois, which is directed to prevent clandestine marriages. We see there that the civil law comes in and adopts what has been decreed by the ecclesiastical law in regard to the publication of banns and the keeping of registers. Then we have the Edit de Henri IV., and the Declaration of Louis XIII.

The whole history of marriage in France shews it to have been primarily a religious ceremony, and the most important thing connected with that ceremony was the officer or the person before whom that ceremony could be solemnized. In the Ordonnance of 1667

we have, of course, very precise provisions with regard to the keeping of registers of civil status. In the Edict of Louis XIV., 1697, we find it said that the essential solemnity to the sacrement of marriage is the presence of the proper curé of the parties. I know your Lordships have given attention to all these things, but I am merely following rapidly these papers to shew that throughout the history of France the presence of the person celebrating was considered as of the essence of the solemnization. Perhaps I need not detain your Lordships with this, you will find the special references in the Edict of Louis XIV., Ritual of the Diocese of Quebec, and Declaration of Louis, 1736.

Then, I ask your Lordships' attention for a moment to the Act 32 Henry VIII. ch. 38, this being an Act passed in 1540. You will notice that the word always used is "marriage solemnized." We have there the expression, "such marriage being contracted and solemnized in the face of the church." We have also the expression, "before the time of contracting that marriage which is solemnized" and reference is also made to the Levitical decrees in connection with marriage. That Act, so long ago as 1540, adopts the Levitical decrees of consanguinity, and all through, it deals with solemnization in the face of the church and so on.

Of course, your Lordship is familiar with Mr. Bishop's reasoning that marriage is not a contract, but a status. Whether the word "status" more correctly describes marriage than "contract," it clearly involves a contract, and so far as it involves a contract that contract is consensual, but it requires the sanction of solemnization. I do not think we gain any light by dissolving the contract entirely from the

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solemnization; I do not think we gain anything by that or that it throws any light upon the question.

The House of Lords, considering the terms of "Lord Hardwicke's Act," 1753, discussed the fact that the word "solemnization" is used in connection with matrimony as absolute evidence that the word had a well-founded and well-understood meaning. It says the banns must be published on three Sundays preceding the solemnization of the marriage, and at the end of the first section it says that the marriage shall be solemnized at one of the parish churches or chapels where such banns have been published, and no other place.

Throughout the different sections of "Lord Hardwicke's Act" the term "solemnization of marriage" is used and it all shews clearly that the words had even at that date an absolutely clear and defined meaning. I am, of course, not pretending to elaborate the very full argument of Mr. Mignault, but when we come down to the articles of the capitulation of Quebec, 1759, and the articles of the capitulation of Montreal, 1760, and the Treaty of Paris of 1763, and the "Quebec Act" of 1774, they all granted the free exercise of the Roman Catholic religion. The question has arisen here, as to whether this was a permission granted to certain individuals to resort to churches of their own. It was, in the fullest possible terms, the granting of the exercise of the Roman Catholic religion, and then coming to the Treaty of Paris we find that, whereas that is granted in the fullest and amplest terms in section 4, in the very following section (section 5), there is a provision for the encouragement of the Protestant religion, and a provision that later on, as His Majesty from time to time shall think fit, he

will make provision for the support of the Protestant clergy.

The point I make here is that both religions were from that moment fully recognized. The granting in the Articles of Capitulation of the free exercise of the Roman Catholic religion presupposed naturally the exercise by His Majesty's other subjects of their religion, and that was acted upon from that very moment and in every subsequent Act both systems are fully recognized. My point now is simply this: that marriage was an established institution of both religious systems and in both religious systems the person celebrating was of the very essence of solemnization of marriage. In the Act 35 Geo. III. ch. 4, 1795, both systems are recognized and that is an Act passed a very short time after. I will not trouble your Lordships by references to these other Acts further than to say that the word "solemnization of marriage" occurs in every case. We cannot get away from the fact that in the various branches of the Protestant Church and in the Roman Catholic Church marriage was an established institution and that the person who solemnized was of the essence of the solemnization. Then, we have that recognized in articles 57 and 128 of our own Code, which, it must be remembered, was the state of the law in the Province of Quebec when the "British North America Act" was passed.

Then we have before us the course of legislation extending over centuries by the very Parliament that enacted the "British North America Act." If your Lordships have any curiosity to look at these statutes there is a list of them in the first volume of Phillimore's Ecclesiastical Law, pages 643 and 644. There is a list there covering two pages of marriage cases,

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dealing with solemnization of marriage, curing defects in solemnization of marriage, prescribing the hours in which solemnization of marriage could take place and so on. In that long list there is not a statute that does not deal with the solemnization of marriage as involving as an essential the presence of a priest or a clerk in orders.

All our elaborate systems of registration of civil status are directly traceable to the Council of Lateran and the Council of Trent. I have some reason to believe that there were earlier provisions than those particularly with respect to the registration of baptism. Is it conceivable, my Lords, that in the Parliament that for centuries — I do not require to go back further than Henry VIII. — had been enacting laws respecting solemnization of marriage, and always treating solemnization as meaning the one thing, and in the whole history of that legislation there is nothing that is antagonistic to this one view or that is at variance or incompatible with this one view — is it conceivable that the British Parliament in enacting the "British North America Act" had any doubt whatever as to what the signification of solemnization was ?

One observation on what is called the doctrine of overlapping. In *Hodge* v. *The Queen*(1), page 130, we find this declaration:—

"It appears to their Lordships that *Russell* v. *The Queen*(2) when properly understood is not an authority in support of the apparent contention and their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case."

On the following page there is that declaration so frequently referred to, that the legislatures of the

(1) 9 A.C. 117. (2) 7 App. Cas. 829.

provinces are not to be deemed with respect to the matters assigned to them, to exercise a delegated authority, but are deemed to have all the power which the Imperial Parliament in the plenitude of its powers, passed or could confer. The latest declaration on this question is in this recent decision of the Privy Council upon the question of jurisdiction on the Reference in the Insurance Companies cases(1), and Lord Loreburn, the Lord Chancellor, says:—

"Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation) general terms are necessarily used in describing what either is to have, and with the use of general terms comes the risk of some confusion, whenever a case arises wherein it can be said the power claimed falls within the description of what the Dominion is to have, and also within the description of what the province is to have. Such apparent overlapping is unavoidable, and the duty of a court of law is to decide in each particular case on which side of the line it falls in view of the whole statute."

The point to which I ask your Lordships' very careful consideration is this (and I must say that it impresses me quite as strongly as any other point arising on this argument), that where you have the general subject committed to the Dominion Parliament and you have a portion of that very subject, as has been not inaptly said, carved out of it, detached from it, I respectfully suggest to your Lordships that there can be no application of the doctrine of overlapping.

(1) [1912] A.C. 571, at p. 581.

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Neither can there be any application of incidental or implied powers. If your Lordships were to say that under the doctrine of implied or incidental powers the Dominion Parliament by virtue of its general power to legislate on marriage could also legislate regarding the solemnization, the "British North America Act" would be defeated absolutely. In other words, what I ask your Lordships to hold is that, in this particular case, solemnization of marriage calls for an exact delimitation, and I say that nothing else can possibly be a reasonable or true interpretation of the Act. It calls for an exact delimitation, or, otherwise, why should it have been detached or carved out of the general subject of marriage? If on any pretence whatever the Dominion Parliament is to be allowed to trench upon the solemnization of marriage on the pretence of legislating upon marriage, then I say that the object and purpose of the Imperial Parliament in clearly carving out that portion of the subject would be defeated by such an interpretation.

Another thing I submit as an essential consideration is this: If the Legislature has power to legislate it has power to legislate effectively. To concede that the legislature has power to pass laws relating to solemnization of marriages that may be violated with impunity as far as the validity of the act done in contravention is concerned, is, I say, to take away the power of legislation. If the legislature is given power to legislate with respect to solemnization, surely it has the power to say, at least within the province, what you do in contravention of this law that we enact is null, or what you do without the sanction of what we have prescribed is null. If you are going to give the power of legislation at all it must be neces-

sary that you are entitled to enact a law which has some force and to provide that a thing which is done contrary to it cannot stand. Again, my learned friend Mr. Nesbitt says that solemnization relates only to what is evidential. I need not go back into history again to shew that solemnization of marriage existed long before there was any evidential proceeding at all, long before there was publication of banns, long before there was any registry kept of it. The act of solemnization is quite distinct from the record of that act. The record of that act may be incidental to it in that sense, as a necessary consequence of it that it should be preserved and so on, but the registration of the marriage and the keeping of the register is one thing, and the actual solemnization is another. The solemnization existed long before any of these requirements, which my learned friend treated as evidential, had any existence at all.

Another argument of my learned friend is this: That allowing the legislature to prescribe nullity in case the requirements of the provincial laws are not observed is an invasion of the power of Parliament with regard to divorce. I say with all possible respect that the fundamental error there is this: The distinction between, as we say in civil law, that which is void and that which is voidable. We do not pretend for a moment to say that the effect of the Quebec law is to annul a marriage which has had valid existence. For the purpose of my present argument I would concede my learned friend's most extravagant claim with regard to divorce, and I say respectfully this, that if the Province of Quebec can validly legislate regarding the solemnization of marriage then if that law be not observed the marriage

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has no existence and never had any existence. If the Province of Quebec can legislate concerning the solemnization of marriage it can create what is the condition precedent to the existence of the thing at all. It is not, that the thing has to be annulled.

I would be willing to go to the extreme and say that suppose the Legislature of Quebec at its next session were to pass an Act saying that the laws of the Province of Quebec relating to the solemnization of marriage are hereby repealed, and the Province of Quebec is left without any law whatever relating to the solemnization of marriage, it is not debatable that such a law would be absolutely constitutional. I say that if the Province of Quebec passed such an Act tomorrow it would not invest the Parliament of Canada with a scintilla of legislative power regarding solemnization of marriage. The power is derived from the "British North America Act," and I say that the "British North America Act" has committed to all the provinces the power to legislate regarding solemnization, and if they do not exercise it, that does not give the Dominion power. If they abuse it, if they enact an absurd law, no matter what they do in that respect, that does not confer power on the Dominion; as I pointed out this morning the only case in the "British North America Act" in which there is any suggestion of remedial power is in section 93 with regard to education.

A very plausible argument was presented by Mr. Lafleur in these terms: If clandestinity be an impediment then the bill in question is constitutional because the Dominion would have the power to deal with impediments. That would be altogether too easy a solution of this question.

The word "impediment" has been used by some high authority in connection with this, and I am willing to let it go at that, but it is begging the whole question to say that the Dominion could deal with it. Your Lordships have to inquire first as to clandestinity. Is clandestinity an impediment which relates to the solemnization of marriage, which is within the provincial jurisdiction, or is it an impediment which relates to that which is within the federal jurisdiction ? It does not help us a bit to make use of the term "impediment." We have to inquire whether it comes within a subject-matter which is assigned exclusively to the province or whether it comes within a subject-matter assigned to the Dominion. In this particular case, beyond all question I suppose it relates to the person who is to give solemnity to the Act and it must come under the terms "solemnization." I do not think there is much to be gained by citing analogies. The power to legislate regarding solemn declarations one would naturally conclude included the nomination of the person who was to receive solemn declarations. The power to legislate with regard to a notarial instrument would involve the nomination of the person who was to give effect to the instrument, and so on. How could it be otherwise ? I could not conceive it possible that solemnization did not include the person who was to give solemnization or who was to solemnize as the bill says. This bill deals exclusively, in both its clauses, with the functionary who is to solemnize. It is not necessary for my argument that I should try to enumerate what powers are included in marriage or what is the residuum of legislative power remaining with the Dominion. All that is necessary for our argument

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is that this particular bill deals solely with one question, the nature and character of the official who is to solemnize. With that I submit our argument is complete. As I said in opening, I would not be willing to concede as much as has been claimed with regard to the power of the Dominion to legislate as to rights resulting from marriage and all sorts of incidental property rights. I think things of that sort would have to be determined as they arise in proper cases. Our argument is complete in saying that as regards this bill it deals with one thing, and that, we say, incontestably comes under solemnization. I do not think I can add anything on this question, my Lords; it is a question on which I am sure your Lordships are well advised.

Permit me to say a few words now as to the answer to question 2. The bill uses the expression "without regard to the religion of the person," and the second question refers to marriage "unless contracted before a Roman Catholic priest." It deals with the one thing throughout and it is enough for our argument to say that that comes clearly under solemnization. The *Swifte Case*(1) that my learned friend Mr. Hellmuth commented on was a clear authority for saying that the person celebrating certainly comes under the form of ceremony.

This division of authority, shall we call it, on the subject of marriage, also follows the general lines of private international law, which, if anything were necessary, — I do not say anything is necessary — would also aid in interpreting it.

Just a word or two on the second question in the reference. It is my duty to pray your Lordships not

(1) [1912] A.C. 276.

to answer the second question. In the first place I do it because it seems that probably and inevitably your Lordships will answer to the first question that the bill is unconstitutional as dealing with solemnization of marriage. If your Lordships reach that result, as we hope your Lordships will, is there any necessity for answering question No. 2? In the second place we say that there cannot be any question submitted which involves more complete private rights than this question. It involves a declaration which would not only cause disturbance, but would put the ban of absolute nullity upon scores of marriages of persons who are not represented at all before your Lordships. My learned friends, Mr. Lafleur and Mr. Mignault, have been placing before your Lordships their views upon that question, but the individual whose rights as a married person or whose legitimacy is in question is entitled to be represented by his own counsel. My learned friends say that your Lordships' declaration would be advisory. We know that it would; but, should your opinion go that way, as far as the name and fame and standing of every person married under the conditions set forth in these general questions is concerned, it would place the stamp of illegitimacy upon the children and the stamp of illegitimacy authenticated by the highest tribunal in the country. The Civil Code, which says that marriage contracted in good faith produces civil results, is very indefinite, and it would have this effect. It is conceded at once that while a marriage in good faith or an ordinary putative marriage may have the effect of producing legitimate offspring, that the parties themselves would be free to contract another marriage, and it would be practically dissolving the marriage

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tie as far as that part of it is concerned. At all events it is obvious that it involves a pronouncement upon the rights of those who are not here represented. My learned friend, Mr. Lafleur, said, while speaking on the *Hébert* v. *Clouâtre* case(1), that there are hundreds of other cases in exactly the same position. I say that no wider admission could have been made before your Lordships. I cite the declaration of Lord Herschell, in *Attorney-General for Canada* v. *Attorney-General for Ontario, etc.*(2), (referred to by the Lord Chancellor in *The Companies Case*(3),) that their Lordships declined to answer one of the questions because it involved certain private rights with respect to certain riparian proprietors; rights which are not measurably comparable for a moment with the rights of individuals involved in such declarations as your Lordships are asked to make with regard to the invalidity of certain marriages.

What I am asking is, that your Lordships should refer question No. 2 back to the Governor in Council asking his Royal Highness in Council to consider whether there is necessity now for answering that question in view of the answer which I presume you will give to question No. 1; or referring to His Royal Highness the other consideration that there is now *sub judice* before a competent tribunal the very same question. Your Lordships may make either of these representations to His Royal Highness in Council and I feel that they would commend themselves to him. At all events I am absolutely confident that whatever representations your Lordships would make would be acted upon.

(1) Q.R. 41 S.C. 249. (2) [1898] A.C. 700, at p. 717.
(3) [1912] A.C. 571.

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Aimé Geoffrion K.C. (for the Attorney-General of Quebec).—On questions No. 1 and No. 3, which I intend to refer to together, I have little to add to the argument made by Mr. Smith as to the construction of the words "marriage" and "solemnization of marriage." Mr. Smith has very forcibly pointed out that "solemnization of marriage" must be considered as having been carved out of "marriage" relegated to the Federal Parliament, so as to be exclusively within the power of the province, and, that the doctrine of overlapping does not, therefore, apply. Mr. Smith has given, as a reason why the jurisdiction as to solemnization should be absolutely exclusively in the province, and not divided between both, the decision on the overlapping theory, and the fact that we are here with a general power in the federal and a special power in the province. As was pointed out by Mr. Justice Duff, in every case where the question of ancillary or overlapping power has come up it was in connection with property and civil rights, where the general power was in the province and the special power, carved out, in the Federal Parliament. I would like to quote an authority bearing indirectly on that question which is to be found in *City of Montreal* v. *Montreal Street Railway Co.*(1), pages 343 and 344. Lord Atkinson, suggesting that the previous decisions dealt only with the residuum power given by the opening words of section 91, adds that some considerations before the court appear to refer to matters enumerated in section 91, namely, the regulation of trade and commerce. There is here, as you will notice, a departure from the general proposition till then always acted upon as regards the ancillary or overlapping power theory.

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

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It is there held that as regards the regulation of trade and commerce which is a federal subject, the natural meaning of the words used has to be restricted so as to allow of the powers expressly granted to the provincial legislatures remaining with the provincial legislatures. This is really only developing further what has been intimated in the *Citizens Insurance Co.* v. *Parsons*(1). In that case their Lordships intimated that the words "trade and commerce" had been restricted and could not have the full effect the words otherwise would have because if so it would absolutely nullify powers given expressly to the provincial legislatures. In the *Montreal Street Railway Case*(2), they go further and they state that the residuum power can never be used so as to curtail the special powers given to the provinces. And, while the general express powers given especially to the Federal Parliament do curtail the special powers given to the legislatures, their Lordships go on to assimilate to the residuum, the trade and commerce clause without any apparent reason to distinguish, except that they cannot apply to the trade and commerce power the same rule of construction as they applied to the bills of exchange power, the bankruptcy power, without absolutely nullifying the power of property and civil rights given to the legislature. The analogy between that case and the present case is complete. If you apply to the general allowance of "marriage" in the federal authority, the theory of overlapping as it has been applied to bills of exchange, railway legislation and so on, you completely nullify the solemnizing power or at least you completely nullify its exclusive character. All

(1) 7 App. Cas. 96. (2) [1912] A.C. 333.

that could be suggested as regards the effect of giving to the words "trade and commerce" their true construction, was that if you did so it would, to a large extent, nullify the exclusive character of the allowance of property and civil rights to the local legislature. It was shewn that whenever there was federal legislation dealing with trade and commerce, which also affected property and civil rights, then the power of the provincial legislature became void, if the construction applied to bills of exchange and bankruptcy was to be applied to trade and commerce, and it would, therefore, nullify in great part the exclusive authority of the province to legislate respecting property and civil rights. In the present case, if this court does not hold that "solemnization of marriage" is carved out from "marriage" completely, so as to be exclusively given to the province, and so that the Federal Parliament under the word "marriage" cannot touch it, you will nullify absolutely the exclusive power of the provincial legislatures regarding solemnization. I would suggest that the logical working out of this analogy should lead your Lordships to hold, either broadly, that the rule about overlapping as applied in the cases summed up in these last decisions applies only when the general power is in the province and the carved out power is in the federal authority or, if your Lordships are not prepared to go that far, I would ask your Lordships to hold, at least, that giving effect to the overlapping theory so as to extend the federal power would have the effect of nullifying the exclusive power of the provincial authority in this matter, and that, therefore, the overlapping theory cannot be applied. We should read the "British North America Act," as regards the words

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"marriage and divorce," as marriage laws minus all laws respecting solemnization of marriage. That is all that has ever been assigned to the federal authority.

I was trying to answer the point that the law respecting the solemnization of marriage is also a law respecting marriage. I submit that the authority is assigned to the two powers from different points of view: one as being a law respecting marriage, and the other as being a law respecting solemnization. I am pointing out that "marriage" absolutely has never been assigned to the federal authority, and we must read the "British North America Act" as a whole, qualifying the allowance of marriage to the federal authority by the allowance of solemnization to the province. And so the only thing left to the federal power is marriage minus solemnization. And, I submit, that the moment that marriage minus solemnization is the only thing assigned to the federal power, the whole question is at an end. This, I submit, disposes of every one of the objections made so far.

I do not intend to add anything to the argument as to what solemnization is. I respectfully submit that the very authorities cited by Mr. Nesbitt shew that the designation of an officer, or of a person before whom one must appear to get married, is legislation respecting solemnization. The American authorities which he cited say that solemnization consists of a third party appearing at the making of the contract, but, I submit that, in the days when the "British North America Act" was passed, the word "solemnizing" had a more limited meaning. Even taking Mr. Nesbitt's own definition, the designation of the person, or of the officer before whom the parties must appear to make the contract, is obviously legislation respect-

ing solemnization. I submit that any law that touches that question, that specifies that for certain purposes it shall be one officer and for certain other purposes it shall be another officer, is necessarily legislation respecting solemnization. Then, if it is legislation respecting solemnization, the next point is as to the argument of Mr. Nesbitt to the effect — and I understood this to be his main argument — that, while the power to prescribe how marriages shall be solemnized is in the province, the power to determine when nullity results from failure to comply with that law is in the federal authority. Mr. Nesbitt might have suggested that the power to make that mandatory provision is with the province and the power to impose the sanction is with the federal authority, a rather unusual division of legislative power. But, Mr. Nesbitt has gone further, and he has stated that the province has the right to impose penalties for non-observance. His argument amounts to this, that the province can legislate as regards solemnization, can prescribe what forms must be followed in order to get married, and can impose one definite condition, namely, a penalty for disobedience to its laws, but cannot impose, what is the most ordinary condition in such cases, nullity for non-compliance with the law. I submit that such a distinction is illogical. It would have been more logical to say that the power of imposing a sanction would be in one authority, while the power of making the mandatory order would be in the other. Surely, the legislature which imposes the formality must be able to say what would be the consequence of non-compliance. Our Quebec Code says that the failure to make publication, in marrying without a license, entails only a penalty. There are many formalities that

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the parties would be willing to frustrate if the result would be only a penalty and not a nullity. There are other formalities as an essential condition of the contract, and it is clear that the judgment of the legislature in prescribing what formalities it may prescribe will be influenced by the consideration of the success and the failure to comply with these formalities. The suggestion of my learned friend is that the provincial legislature could plainly legislate requiring formalities, but without knowing what the Federal Parliament would do about it; whether it would prescribe an absolute or a relative nullity or a penalty. It is obvious that any legislature which undertakes to declare a mandatory provision, must, in order to make that provision wisely, know what will be the consequences flowing from disregard of it. It is unheard of where the division between the power to make a rule and the power to impose a consequence for disregard of it has been divided between two independent bodies. And yet, the theory of my learned friend, Mr. Nesbitt, would lead to this. He says that the province can prescribe formalities, but he says the province cannot say whether there will or will not be a nullity for non-observance of them. He admits that some person has the power to say that nullity shall result from non-observance, and, therefore, he contends it must be in the Federal Parliament. It seems obvious that the moment a provincial legislature repeals a requirement that a certain form shall be followed — a requirement which under the laws existing anterior to Confederation had to be followed or if not their non-observance resulted in a nullity — it seems to me that the common sense view is that the repeal of the requirement would carry with it

the repeal of the nullifying clause. But the suggestion of my learned friend would be that the nullifying clause would have to remain in force until the Federal Parliament would repeal it. We can work out indefinitely a regular Chinese puzzle which would result from giving the power to prescribe forms, to repeal requirements as to form, to amend the laws as regards forms, to one authority, and to put in the other authority the power to say whether the consequence of non-observance shall be a penalty, an absolute nullity, or a relative nullity.

This brings me to deal with the argument in reference to divorce and I think the word "divorce" should be given a construction — if it is the only construction that can be given to it — that does not produce the results I have indicated. The word "divorce" may be given a meaning which, when tortured, may include actions in nullity, but in its strict sense it does no such thing, or, at least, it is possible of being construed as not including nullity. Under the law of our province the distinction is obvious. We have an absolute nullity, we have a voidable relative nullity, and we have, beyond that, the right to rescind a contract at the request of one party for non-fulfilment of his obligation by the other. I cannot do anything better than to suggest it as pointing out the distinction between the three actions; an action to have it declared that a marriage has always been void, an action to annul a voidable marriage, and a divorce action to cancel an absolutely previously binding contract, because one of the parties has broken his engagement. I submit that this distinction is recognized expressly by the English Act. The "Matrimonial Clauses Act" of 1837 clearly distinguished be-

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tween actions to annul and divorce. What was called divorce *a mensa et thoro* is now called judicial separation. In that Act, however, the previously existing distinction is recognized, between an action for dissolution of marriage, which is divorce, and an action to annul, which is not, but which declares that on account of a defect in the making of the contract it should be set aside. It is difficult to argue conclusively, with any chance of success, that when there is an absolute nullity the judgment that recognizes it divorces. I am discussing the question of formalities now, because to a certain extent the Civil Code makes certain want of formalities a nullity, and I want to say a few words as to where a distinction should be made between absolute and relative nullity. Is it logical to use the word "divorce" in the "British North America Act," which at the time of its passing had such a definite meaning, so as to import into the Act such an illogical distinction as this — that if the provincial legislature prescribed a form it is denied the right to say that there will only be a nullity if the parties are in bad faith, or that it will only be annulled if the judge thinks the circumstances justifiable?

It seems to me perfectly obvious that this bill purports to legislate on solemnization of marriage, because it says that although the laws before Confederation said that if you do not follow certain formalities you are not married this bill undertakes to say that, nevertheless, although you have not observed these formalities prescribed by the pre-Confederation laws, you are validly married. That is amending the law respecting solemnization of marriage. The whole question lies in the submission that it is only "mar-

riage," minus "solemnization," that is left to the federal authorities. If that is correct, then this bill which says that, in future, your marriage will be good even if you do not go through certain formalities prescribed by the province, and which previously were neglected under the pain of penalty, is absolutely *ultra vires* of the Federal Parliament. Can it be suggested that the jurisdiction as to prospective legislation is in one authority, while the jurisdiction as to retrospective legislation shall be within another authority? I fail to see any justification for such a proposition. What is done under the "British North America Act" is invariably to leave to the same authority the power as to prospective and retrospective legislation. The validity of an Act as regards its retrospective character depends on its validity as regards its prospective character. The prospective character of this bill, worded as it may be, is simply saying that in the future you need not comply with certain formalities which the previously existing law required.

It has been suggested by one of your Lordships, that suppose there is no law in the province respecting solemnization, and that province refuses to pass a law respecting solemnization, that the Federal Parliament could do so, and then that would constitute a valid marriage, or if you like, that they could go back to the Roman form of marriage and declare, that that would be a marriage, and then make it subject to conforming to the solemnization. My submission is that if the legislature repeals every law governing marriage, there is only one effective remedy in the hands of the federal authority and that is the disallowance of such a provincial act. The fact that the

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province repealed all its solemnization of marriage laws would give no authority to the federal parliament.

I want to protest against the theory advanced that the law of Quebec, as construed by Mr. Mignault, is what your Lordships call an abdication, and that that should be given as a reason why the Federal Parliament should interfere in the matter of solemnization. I think your Lordships are entitled to construe the "British North America Act" by the conditions existing in Canada at the time of its passage. The fact that there are a number of French people, having French laws, living in Canada, is referred to in the various cases before the Privy Council, defining property and civil rights. In the present case, what your Lordships may think absurd is considered by a large part of the population of Quebec as the only right thing to exist. It may seem to your Lordships extraordinary, but nevertheless the people of the Province of Quebec think it is right. And, when Confederation was brought about, why was there this extraordinary division between marriage on the one hand and solemnization on the other hand. It was not because one was of national importance and the other was not; it was because of the religious differences and the resulting difference in the points of view of the majority in one province compared with the majority in another. It was because the Roman Catholic majority in Quebec thought the views of their co-patriots of other religions so entirely different from theirs that they would not understand their views, and so the Catholic majority in Quebec would not entrust their other co-patriots with the power to legislate upon the solemnization of marriage, and that is why

the solemnization was entrusted to the province. The people of Quebec were convinced that the majority of other religions and origin could not understand their feelings as they did themselves, and so they were not willing to allow them to interpret them for them, and so the solemnization of marriage was entrusted to the provinces in the "British North America Act." By the Roman Catholic people of Quebec, rightly or wrongly, it was considered more of a religious than of a civil ceremony, and they were unwilling to entrust the matter to the Dominion and they wanted to be the sole judges as to when and how they would change their minds on the question of marriage. They were unwilling to abandon their authority over the question as to how they could get married to any other authority than themselves.

When the Roman Catholic population of Quebec entered into Confederation they had to make certain concessions from their religious point of view, and, no doubt, the people of Protestant religions, had to make concessions, and it is to be assumed that the people of the other provinces agreed to leave the question of mixed marriages, and even Protestant marriages, as to solemnization, in the hands of the provincial authorities in Quebec, trusting either to the reasonableness of the Quebec Legislature to pass just laws, or to the power of disallowance by the Dominion which was for them an effective protection. At all events, whatever the reason, the solemnization of marriages, mixed marriages and Protestant marriages, was left in the power of the provincial authorities. I do not understand that Mr. Mignault, in his argument, insisted very strenuously on the point that mixed marriages were null unless contracted before a Roman Catholic priest.

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I have only, my Lords, to add a few words. The position of the Province of Quebec, with respect to questions No. 1 and No. 3 is in favour of maintaining its jurisdiction. The position of the Province of Quebec, with regard to question No. 2, is that it has no opinion to offer and no argument to present as to what is the existing state of the Quebec law. All it has to state on that point is that the law of Quebec is the law of Quebec and that the Province of Quebec alone can change it. If the law of the Province of Quebec is Quebec law alone, the law of Quebec being the law of Quebec, Quebec alone can change it, and the only reason why the Supreme Court should be called upon to give an opinion disappears. I submit, that there is excellent ground to justify this court in asking the federal executive whether it insists on an answer to question No. 2, notwithstanding the answer which may be given by this court to questions No. 1 and No. 3. I need not insist on the fact that the answer to question No. 2 may lead to very serious results. If it is answered in the sense of the invalidity of these marriages, then there may be many who want a divorce who will be willing to step into the box and say they were Roman Catholics, when, as a matter of fact, they were practicing no religion at all. It may not affect the illegitimacy of the offspring because bad faith would be hard to prove and illegitimacy in the Province of Quebec depends on there being bad faith in contracting an invalid marriage. I am instructed to point out some of the possible consequences that might follow from the answering of question No. 2, and I submit that every ground of public policy and good sense suggests that it should not be answered by your Lordships. Is it not well to

leave things as they have been going along and under conditions in which no great harm has resulted to anybody ? Before the agitation arose we were getting along in perfect peace and harmony, and there were only three or four cases in dispute, but the moment the agitation arose we heard of a great many others. I point out to your Lordships that in the Province of Quebec the *Hébert Case*(1) is pending in the Court of Review, and that on that case a decision will be given.

I am instructed to submit the point to your Lordships, as to whether the decision of the Privy Council is conclusive that, when an opinion is asked by the federal authority concerning a matter which exclusively affects the Province of Quebec, there is jurisdiction in the federal authority to ask that question, and whether you are bound to answer it. The recent Privy Council decision(2) proceeds on the basis that the power to consult the court must be somewhere and that admittedly if it is not in the province it must be in the Federal Parliament. In that case, what was being dealt with incidentally was the power of the provincial legislature to legislate but, practically, it meant the power of the Federal Parliament to legislate, because, in almost every case, the question as to what is the power of the Federal Parliament to legislate, involves the question as to what is the provincial power to legislate. In that case it could not be contended that it appertained to the provincial legislatures alone. The question as to whether the Federal Parliament can pass an act is a question which the Federal Parliament can refer, but I submit, your Lordships, that if the question is one

(1) Q.R. 41 S.C. 249. (2) [1912] A.C. 571.

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which concerns exclusively a provincial law, or on which the Federal Parliament has no power whatever to legislate — the disallowance period having passed — the Federal Parliament has no right to refer such a question to the court.

Newcombe K.C.—If your Lordships please, speaking on behalf of the Attorney-General of Canada, I am principally concerned to answer the objections raised by my learned friends, Mr. Smith and Mr. Geoffrion — and to some extent apparently supported by Mr. Hellmuth — to the answering of what are termed here questions No. 2 and No. 3. The attitude of the Province of Quebec is, of course, in this respect, not quite consistent with that which she has maintained throughout the proceedings from the very commencement. But, my Lords, these provincial objections which were formerly urged before this court, and which were raised here yesterday by my learned friends, Mr. Smith and Mr. Geoffrion, have been conclusively and finally over-ruled by the Privy Council in its recent decision with reference to companies legislation (1). It is well known that the contention of the provinces was a very broad one, going to deny entirely the authority of the Parliament to require this court to answer in an advisory capacity any sort of a question at all, whether relating to the construction of the "British North America Act," to the interpretation of Dominion statutes, to the administration of the laws of Canada, or to provincial powers of legislation, or to the enactments of the provinces in the execution of those powers.

(1) [1912] A.C. 571.

But, there was also a more limited contention put forward which found favour with some of your Lordships — that, while questions affecting federal powers, questions the answers to which might be made the basis of Dominion legislation, questions affecting the interpretation of these powers which are to be executed by the Dominion under the "British North America Act," might be submitted, that questions of interpretation of provincial powers or questions of interpretation of provincial statutes, on subjects within the jurisdiction of the provinces as distinguished from the Dominion, could not be put to this court. And although that distinction was not urged very forcibly upon the appeal before the Judicial Committee, still it was there.

Now, the result of the judgment (upon the construction of it which I submit to your Lordships) involves the power in the Dominion, in the broadest terms, to submit any question of law or fact which the Governor-General in Council may be advised in his own good judgment to submit for the consideration of this court. But, while it is quite open to my learned friends of the Province of Quebec, if they think there is room in view of what has been decided, to renew that contention, so far as my learned friend Mr. Hellmuth is concerned, in the observation which I happened to hear during the time I was listening to his argument, he has no brief or instructions from the Government to submit or to suggest to your Lordships that any one of these questions should go unanswered.

We have a factum filed denying the jurisdiction of Parliament to enact bill No. 3, signed by Mr. Mignault and Mr. Hellmuth, counsel retained by the Dominion of Canada, and whatever weight your Lord-

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ships may attach to Mr. Hellmuth's observations I wish you to consider them subject to the statement that he certainly has no instructions to submit on behalf of the Government that any one of the questions which have been solemnly submitted by the counsel for the Government to your Lordships, should not be answered. Outside of instructions he should make no suggestion on that point. He is either instructed or he is not instructed; his instructions are the limit of his authority to submit anything to the court. As to the course your Lordships should take I have submitted and I maintain that the power of the Governor-General in Council to submit every one of these questions and to require your Lordships to answer them is conclusively set at rest by the recent decision of the Judicial Committee(1).

The practical question remains as to what course should be adopted by the court under the circumstances of the present reference and I would like to direct your Lordships' attention for a moment to the circumstances out of which this reference arose. A bill was introduced into the Parliament which is set out in what is termed the first question. That bill came up for discussion and being a bill predicated upon nothing but the solemnization of marriage it seemed hard to resist the conclusion that it did not relate to that very subject. But, it was maintained that it did not relate to the solemnization of marriage; that there was either an overriding power in the Parliament to control provincial legislation in the exercise of its powers to solemnize marriages or that this bill did not relate to that subject; I think the latter was the contention upon which the pro-

(1) [1912] A.C. 571.

moters of the bill rested. Now, my Lords, in these circumstances the absence of jurisdiction by the Parliament to enact the bill seemed to be reasonably clear, but considering the uncertainties of the law and that, in these constitutional questions particularly, the variety of judicial opinions is only limited by the number of courts to which resort may be had, it seemed necessary to submit a question upon the subject. Now, I say a "question," because in the view I submit there is really only one question here. You may say that there are five questions here if you like, or you may say there are three, but, in my view, there is really only one question before the court, because what exists is an interrogation of the court arising out of the circumstance that this bill was introduced into the House of Commons and was advocated there as a measure which the House had authority to pass and which, in the exercise of its judgment, should receive effect as law. Then, the subject being very important and the authority of the Parliament to interfere with it at all being, at least, very doubtful, the Government concluded that the matter should stand over until judicial advice could be obtained, and the result was this interrogation which is before your Lordships.

Nobody says that what they call question No. 1 is not a perfectly proper question. It is the main point of the interrogation: Is this bill a bill which the Parliament has authority to enact? But, it is very plain to see that when a question is submitted to a court it cannot be foreseen what the answer to that question may be, and, therefore, in order to cover the ground so as to put Parliament in a position to deal intelligently with the subject, (if it be renewed,) it is necessary to

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put several inquiries, the one bearing upon the other, anticipating any sort of conclusion which the court may arrive at. Now, if your Lordships should conclude that Parliament has jurisdiction to pass this bill, it is obvious, I submit, that it is a very important and necessary inquiry as to what is the law of the Province of Quebec in respect to the point raised by the second question. Questions No. 2 and No. 3, in that view, especially question No. 2, become of the utmost importance, and I would respectfully urge that your Lordships should not hesitate by reason of any of the considerations which have been urged, to answer these questions on their merits if your conclusion be favourable to the jurisdiction of the Parliament upon the first question.

It is said that these questions may affect marriages, the status of parties who are not and cannot be represented in this court. The same is true, my Lords, of every case that is heard in this court, because other interests which are not represented and which cannot be represented under the practice of the court are affected, and are determined in every case which your Lordships decide. If the *Hébert Case*(1) comes to this court, the decision on it might affect hundreds of people, and yet they are equally without representation and without means of representation in that case as they are upon one of these references. The same is true of every case that has been heard and determined by this court by way of reference under the procedure of section 60 of the "Supreme Court Act." It is true that my learned friend points to one question of the *Fisheries Case*(2) — and a single one — which Lord Herschell

(1) Q.R. 41 S.C. 249. (2) [1898] A.C. 700, at p. 717.

objected to answer because it related to the rights of riparian proprietors acquired previous to Confederation, and in that case his Lordship said that these people were not, and could not be represented before the court and he did not see fit to answer. But he did answer all the other questions and these other questions affected existing rights to the fullest extent. Take the question, for instance, as to the section in the "Fisheries Act" where it was enacted — and the Act had been standing there ever since the Union — that the Dominion might make leases of property in fisheries. The Department of Marine and Fisheries had been exercising that jurisdiction to grant fishery leases from the very beginning; there were hundreds of these leases outstanding; and yet the court proceeded cheerfully and without any protest to say that the Government had no power to grant these leases, but, the lessees were not and could not be represented although the property which they thought they had was taken away by that very decision. The same result may be shewn with regard to the other references.

Then, there is the public interest and there is the private interest to consider and the public interest overweighs the private interest. Your Lordships cannot question the policy of any action of the Parliament within its jurisdiction, and if the Parliament has considered it good policy for the peace, order and good government of the country that these questions should be set at rest generally in this way, then I say that no single private interest, or group of such interests, should stand in the way of the determination of such questions as the Governor-General in Council

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sees fit to submit. The constitution, it is said, is carefully balanced so that no one of the parts of the Dominion can pass laws for itself except under control of the whole acting through the Governor-General. The Governor-General in Council in the exercise of that control, and by the authority of the Parliament, has submitted these questions in view of the situation which I have endeavoured to state. If your Lordships conclude, therefore, that there is jurisdiction, I submit that on no consideration which has been or can be suggested should your Lordships fail to advise upon every point that has been placed before you. On the other hand, if it be determined that there is no jurisdiction to enact the bill a different situation is before your Lordships. If there be no jurisdiction to enact the bill, if you answer the first part of the interrogatory in the negative, I see no reason to suppose that the latter part is not to be grouped with that; Question No. 1 and question No. 3 as they stand here appear to go together:—

"3. If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or if both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages whether,

(*a*) heretofore solemnized, or,

(*b*) hereafter to be solemnized,

shall be legal and binding?"

That reference is in reference to the character, status, or qualification of the person before whom the marriage is celebrated. The bill says:—

"3. Every ceremony or form of marriage heretofore or hereafter performed by any person author-

ized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony."

That speaks of the religion of the person performing the ceremony and as to the religious faith of the persons married. Question 2 reads:—

"2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,

(*a*) between persons who are both Roman Catholics, or

(*b*) between persons one of whom, only, is a Roman Catholic?"

That has to do with the person before whom the celebration takes place, and question No. 3 is concerned with the power of the Parliament to enact whether such marriages whether heretofore or hereafter solemnized would be legal and binding. These questions go together and if No. 1 be answered in the negative, No. 3 must be answered in the negative.

Now, my Lords, I have very little to add; it is certain, I submit, that between the view of the executive and the view of the court as to whether a question should be answered or not, in the last resort the view of the executive prevails. But in the meantime situations change and opinions develop, and if it appear on the reading of this submission that there is in effect one interrogation, that it is divided into

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clauses having regard to what might follow from the different views which the court might entertain, it is quite open and proper for the court, no doubt, to submit that, in view of the opinions which are handed in upon certain parts of the interrogation it becomes unnecessary, in the view of the court, to answer the rest. And if the Government upon that submission, entertain a different view, I presume the Government would communicate that to the court for further consideration.

The two bodies are engaged, each in its own sphere, in working out the constitution of the country. In arguments before the court extreme cases are often put, but they are not good as illustrations for the purpose of arriving at the principle. It would be an extreme case that the Government insist upon very extravagant questions, unusual and improper, being put and answered by the court. It is time enough to consider that when such a case arises. It never has arisen yet and I do not anticipate, and I do not see that there is any reason to anticipate that there should ever be any conflict between the executive and the judiciary in the administration of section 60 of the "Supreme Court Act." That section contains a very useful power and one which has been often invoked and which the courts have accepted and acted upon in the settlement of the great constitutional questions of the country. The Government in the submission of questions, so far as intention goes, is certainly very careful to submit nothing but what is of public importance and what, in the view of the Government, may properly be answered by the court. The court, in its superior knowledge of the constitution and the working of the laws, may upon the con-

sideration of these questions see reason, instead of answering categorically, to submit points for the consideration of the Government with regard to the matter. That is the situation here. I submit that the matter is in your Lordships' hands here as one interrogation arising out of a situation created in view of the public agitation and the introduction of this bill.

Nesbitt K.C. (in reply).—My Lords, my desire first, is, to get back to what is, after all, the real question, namely, whether the Dominion has power to pass the bill referred, and to arrive at a right conclusion upon that question.

The first essential is a careful examination and a right understanding of the terms of the bill itself. The bill pre-supposes three things: (1) It pre-supposes a provincial official, appointed and authorized by one of the provinces to solemnize marriages — no matter for the moment what marriages, but "some" marriages — in other words, it pre-supposes some machinery established by the province for the solemnization of marriages in the province. The power of the province to establish such machinery is in no way questioned or impaired by the bill. (2) It pre-supposes also that the parties seeking the protection of its provisions shall have their marriage solemnized before this provincial official — that is, that they have availed themselves of the solemnizing machinery established by the province. (3) And lastly, for more abundant caution, it pre-supposes that all other relevant provincial requirements, with the one exception to be mentioned in a moment, have been complied with. Unless the requirements of these three suppositions have been complied with, the benefit of the

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bill cannot be obtained. In short, the language of the bill is confined strictly to the object which it is designed to effect, and neither touches nor impairs anything but the difficulties which it is intended to remedy. It does not dispense with the performance of any ceremony, nor relieve any one concerned from any penalty which they may have incurred under the provincial law owing to failure in such performance. What it does, and all that it does, is to relieve the persons who have fulfilled its requirements from the effect, upon the validity of their marriage — not upon any other liability to which they may have exposed themselves — which the province has said shall prevent them from availing themselves of the machinery of solemnization which it has established. In other words, it relieves them from the effect upon their marriage of article 127 of the Civil Code.

It is admitted — indeed learnedly contended by the other side — that the incapacity of the parties to avail themselves of the provincial machinery I have mentioned is an impediment so-called, and an impediment within the meaning of that article. It is admitted also that the Dominion has jurisdiction to create and remove impediments to marriage under its undoubted jurisdiction over the capacity of the parties. What foundation, then, is there for the objection of the power of the Dominion to pass this bill, which is designed to remove this impediment of clandestinity as it is carefully worded so as to do nothing more.

My submission is that the Dominion, under the right to legislate upon the broad subject of marriage, as to the status or capacity of the parties, can enable any person to enter into that state, to obtain that

status and can prescribe what is precisely necessary to create that status, leaving it for the provinces to pass any laws they see fit to solemnize the status which the Dominion has so allowed to be created.

But my friend, Mr. Mignault, has endeavoured to put his case on question 2 upon the provisions of the Code apart from article 127. I shall leave it to my friend, Mr. Lafleur, to discuss how far it is possible for Mr. Mignault to support his contention without the assistance of that article. But, Mr. Lafleur has pointed out in opening, and I point out again that, even as so put, Mr. Mignault's contention involves this — that there is no way in which those who profess any religious belief not recognized by one or other of the special Acts that have been referred to and no way in which those who profess no religious belief whatever can validly contract marriage at all. That has been referred to at somewhat greater length since I made this note — my learned friends opposite are left in the extreme dilemma that, although the Dominion has complete and absolute jurisdiction on the subject of marriage to declare throughout the length and breadth of the Dominion what shall constitute marriage, so far as the Province of Quebec is concerned, if Mr. Mignault is correct, there are great numbers of people in that province with an absolute inability to obtain that status from any jurisdiction. My friend, Mr. Mignault, has no answer to the contention that those who profess no religious belief whatever cannot, under his argument, validly contract a marriage in the Province of Quebec at all. His idea is that such persons can, if they choose, and if they can afford it, apply to the legislature for a special Act of their own, which they may or may not

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obtain. So that the situation is, if he be right in his contention, that many of the inhabitants of the Province of Quebec have no capacity to marry, there being an absolute impediment to their marriage. Why, if this be so, is it not competent to the Dominion, in the exercise of its admitted jurisdiction over capacity and impediment, to confer upon such persons the capacity which my learned friend, Mr. Mignault, by his answer to the difficulty, admits that they now lack, and to remove the impediment to their marriage, which under his contention is imposed upon them.

As to the second clause of the bill it is, I submit, interesting to discuss any questions as to the power of the Dominion under the word "marriage," to legislate upon the property rights and so forth which may flow from the establishment of the marriage contract. The bill, which alone is before your Lordships, touches none of these matters, but simply leaves the parties to such rights in these respects as, their marriage being established, they may have under the provincial law. It gives them no greater rights than such as may be conferred by the province legislating in its own sphere, upon any other married people, the words "rights and duties as married people," obviously mean only such rights and duties as the competent authority — the Dominion, possibly, in some respects; the provinces, in others — may confer upon persons validly married.

I turn now to the argument of my friend, Mr. Hellmuth, and it seems to me, if I may say so, that he has completely misapprehended the argument which I addressed to your Lordships in opening this discussion. I am quite prepared to admit to the fullest extent — I could not do otherwise if I would — the principles

laid down by the authorities he has cited. But I was unable to understand their effect upon my argument. They establish, as I understand them, that a marriage validly solemnized according to the laws where the solemnization takes place, is, *quâ* that solemnization, valid everywhere — in other words that the "form" of the marriage is governed by the *lex loci contractûs*, or *celebrationis* as it is sometimes called, and differs in that from the *capacity* of the parties to the marriage, which is governed by the law of their respective domicile. And, consequently, if a marriage be solemnized in a country by the laws of which certain ceremonies are essential to the formation of a valid marriage, or, in other words, where those ceremonies are actually made part of the very contract, and those ceremonies are omitted, or defectively performed, the marriage, being invalid by the *lex loci contractûs* is invalid everywhere. No one, I should think, could dispute that proposition. But, it has no application to my argument or to any of the questions before the court, for it assumes the very point at issue in all of them. It assumes, and is based upon the assumption, that by the law of the place where the marriage is contracted the proper observance of the prescribed forms and ceremonies is essential to the validity of the marriage. But the very questions before the court in this case are: (1) Has the province made a particular form of solemnization essential to the validity of a marriage, and, (2), if it has purported to do so, is such legislation within its powers?

I am, of course, not dealing with the former question because an affirmative answer to it is just as necessary a pre-supposition of my present argument

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as it is of my learned friend's proposition. But, my friend's authorities can have no application to the latter question either, which is the one I am now discussing, that as to the legislative power of the province, because those authorities equally pre-suppose an affirmative answer to this question as well. Every case that Mr. Hellmuth discussed is based upon the ceremony, the form being made an essential part of the validity of the contract, and made by a power with undisputed rights to deal with the whole subject-matter, contract, solemnization and everything else. But, that does not forward the discussion here. What we have to discuss is a question of legislative power under a divided jurisdiction, and the only question with which I am now concerned is one on which my friend's authorities throw no light at all, namely, whether or not it is within the powers of the provinces under "solemnization of marriage in the province" to make any ceremony at all essential to the validity of a marriage.

The "British North America Act" says "solemnization of marriage"; that is, solemnization of that status, of that condition pre-supposing the status existed. I should think that a very large majority of your Lordships — I hope not all — are startled by the argument, but, were it not for the fact that it had been taken in, so to speak, the breath of our lives from the beginning that marriage means something connected with a ceremony and that a ceremony is essential to it, I should have thought that the language of the Act would be perfectly plain — the solemnization of the status, which status is entirely within the sole and absolute jurisdiction of the Dominion to deal with entirely; and when the Dominion says what

shall form that status when people are married the provinces can pass any legislation they please with reference to the solemnization of it, but they cannot for one moment interject or interpose something that is essential to the validity of that marriage. The Dominion alone has the power to deal with that.

My contention, as I have said, is that ceremony is not essential to the validity of a marriage. And here again my learned friend, Mr. Hellmuth, seems to have fallen into some misapprehension. He appears to have thought that the purpose for which I cited *The Queen* v. *Millis*(1) and *Beamish* v. *Beamish*(2) is answered by pointing out that what those cases actually decided was that under the law of England a certain form or ceremony, namely, the presence of a priest, had always been essential to the validity of a marriage. But that decision — that is, the point actually decided — has no application to my argument, for the same reason that my friend's other authorities have none, namely, because it was based upon special legislation making the ceremony essential. The purpose for which I cited *The Queen* v. *Millis*(1) was to shew, from the reasoning and authorities to be found there, what the situation was and always would be apart from such special legislation, and to establish that, apart from legislation to the contrary, the contract of marriage and its solemnization are two separate and distinct things, and that, even when some ceremony was prescribed, its absence did not invalidate unless it appears from the legislation that that was the intention. My friend cited *Swifte* v. *Attorney-General for Ireland*(3), but I should think that that authority made perfectly clear the difference.

(1) 10 C. & F. 534. (2) 9 H.L. Cas. 274.
(3) [1912] A.C. 276.

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Lord Loreburn says that legislation relates only to the form of ceremony and, therefore, is not extra-territorial, but he points out the distinction. In that case the form or ceremony was made an absolute essential, a condition precedent to the validity of the marriage, and the legislation was passed by a legislature fully competent to deal with the subject. It throws no light on it except the sort of side-light that may be gathered from case after case cited by Mr. Hellmuth where the statutes used the word "solemnize" as distinct from the other, and, as I say, with every submission, points to the one conclusion to be drawn from this Act — that what you are dealing with is the power of the provinces, not to legislate upon marriage, but simply on the solemnization of the existing status — of a status, the right to prescribe all the essentials of which are in the Dominion. Deny that proposition and you will say that although the Dominion has complete and absolute power, notwithstanding anything contained in section 92, to deal with the subject of marriage, to create that status with the subject of marriage, and, therefore, to create that status and, therefore, to legislate upon all its essentials, yet the provinces can step in and, by interposing anything they see fit under the guise of solemnization, can say that that status cannot come into existence. I submit that such a result will certainly make your Lordships pause a long time before you bring it into effect. It was for this reason that I quoted so largely from Lord Brougham and Lord Campbell. They held that there was no such special legislation in England, and, consequently, discussed what the position was in its absence. And what they say as to this neither was disputed, nor, I suppose,

could be disputed. From their reasoning I argue that the power claimed by the provinces to make any ceremony essential to a valid marriage, and to invalidate marriages where such ceremony has not been performed, cannot be conferred on them by the words "solemnization of marriage," in any proper meaning of these words, and, consequently, the power to override any such invalidating provincial legislation must be in the Dominion under the word "marriage." Under the word "marriage" the Dominion must have power to define what marriage means, to say what are, and, consequently, what are not essentials, of a valid marriage; in other words, as Mr. Justice Idington put it, to say that marriage is what marriage is; and you cannot get out of the word "solemnization" the power to add another essential to marriage. The result I submit is that, even though the bill cannot be supported as removing an impediment or conferring a capacity, — for that argument has nothing to do with the argument I am now urging — it is still within the power of the Dominion as asserting its jurisdiction over marriage.

One other observation about the *Montreal Street Railway Case*(1). That case, I submit, has no bearing whatever upon the real point of the construction of the "British North America Act" involved here. As I understand it, what is involved here is this: Granted the subject is one for which there is a special heading under section 91 of the "British North America Act," anything that is necessarily incidental to that can be passed by the Dominion Parliament, this overrides any of the matters involved in section 92. I think that is established beyond doubt.

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

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But His Lordship, the Chief Justice, puts this, which needs to be grappled with, — as I understand him he says you have out of that head in 91 a special head of its own delimited and coupled with property and civil rights and, therefore, that it hinges upon the rule of construction that I have been urging. Now, I say that, if anything, it points and adds force to the rule that I have been urging. You have got to take first marriage, and out of that is taken — they have seen fit not to leave property and civil rights to be dealt with at all — but out of that they have taken the solemnization of that condition. Suppose they said "the solemnization of that status," would your Lordships say that they could say that under the head of "solemnization" they could destroy that status by inserting terms that would render the bringing of that status into existence absolutely useless. You have the word "marriage" coupled with "divorce" and you have to read the two together. Divorce must be given the meaning of anything that relates to the untying of the supposed *de facto* condition of marriage. Why should you make marriage of a less breadth or importance than divorce when you have eliminated out of that simply the solemnization of that status ? Now, the answer to the first question is only with regard to the bill and the answer to the third question is as to the general validity. The Dominion can create a court and can give that court full power to deal with, if I am right in my argument, the undoing of that marriage which would set the parties loose, as for instance, on the ground of physical incapacity. Under this authority the Dominion could give that court any rules it sees fit, to declare what it shall be governed by. Could the Dominion not say

that if the parties have gone through the solemnization in a form that is prescribed they may have the status or may not have the status; and could not the Dominion legitimize the children and declare that the parties had the status of married people? Could a province, under the guise — and this is my last suggestion — could a province, under the guise of solemnization, limit the right of a citizen to enter into the state of marriage; could the provinces say that a red-haired man must only be married to a red-headed woman? Can the provinces curtail and fetter the rights of a citizen in that respect upon which the Dominion alone has the right to legislate? Can a province declare as to the right of a citizen to enter into the married state; can a province limit his capacity by any attempt to say that he can only do it by so and so?

Lafleur K.C.—My Lords, as I intimated in my opening remarks, an investigation of the conditions of our laws immediately after the conquest does not seem to me to be pertinent or necessary for a decision in this case, because, as I observed to your Lordships, we have a declaratory statute immediately preceding the Code which seems to me to do away with all doubts as to the rights of the several churches to celebrate marriage, and it only becomes a matter of construction as to how far the authority of the clergymen of each of these communities extends in the celebration of marriage. That there is no restriction as to the persons whom they may marry is my view on the matter, and nothing that I have heard up to this time has disturbed that.

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The declaratory Act is the Consolidated Statutes of 1860. May I say this with reference to the law before that date, and I consider it useful only in leading up to a statement of what the law was in 1860 and at the time the Civil Code was enacted. It appears to me that the Articles of Capitulation in 1759 and the Articles of Capitulation in 1760, and the Treaty of Paris, in 1763, had this effect, and no more: It gave to the Roman Catholic subjects of His Majesty free exercise of their religion and the fullest and freest rights in that respect, but it appears to me that it cannot be successfully contended that the grant of this right and privilege to the Catholics of the colony implied the exclusion in any sense of the religion of the conquering nation or delimitation or restriction of the rights of the clergy of the conquering nation who were clearly entitled to exercise their ministry in the conquered country. It seems to me that any other contention is repugnant not only to the British constitution but to a reasonable construction of these Articles of Capitulation and to the language of the treaty. It would seem to me on the face of it that you cannot pretend that by tolerating a religion, which was then repugnant to the religion in the constitution of the conquering country, that you restricted in any way the religion of the conqueror in the conquered territory. That would seem to be self-evident as a matter of constitutional law.

Therefore, it does not seem to me to be reasonably arguable that the grant to the Roman Catholic subjects of His Majesty of the free exercise of their religion whether under the capitulation of Quebec or the capitulation of Montreal or the Treaty of Paris gave them any exclusive rights as against the Anglican Church. That, I think, is reasonably clear.

I say that so much of the French canonical law as was inconsistent with the free exercise of the ministry of the Church of England, after the conquest, was repugnant and could not survive the conquest. So much of that law as would exclude the ministry of the Anglican Church clergymen would be quite incompatable with the law of the conqueror and would be repealed, and I find that is the law by reason of the declaratory statute that says that Anglican clergymen had the power before 1861, which presupposes existence of that power from the time of the conquest down to this date; and remember, when you come to the next step after the capitulation of Quebec, and the capitulation of Montreal in 1760, you have in the "Quebec Act" of 1774, language which introduces, in the 8th section, the laws of Canada. Now, that must mean the laws of Canada as they existed immediately before the Act. It says that resort shall be had to the laws of Canada as the rule for the decision of matters of controversy relative to property and civil rights. That means and includes the law that was brought in as a necessary part of the conquest, and which had not been repealed. The "Quebec Act" simply repealed the proclamation of Governor Murray, which purported to introduce the English civil law as a whole into the country, and all the previous ordinances and other Acts and instruments which had been issued thereunder. But it did not affect what I contend was a necessary part of our system immediately after the conquest and that is the exercise of the ministries of the Anglican clergymen according to the rites of their church, and in that respect their authority was absolutely unrestricted, and they could marry any one whomsoever.

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What confirms that view is the fact that between 1774 and 1860 you find no statute which purports to give to the clergy of the Anglican Church the power to marry. You have statutes granted to dissenters to give that power, and you have it given at a very early date to the Church of Scotland, and you will find from the statute that the authority given in 1827 to the Church of Scotland is absolutely unrestricted.

Now, with regard to the Anglican Church no special statute was necessary because of the position of things which necessarily occurred at the time of the conquest, viz., the introduction of the power of the clergy of the conquering nation and of the exercise of that religion. It is only in 1860 that any reference is made to the subject by a statute which recognizes the rights of the various communities to celebrate marriage.

I submit that that Act, being a declaratory interpretative Act, justifies my contention. That statute with reference to the Scotch Church is absolutely unrestricted, the clergy of that church can celebrate all marriages.

It helps one to understand this legislation when we see that section 16 of the Act, ch. 20, Con. Stat. L.C. 1860, made provision separately for the Church of England and the Church of Scotland. Then you pass on to section 17 of that Act, which recites the numerous statutes passed to enable various religious communities to keep registers of civil status, beginning with the Baptists and ending with the Quakers. The recital of these Acts covers two pages and includes almost all the dissenting sects which had arisen in Canada up to that time. Of course many more have arisen since and we have had a great deal

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of private legislation giving them the right to keep registers. But the enacting part of that Act says, that this Act extends also — independent of the Anglican Church and the Scotch Church — to the several religious communities and denominations in Lower Canada mentioned in this section of the Act, to the priests or ministers thereof, who may validly solemnize marriages and may obtain and keep registers under this Act subject to the provisions of the Act mentioned, with reference to each of them respectively. So that if there was any restriction in any Act applying to a religious denomination its powers would be restricted *pro tanto*. It is not very material, but, if your Lordships refer to the Act respecting the Jews you will find that they did not effectually restrict the powers of the Jews in that respect, but that they did restrict the power of the Quakers by saying that they should have the right to celebrate marriages between persons professing the faith of the said religious Society of Friends commonly called Quakers or one of whom may belong to that denomination.

But I suggest that this interesting inquiry into the old law becomes superfluous when we have the law immediately before the enactment of the Civil Code clearly laid down in the statute of 1860. I say it is the source of the Code, and that statute gives the state of the law which you have to consider, if you are going to consider the antecedent law at all, in explaining unambiguous words in the Code. But, my submission is that there is no ambiguity in the Code, that nothing could be clearer than article 129 and that it needs no reference to antecedent law to construe it, and if you go beyond the existing law then you must take the law that existed immediately be-

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fore the enactment of the existing law, and not go back one hundred years before for your authority. The law which immediately preceded the Code is the law laid down in the statute of 1860, and it gave no restricted authority to the ministers of religion, except in so far as a special Act in some cases may have restricted them. That brings me once more to article 129, to which I am loth to return, because it seems to me I have taken up a great deal of your time over it already. To the Baptists, to the Presbyterians and so on, the powers are given to the ministers of these bodies almost in the same words in each statute.

It would be impossible, where all religions are tolerated as they are with us, where all sects are lawful and are able to carry on their ministry without any difference being made between them by the law of the land, to carry out a system in these days that originated at a time when there was only one State Church. It is inapplicable in its terms to the present complicated state of things and there I take it we find an explanation of the general terms used in article 129 of the Code. The observations of the commissioners which have been cited by Mr. Mignault go no further than this: That it was intended to frame this article in general terms because of the difficulty of the situation but not to make any distinction between one and the other in law. My learned friend's contention, if I understood it at all, was this: that the Catholic priest's authority to marry was restricted to the Catholics, the Anglican clergyman's authority was restricted to the Anglicans, and so on, every sect was restricted to its own congregation. I submit you cannot find that even suggested by the terms of article 129. I say, on the contrary, it is precluded by

the language of article 129. The first paragraph of article 129 is of so general a character that you cannot import any such idea into it unless you had it in your mind beforehand. I would defy any one who is not familiar with the history of this country to take that article *per se* and read into it all that the ingenuity of Mr. Mignault has read into it. He is filled with all the historic lore that he has so well expounded to your Lordships, but take any judge who is free from any such prepossession and get him to construe article 129, — can you imagine he would introduce any such restriction into it? It says:—

"All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage."

It says they are competent to solemnize marriages generally; not, to solemnize particular marriages between certain persons. And then it goes on to say what is inconsistent with the idea of their being so restricted; it says that

"none of the officers thus authorized can be compelled to solemnize a marriage if any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs."

Mr. Mignault suggests that that means that where there is an impediment to the marriage the priest or clergyman is not compellable to marry. Of course he is not; if there was an impediment he would not need article 129 to relieve him of the obligation; he would not have the right to celebrate the marriage. The provisions of that paragraph are intended to apply to a case where there is no legal impediment but where there is conscientious objection on the part of the minister.

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Can it be doubted that the Parliament since Confederation has the power to pass bills for the relief of consorts who have been married and to authorize them to marry again? That power has not been disputed. Take the case of two persons who have thus procured divorce from the Parliament of Canada and who have been authorized to marry again, presenting themselves before an Anglican clergyman or a Roman Catholic priest; surely that is a case where the article applies. That clergyman is not compelled to celebrate that marriage because it is contrary to the doctrine of the church to which he belongs although the parties are free to marry. They are free to marry but they cannot compel that clergyman to marry them. That is surely the natural meaning of that article, and to give it any other meaning is to deprive it of any sense at all.

Just one or two observations with regard to the other articles you are referred to in connection with article 129. It seems to me that if you look first at the place where the marriage is to be celebrated, and I do not think that would be conclusive in any event, but even if it were there, which I contend it is not, and that the marriage must be celebrated in the parish of the parties, it could not always be celebrated in the parish in one place because the parties might have different parishes. I will comment on article 63 as to that. However, that is not the question, the question is:—Assuming that the *locus* of the marriage is defined and restricted, that does not restrict the capacity of the officer to marry persons who come from another place, as long as he performs his ministry within his jurisdiction, if jurisdiction there be. I shall refer briefly to these articles. By article 57

the banns must be published where the parties reside, in their respective churches, but as you see from this article the marriage is not necessarily solemnized by the person who publishes the banns, and all the person who performs the marriage has to do is to get a certificate shewing that the banns have been published.

Take the case where they are in different parishes, and then there must be two competent since the marriage is celebrated by the curé of the parties. By article 63 the marriage is celebrated at the place of domicile of one or other of the parties.

My learned friend says there may be two competent to solemnize the marriage, and I say there may be more, but at all events he cannot contend there is only one competent. The marriage is to be celebrated at the place of domicile of one or other of the parties and if it is solemnized elsewhere the person officiating is obliged to ascertain the identity of the parties. That is a natural consequence of having your marriage solemnized outside of your domicile. Surely, that shews that the provision is merely directory. If you look at article 1105 of the Code of Civil Procedure, which has not been referred to, you will find it confirms the idea that the *locus* is not a matter of necessity, but the obligation is placed on the officer of identifying the parties if they are married elsewhere than at their domicile.

I do not attach the slightest importance to the question of the *locus* where the marriage is to be celebrated, because it does not seem to me that touches the question of the capacity of the clergyman when he is officiating in that *locus*. I merely wished to give your Lordships my construction of these articles

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which, I admit, leave the law in an unsatisfactory condition, though not as unsatisfactory as the law with regard to marriage licenses.

Now, as to the application of section 127 of the Civil Code — that is really the last fortress of my learned friend, Mr. Mignault. After he is driven from the field in his restricted construction of article 129, he still says that, under the provisions of article 127, there is an incapacity in the case of Catholics to have a marriage celebrated before any one else than a priest of that religion. What I have to submit, with respect to article 127, is that, whatever may be regarded by the canonists as its meaning, we must construe what is the meaning and application of the word "impediment" in article 127, having regard to its place in the Civil Code and to the context. You find that it is under the chapter headed: "Of the Qualities and Conditions Necessary for Contracting Marriage," and among the disabilities there enumerated you will find there is want of puberty, impotency, minority, alliance and relationship. Articles 123, 124, and 125 deal with relationship or affinity, and article 127 says:—

"The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities."

My submission was and is, that these other causes must be causes of the same nature, causes within the purview and scope of that chapter, that is, they must be qualities and conditions necessary for contracting marriage and of the character of the others, viz., they are disabilities of the persons. The whole chapter

deals with the competency of the candidates for marriage. The next chapter deals with a totally different subject, and that is the competency of the officer who solemnizes the marriage. I say you introduce a hopeless confusion if you construe article 127 as in any way referring to the formalities relating to the celebration of marriage, and I say it is a misnomer and a misuse of language for lawyers to say, when they are construing article 127 of the Code, that that is an impediment to the marriage of the parties, when the heading of the chapter within which the article is found treats of the qualities and conditions necessary for contracting marriage in the parties themselves.

My submission is that that must all refer to the qualifications and conditions of the candidates for marriage. The next chapter deals with the qualities of the celebrating officer. You cannot say that in a chapter that deals with the qualifications and conditions required for marriage, you could consider the objection to or incompetency of a public officer. Article 127 has left that subject-matter of canonical impediments to the diffierent churches and in the next chapter, which deals with the competency of the public officer, it has not left it to any church to say; the Code itself says what a competent officer is. I submit that the language of that section is very plain.

Now, I have only one word to add as to sub-question (*b*) of question No. 2. I shall say very little on that for the obvious reason that my learned friend, Mr. Mignault, does not support the view that mixed marriages are at all in jeopardy; he believes that they are valid. An expression fell from the Chief Justice yesterday to the effect that the whole question was

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settled by the terms of the Benedictine declaration, and I concede that settles the question so far as the application of article 127 is concerned. That is clear, because under the Benedictine declaration it seems to be a canonical impediment and so there is an end to that question. But I say it does not do away with the difficulty which does result from the restrictive interpretation put upon article 129 independently of article 127.

If the minister of each sect were restricted to his own congregation, then there would be an end to the possibility of mixed marriages at all, there would be no clergyman by which they could be celebrated. That is the legitimate conclusion of Mr. Mignault's argument, but he recoiled from that legitimate conclusion when it comes to be applied in practice.

THE CHIEF JUSTICE.—As this is the end of the argument, it remains for me, on behalf of my brother judges and myself, to say that we are extremely indebted to the bar for the very valuable assistance they have given to us throughout the whole of this argument. We have all been impressed with the unfailing patience and courtesy of counsel, and the learning displayed by them, which we all agree is quite worthy of gentlemen who occupy the very high position that you occupy at the bar of your respective provinces.

The court reserved its decision and, on the 17th day of June, 1912, their Lordships proceeded to give the following reasons for their respective opinions.

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THE CHIEF JUSTICE.—To the first question, my answer is "no."

Whatever may be, with respect to the capacity of the parties, the authority over marriage which is vested by section 91 in the Dominion Parliament, there can be no doubt, in my opinion:—

1st. That a marriage is not valid and can produce no civil effects until solemnized.

2nd. That solemnization, which includes the form and ceremony of marriage, is, by virtue of section 92 of the "British North America Act," within the exclusive legislative competency of the different provincial legislatures.

3rd. That there is no marriage within a province where all the legal formalities prescribed by the legislature of that province are not observed.

4th. That Parliament has no power or authority to remedy any omission or defect or to dispense with any of the requirements with respect to form or ceremony which are prescribed by the legislature of the province within which the marriage is solemnized.

Therefore, Parliament has no authority to enact in whole or in part Bill No. 3 of the First Session of the Twelfth Parliament of Canada, intituled "An Act to amend the 'Marriage Act'" the purpose of which is to provide a legislative remedy for or dispensation from any defect or requirement in "every ceremony or form of marriage" and to regulate the "rights and duties of the persons married and of the children of such marriages."

In answer to question 2:—

In view of the replies given to questions 1 and 3 and the reasons assigned therefor by the majority of the judges here, I beg to ask that I may be relieved of

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the obligation to answer the first branch of this question No. 2 for the following, among other, reasons:—

1st. Because Mr. Newcombe and Mr. Hellmuth, both acting for the Attorney-General of the Dominion, have informed the court, in substance, that this question was predicated on the assumption that questions 1 and 3 would be answered in the affirmative.

2nd. Because, as at present advised, I am of opinion that there is no appeal to this court from the judgment of a Quebec court in a case which would involve the determination of this abstract question;

3rd. Because the question involves the determination of a point that is in issue in a case now actually pending before a competent Quebec tribunal, and I respectfully suggest that in such circumstances proper respect for judicial ethics requires us to abstain from unnecessarily expressing an opinion which must be without force or effect;

4th. Because the Attorney-General of the Province of Quebec, who is immediately responsible for the administration of justice in that province and the guardian of the legal rights of its inhabitants has represented to this court that although the answer to the first branch of this question is only advisory in its character, litigants in that province will necessarily be prejudiced by any answer that may be given, to use the language of the Lord Chancellor "without so much as an opportunity of stating their objections." In these circumstances, adopting the suggestion of the Lord Chancellor, I give the above reasons as some indication of the "high degree of constraint and inconvenience" which is certain to result from a merely academic answer to the first branch of this question.

To the second branch of this question, I answer "no."

In answer to the third question, I can add nothing to the reasons given in support of my answer to question No. 1. If the power to authorize the solemnization of marriage in a province is vested exclusively in the Provincial Legislature, there can be no authority in the Parliament of Canada to retrospectively validate a marriage defectively solemnized or to provide that future marriages may be solemnized otherwise than in accordance with the requirements of the provincial law.

DAVIES J.—Question 1(*a*). "Has the Parliament of Canada authority to enact in whole or in part Bill No. 3 of the First Session of the Twelfth Parliament of Canada, intituled 'An Act to amend the Marriage Act' " ?

The bill provides as follows:—

1. The "Marriage Act," chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

"3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any difference in the religious faith of the persons so married and without regard to the religion of the persons performing the ceremony."

"(2) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the right of the said persons or their children in any manner whatsoever."

(*b*) If the provisions of the said bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority ?

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I construe this bill as attempting, in its first section, to validate by Dominion legislation marriages solemnized by or before a person having only a limited provincial authority to solemnize marriages in cases where such person has ignored such limitations and attempted to solemnize a marriage beyond the powers given him by a provincial legislature.

The bill is supported on the ground that the subject-matter of "Marriage and Divorce" was assigned by the 91st section of the "British North America Act, 1867," to the Dominion Parliament, and that as a consequence that Parliament has the exclusive power of legislation with regard to essentials over the whole subject-matter, and that this exclusive power has not been lessened or diminished by the assignment in the 92nd section of the same Act to the Provincial Legislature of the exclusive power to legislate with regard to "the solemnization of marriage."

The contention submitted by Mr. Nesbitt was, in effect, that under our constitutional Act of 1867, all questions relating and essential to the contract of marriage, namely, its definition, the capacity of the parties to enter into it, and all the circumstances upon which its validity are to depend, are assigned to the exclusive jurisdiction of the Dominion Parliament while the regulation of the evidential formalities authenticating the contract, they not being essential to its validity, are assigned to the legislatures of the provinces. All matters of substance would thus be assigned to the Dominion. Mere matters of form would be assigned to the provinces and their neglect or violation though punishable by penalties prescribed by provincial law would not in any way affect the validity of the marriage.

The conclusion was submitted by counsel for the promoters of the bill that the contract of marriage is and always was "entirely independent of any religious or other ceremonial accompaniment" and that in the absence of Dominion legislation the common law had to be resorted to in order to determine whether parties were legally married or not,

I cannot bring myself to believe that these contentions can prevail. They are not in my opinion based upon a true construction of the "British North America Act, 1867." In my judgment the division of legislative power created in that statute and assigned respectively to the Dominion and the provinces was not one which gave exclusive legislative power over all the essentials of the subject-matter of marriage to the Dominion, and that over non-essential formalities only to the provinces. The Imperial Parliament, when passing that Act, will at least be credited with the knowledge that so-called common law marriages were not valid in England and that it had been judicially determined by the House of Lords in the case of *Beamish* v. *Beamish*(1), that

> it was settled by the decision of *The Queen* v. *Millis*(2), that to constitute a valid marriage by the common law of England it must have been celebrated in the presence of a clergyman in holy orders.

In the light, therefore, of the law as it existed in England at the time of the passage of our constitutional Act, 1867, on the subject of marriage and also as it then existed in the colonies being confederated into the Dominion and also in view of the differences of race and religion prevailing amongst the inhabi-

(1) 9 H.L. Cas. 274. (2) 10 C. & F. 534.

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tants of the various provinces, I cannot doubt that in assigning the exclusive power of legislation over the solemnization of marriage to the provinces, the Imperial Parliament intended to confer upon them a much greater power than that of legislating on mere non-essential formalities.

The subject-matter, "the solemnization of marriage in the province." covers and aptly expresses, in my judgment, every manner or mode in which competent parties, intending to contract marriage with each other, might validly so contract. No limitation was placed upon the power of the legislatures to which that subject-matter was assigned. Their powers are plenary. The legislatures of the several provinces may within their several legislative jurisdictions make religious ceremonies necessary to validate a marriage or may make its solemnization before a civil functionary of any kind sufficient for the purpose with or without witnesses. It is probable that they would have power to declare the solemnization of marriage to be complete without the presence of a priest, clergyman, minister, civil functionary, or witness, and by the mere consent of the parties intermarrying evidenced in writing or by mere words. As their powers of legislation are plenary and exclusive over the subject-matter assigned to them, no limitation can be placed upon their exercise and any invasion of their jurisdiction by the Dominion Parliament under the guise of legislating upon marriages and divorce would be *ultra vires*. If apt and proper language is used in provincial legislation, making any form of solemnization or the presence of any designated person or any person of a designated class, religious or civil, essential to the validity of the solemn-

ization of a marriage and such requisite is disregarded and ignored, the marriage is *ipso facto* void and cannot be validated by the Dominion Parliament.

I construe the division of legislative powers made by our constitutional Act as carving out of the subject-matter of marriage and divorce assigned to the Dominion a distinct and essential part denominated "the solemnization of marriage." The legislative powers of the Dominion cover the subject-matter of marriage and divorce minus that part of it carved out and assigned exclusively to the provinces. The judicial rule of construction of the two sections, 91 and 92, of the "British North America Act" that the Dominion Parliament in exercising its powers of legislation under any one of the enumerated powers of section 91 may do so to the extent of invading or interfering with the subject-matters assigned to the provincial legislatures, so far as is necessarily incidental to effective legislation on the part of Parliament within the enumerated subject being legislated on, is a rule of construction necessary to the practical working out of the division of legislative powers assigned to the Dominion Parliament on the one hand and the provincial legislatures on the other. Efficient legislation could not be had if such salutary rule was not adopted. But that rule has no application, in my opinion, to the unique case we now have before us where a special subject-matter is assigned to the Dominion Parliament and a portion of that subject-matter carved out and deducted from it and specially assigned to the provinces. If the rule was applied to such a case it would defeat the very object and purpose of the division as I construe its meaning.

The conclusions above expressed seem to have been

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those of the Crown law officers of England as found in the despatch from the Secretary of State for the Colonies to the Governor-General dated the 15th January, 1870.

The questions submitted to them were whether the authority to grant marriage licenses was vested in the Governor-General of Canada and whether the power of legislating on the subject of marriage licenses was solely within the Parliament of Canada. That opinion is stated by the Secretary of State, as follows:—

> It appears to them that the power of legislating upon this subject is conferred on the provincial legislatures by 30 & 31 Vict. ch. 3, sec. 92, under the words "the solemnization of marriage in the province"; the phrase "the laws respecting the solemnization of marriages in England" occurs in the preamble of the "Marriage Act" (4 Geo. IV. ch. 76), an Act which is very largely concerned with matters relating to banns and licenses, and this is, therefore, a strong authority to shew that the same words used in the "British North America Act, 1867," were intended to have the same meaning, "Marriage and divorce," which by the 91st section of the same Act are reserved to the Parliament of the Dominion, signifying in their opinion all matters relating to the status of marriage between what persons and under what circumstances it shall be created and (if at all) destroyed. There are many reasons of convenience and sense why one law as to the status of marriage should exist throughout the Dominion which have no application as regards the uniformity of the procedure whereby that status is created or evidenced.
>
> Convenience, indeed, and reason would seem alike in favour of a difference of procedure being allowable in provinces differing so widely in external and internal circumstances as those of which the Dominion is composed and of permitting the provinces to settle their own procedure for themselves, and they are of opinion that this permission has been granted to the province by the Imperial Parliament and that the New Brunswick Legislature was competent to pass the bill in question.

For these reasons, I am of the opinion that the proposed bill, the constitutionality of which is submitted for our opinion is, upon the construction we

put upon its language, beyond the authority of the Parliament of Canada to enact.

I answer the first question in the negative.

The second question submitted to us, reads as follows:—

2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,

(*a*) between persons who are both Roman Catholics, or (*b*) between persons one of whom, only, is a Roman Catholic.

In view of the answer I have already given to the first question that the Dominion Parliament has not the power to pass the bill submitted to us as it is construed by me, and that the exclusive power to legislate on its subject-matter is by our constitutional Act assigned to the provinces, I proceed to examine the law of the Province of Quebec and I am of opinion that the answer to both parts of the second question above set out must be in the negative.

The answer depends entirely upon the construction of the legislation of the Province of Quebec as embodied in the Civil Code and its amendments. That Code was enacted by the late Province of Canada and became law before our constitutional Act was passed in 1867. The legislature of the late Province of Canada had jurisdiction over the whole subject-matter of marriage. There was no divided jurisdiction as there is now between the Dominion and the provinces. The Code, therefore, contains many provisions upon the subject-matter of marriage, such as title 5, chapter 1, of Marriage, defining "the qualities and conditions necessary for contracting marriage," and chapter 2 "of the formalities relating to the solemnization

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of marriage," and chapter 3 "of oppositions to marriage." It is necessary to bear this in mind when putting a construction upon the articles of these several chapters of the Code.

I am of the opinion that Mr. Lafleur's contention is sound, namely, that the question now being discussed can be decided by reference to the Code itself without reference to the historical aspect of the question or the state of the law antecedent to the passing of the Code and *must* be so decided without reference to previous legislation on the subject if the language of the articles which control and govern the answer to be given the question are intelligible and unambiguous.

I think the judgment of the Judicial Committee in *Robinson* v. *Canadian Pacific Railway Co.*(1) ample authority for that latter proposition. In delivering the judgment of the Board, Lord Watson says, at page 487:—

> In the course of the argument, counsel for the parties brought somewhat fully under their Lordships' notice the law of reparation applicable to cases like the present, as it existed prior to the enactment of the Code; and they discussed the question whether, and if so, how far, chapter 78 of the statute of 1859 altered or superseded the rules of the old French law. These may be interesting topics, but they are foreign to the present case, if the provisions of sect. 1056 apply to it, and are in themselves intelligible and free from ambiguity. The language used by Lord Herschell, in *Bank of England* v. *Vagliano Brothers*(2), with reference to the "Bills of Exchange Act, 1882," (45 & 46 Vict. ch. 61), has equal application to the Code of Lower Canada: "The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities." Their Lordships do not doubt that as the noble and learned Lord in the same case indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning.

(1) (1892) A.C. 481. (2) [1891] App. Cas. 145.

But an appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some such special grounds.

But apart from judicial authority, I agree that article 2613 of the Civil Code is conclusive upon the point, as express provision is therein made upon the subject-matter of the question.

While I contend that the Code itself until altered either by Parliament or the Legislature of Quebec under their respective powers is the sole arbiter of the law on the subject-matter of marriage and its solemnization irrespective of what that law was previous to it being enacted, still the subject of the antecedent law was so largely discussed at bar and the whole subject is so important that I may be pardoned if I shortly refer to this antecedent law and its gradual development.

Before and up to the time of the conquest the Roman Catholic religion was the only one tolerated in Quebec, and the priests of that church were the only ones who could solemnize marriage there.

In England, on the contrary, the Anglican Church was at the time of the conquest the only one tolerated. Its ministers and priests were the only ones who could solemnize marriage in England, and Roman Catholics were subjected to severe penalties.

Anything, therefore, in the law of Quebec at the time of the conquest which required any person not a Roman Catholic to be married before a priest of that religion or prevented any person of that religion who so desired from being married before a priest or clergyman of the Anglican Church, was so far opposed to the will of the Government of the conquering power as it had been previously expressed upon the

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subject, that it must be taken to have been abrogated by the conquest.

The capitulations of 1759 and 1760, and the provisions of the Treaty of Paris, 1763, conceded to the Roman Catholic inhabitants of Quebec the "free exercise of their religion as far as the laws of Great Britain permitted."

In 1774, eleven years after the Treaty of Paris, the Quebec Act was passed by the Imperial Parliament and it declared, section 5, that "His Majesty's subjects of the said province (Quebec) professing the religion of the Church of Rome of and in the new Province of Quebec may have, hold and enjoy the free exercise of the religion of the Church of Rome, *subject to the King's supremacy.*"

I do not doubt that under these concessions, treaty rights and statutory provisions, the priests of the Church of Rome could legally solemnize marriages between the Roman Catholic inhabitants of Quebec, but their *exclusive* power to do so was gone. The privileges and concessions made to the Roman Catholic subjects of the King as to the free exercise of their religion was what it expressed to be, a concession, a privilege, a right, granted to the people, not to the church. They involved necessarily, it seems to me, the right, amongst other things, to have the marriages of Roman Catholics solemnized by the priests of their own church, but they neither recognized nor in any way sanctioned any exclusive right which would be repugnant to the laws of the conquering nation and they were in the treaty and in the "Quebec Act" made expressly "subject to the King's supremacy."

There cannot be any doubt either in my mind that the clergy of the Anglican Church, the established

church of England, and which, it seems to me, became the established church of Quebec, retained also their power to solemnize marriage in Quebec. That power was not exclusive either. It was concurrent with the privilege involved in the grant to the Roman Catholic inhabitants of the conquered country to have their marriages solemnized by priests of their own church.

Beyond that, it does not seem to me there was any limitation upon the exclusive right which they, as the priests and clergy of the established church of England, possessed and brought with them to Canada after the conquest.

Then followed the statute of Lower Canada, 35 Geo. III., ch. 4 (1795), enacting amongst other things, that

> in each parish church of the Roman Catholic communion, and also in each of the Protestant churches or congregations within this province, there shall be kept by the rector, curate, vicar or other priest or minister doing the parochial or clerical duty thereof, two registers of the same tenor, each of which shall be reputed authentic, and shall be equally considered as legal evidence in all courts of justice, in each of which the said rector, curate, vicar or other priest or minister doing the parochial or clerical duty of such parish or such Protestant church or congregation, shall be held to enregister regularly and successively all baptisms, marriages, and burials *so soon as the same shall* have been by them performed.

The judicial construction placed upon this Act was that it extended to priests or ministers of the Anglican Church only, and did not include what were then called Protestant dissenting churches or their clergymen.

Although the statute did not expressly confer the power to marry upon the clergy required to keep the registers of baptisms, marriages and burials, it assumed the existence of such powers and was a statutory recognition of them.

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And here I may remark that at no time subsequently was express power to solemnize marriage given by statute to the priests and clergy of the Anglican church until 1861, or to the priests of the Roman Catholic Church, until the Code was passed in 1866.

In the meantime, however, Scotch and other immigrants had come to Quebec, accompanied by the clergy or ministers of their own churches. These solemnized marriages amongst their own people, and in 1804 the Legislature passed an Act confirming these marriages and adjudged them "to be good and valid" except in cases where the parties were incompetent to contract marriage with each other, without, however, conferring upon these clergy any powers to marry in the future.

In 1821, another similar confirmatory Act was passed, 1 Geo. IV. ch. 19, while in 1827 the Act of 7 Geo. IV. ch. 2, was passed, which *inter alia* enacted

> that all *marriages* which have heretofore been *or shall hereafter* be celebrated by ministers or clergymen of, or in communion with, the Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever, anything in the said Acts or in any other Act to the contrary notwithstanding.

This Act not only confirmed past marriages, but also validated

> *all marriages which should thereafter be celebrated by ministers or clergymen of or in communion with the Church of Scotland.*

There was no limitation at all with respect to the place where the marriage should be solemnized or the persons between whom these ministers should solemnize marriage, no suggestion or language from which it could be implied that the religious beliefs of both or either of the contracting parties had anything to do with the validity of the marriages solemnized.

The statute I am citing would, of course, be construed as embracing only marriages the parties to which could legally intermarry with each other.

Then followed a series of Acts conferring on the ministers of different Protestant denominations being previously licensed thereto by the governing power and authority "to have and keep registers of baptisms, marriages and burials according to the laws of the province."

The language of these statutes differed somewhat. Some of them conferred the power upon "regularly ordained" clergymen of a denomination having a permanent and fixed congregation. The power was conferred in the case of the Wesleyan Methodists

upon the Wesleyan preachers or ministers in connection with the society in Great Britain known as the Conference of the people called Methodists being previously licensed thereto by the Governor, etc.

Nothing was said about these preachers or ministers being regularly ordained or having either permanent or fixed congregations.

A great many of these statutes were passed; none of them conferred express power to marry, though it seems to have been universally accepted that the power was of necessity impliedly given. Some gave simply the power to keep registers of such baptisms, marriages and burials as might be performed or take place under the ministry of such minister, etc.

With the exception, however, of the Quakers, there was no limitation confining the marriages these clergymen celebrated to their own denomination. In the case of the Quakers, there was the limitation that one of the contracting parties should belong to that body.

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In the Consolidated Statutes of Lower Canada, 1860, ch. 20, the general Act is found, and this is a most important Act.

The first section reads as follows:—

1. In order by the keeping of uniform and authentic registers of the baptisms, marriages and burials in Lower Canada, to secure the peace of families, and to ascertain various civil rights of Her Majesty's subjects therein: In each parish church of the Roman Catholic communion, and also in each of the Protestant churches or congregations within Lower Canada to which this Act extends, there shall be kept by the priest or minister doing the parochial or clerical duty thereof, two registers of the same tenor, each of which shall be reputed authentic, and shall be legal evidence in all courts of justice,—in each of which the said priest or minister of such parish or church or congregation shall enregister regularly and successively all baptisms, marriages and burials, so soon as the same have been by him performed.

The sixth section is also important:—

6. In the entries of a marriage in the registers aforesaid, mention shall be made in words, of the day, month and year, on which the marriage was celebrated, with the names, quality or occupation and place of abode of the contracting parties, whether they are of age or minors, and whether married after publication of banns or by dispensation or license, and whether with the consent of their fathers, mothers, tutors or curators—if any they have in the country—also the names of two or more persons present at the marriage, and who, if relations of the husband and wife or either of them, shall declare on what side and in what degree they are related:

(2) Such entries shall be signed in both registers by the person celebrating the marriage, by the contracting parties, and by the said two persons, at least, — and if any of them cannot sign his or her name, mention should be made thereof in the said entries. 35 Geo. III. ch. 4, sec. 4.

It will be noticed while many facts have to be set out in the register nothing whatever is said requiring the mention of the religious faith or connections of either of the contracting parties between whom the marriage was to be solemnized and if the limitations sought to be read into the powers con-

ferred upon these clergymen were intended, surely they would have been required to state the facts on which their very jurisdiction to marry depended.

Then comes the 16th section declaring that

> all regularly ordained priests and ministers of either of the said churches (the Church of England and Ireland and the Church of Scotland) *have had and shall have authority validly to solemnize marriage in Lower Canada.*

Could language be broader or stronger? By what authority could any court read any limitation into the power so declared to exist in the clergy of the Anglican and Scottish churches beyond the necessary one that the contracting parties were persons who could lawfully intermarry?

Then comes section 17:—

> 17. This Act extends also to the several religious communities and denominations in Lower Canada, mentioned in this section, and to the priests or ministers thereof, who may validly solemnize marriage, and may obtain and keep registers under this Act, subject to the provisions of the Acts mentioned with reference to each of them respectively, and to all the requirements, penalties, and provisions of this Act, as if the said communities and denominations were named in the first section of this Act.

Then follow the names of the different religious communities and denominations, twenty-one in number.

The powers given to the clergymen of these several denominations are given subject to "the provisions of the Act mentioned with reference to each of them respectively," and if it is sought to impose any limitation upon these powers, these special Acts must be appealed to and the limitation shewn.

I have already quoted one, the Wesleyan Methodist, and have examined all the others and I fail to

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find any except that relating to the Quakers and possibly the Jews, which justifies the argument that the power to marry conferred on the several clergy of the different churches named was limited either with respect to the place where the marriage was solemnized or to the religious faith or affiliations or connections of the contracting parties.

This law continued until the Code was passed and I again repeat that unless clear and distinct language can be shewn in the Code limiting and reducing the powers which those clergy at the time of its enactment possessed under the statutes I have cited, no court can properly read such limitations and restrictions into the Code.

According to my construction of its language, article 129 C.C., confers powers as large as those which existed in the Act of 1861.

The clergy of the Anglican Church certainly did not derive their power to marry from the Act of 1861, though, as a matter of precaution, that Act expressly professed to give and declare the power.

I ask again, as I asked during the argument, where can you find any statute or law from the time of the conquest down to the passing of the Code, which in any way limited the power of the Anglican clergy to marry after licenses or publication of banns any two persons competent to intermarry on the ground of their religious faith or affiliations? If no statute impairing that power can be found then I venture to say it must be maintained unquestioned.

The same question may be put with respect to the clergy of or in communion with the Church of Scotland after the passage of the Act of 1827 conferring upon them express power to marry.

And it may also be put with respect to the clergy of the other Protestant denominations expressly mentioned in the Act of 1861 and in all these cases must receive the same answer that there exists no such statute or law.

Now what are the articles of the Code which control and govern the question we are discussing. They are, in my judgment, articles 128 and 129, and read as follows:—

128. Marriage must be solemnized openly, by a competent officer recognized by law.

129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize marriage. But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs.

There are other articles which have been invoked by counsel on both sides which are important to be considered, namely, articles 57 to 65, article 127 and articles 136 and following relating to "oppositions to marriage." But, as I have said, the two articles 128 and 129 are the controlling ones, and if they are, as I think they are, clear, intelligible and unambiguous, they are, in my opinion, conclusive of the question asked. They provide that a marriage must be solemnized openly, and by a competent officer, and that all priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are such competent officers. There is no restriction upon their powers as to the persons whom they may marry beyond the one necessarily implied that such persons must be competent to contract matrimony with each other, nor is there any restriction upon the place where the marriage may be

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solemnized, nor as to the religious views, affiliations or church connection of either or both of the parties.

But article 129 expressly enacts that none of these officers can be "compelled" to solemnize marriage to which any impediment existed according to the doctrine and belief and discipline of the church to which he belonged.

The classes declared to be competent officers to solemnize marriage, embrace, it is conceded, priests and rectors of the Roman and Anglican churches, as well as clergymen of the different Protestant denominations who were, or might be, authorized to register acts of civil status.

The question raised is whether any and what limitations can be read into this 129th article, respecting the powers conferred on these rectors, ministers and other officers authorized by law to keep registers of acts of civil status.

My desire is not to go beyond the question submitted for our opinion. It assumes the competency of the contracting parties to marry each other and invites an opinion simply as to the competency or power of a non-Roman Catholic priest or clergyman to marry or solemnize marriage in the Province of Quebec between two Roman Catholics, or between two persons one of whom is a Roman Catholic.

In my opinion the law does not render either one or other of such marriages so solemnized either illegal or null and void.

The first observation one would naturally make in reading article 129 is that on its face at any rate there is no limitation or restriction upon the competency of the officers who are authorized to solemnize marriage. Its language is as broad and general as it possibly

could be, "all priests, etc., authorized by law to keep registers of acts of civil status are competent to solemnize marriage."

Their authority is general and there is nothing which expressly or impliedly limits their power to marry those persons only who are their own parishioners or members or adherents of their own church or congregation. It extends, in a word, to all persons who, being competent to intermarry, obtain a license authorizing the priest or clergyman to marry them. The second part of the article is for the ease of the conscience of the priest or clergyman and provides that he cannot be *compelled* to solemnize a marriage as to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs.

This conscience clause, as I may call it, is a reasonable, fair and necessary one in view of the unrestricted breadth of the officer's power to marry. No one would think it right to place a priest or clergyman in a position to be compelled to celebrate a marriage which the doctrine, belief and discipline of his church forbade him to celebrate.

The insertion of such a conscience clause in the article is, therefore, in view of the unrestricted power conferred by the first part of the article upon the priest or clergyman a reasonable and proper protection for him. It confirms the view that persons competent to celebrate marriages may receive applications to be married from people of different faiths or religions, and if not prevented from doing so from conscientious reasons arising out of the rules, doctrine, or discipline of their church, such priest or

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clergyman may, under license, legally marry the persons so applying.

It also confirms the view that such officers or clergymen were not restricted in their powers to their own congregations or their own parishioners.

If their functions were restricted to the members of their own churches or to their own congregations, and if article 127 makes the rules of those churches or congregations binding upon their members, there would be no use in this conscience clause at all, because the clergyman manifestly could not be compelled to celebrate a marriage between two members of his own congregation or church the rules and discipline of which prohibited such marriage or created an impediment to its solemnization. If, on the contrary, his power to celebrate as to persons competent to marry each other by law is unrestricted, the clause was a reasonable and necessary one.

Mr. Mignault, however, contended that several limitations had to be read into the clause to make it compatible and consistent with other articles of the Code, and first he contended that not every one who can keep registers of civil status is competent to celebrate marriage, because those who register under article 70 and following religious vows or professions, are not so competent, but the answer is clear that those and those only who are authorized to keep registers of acts of civil status generally can celebrate marriage and not persons authorized merely to keep registers of limited acts such as those of religious professions.

Then, as to the necessity of the marriage being solemnized at the place of the domicile of one or other of the parties, it is sufficient to say that article 63

which begins with this general enacting declaration goes on to make provision that if solemnized elsewhere the person officiating must verify and ascertain the identity of the parties, plainly shewing that the rule was not obligatory or applicable to all cases and that if not observed the only effect would be to throw upon the person officiating the duty of verifying the identity of the parties.

Mr. Mignault took what from his standpoint was the only logical position possible with respect to the powers of solemnizing marriages possessed by non-Roman Catholic clergymen. He contended that they only had the power to marry those who were "members of the church" over which they respectively had spiritual control. Mere adherents of that church, or those who worshipped there regularly or irregularly would, therefore, if not "members of the church" be excluded from those powers. And by his contention, not only one, but both the contracting parties must be members of that church. The consequence would be that apart possibly from the Anglican Church no Protestant clergyman could marry two persons unless they were both members of the same church as that of the clergyman. If this extreme pretension prevailed, and each Protestant clergyman outside of the Anglican Church could marry only those who were "members" of his own particular church or denomination, the consequence, in view of the practice which has hitherto universally prevailed, would be somewhat appalling. Even if the limitation of the powers of the clergyman was extended beyond the "members" of his church so as to include those who were adherents and attendants regular or casual of it, the results would be startling indeed. No Baptist or

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Methodist or Presbyterian or Congregationalist could be legally married except to either a member or an adherent of his or her own denomination, and only members of the same denomination could be legally married who were domiciled or lived in the same place and were either members or adherents of that church. Not only, therefore, would this limitation prevent intermarriage between persons belonging to different denominations, but it would limit intermarriage between persons belonging to the same denomination to those who resided in the same place and were within the special limited jurisdiction of the officiating clergyman. Now, as the clergyman of those different denominations have no "parishes" or other specially limited territorial areas to which their spiritual jurisdiction is confined, it is apparent that the suggested limitation can have no foundation. It is one utterly inapplicable to these Protestant denominations and its attempted application to them would be absurd and deplorable in its results.

Many hundreds of marriages must have taken place since the passage of the Civil Code in 1866 between persons who belonged to different denominations of Protestants or between members of the same denomination who lived in different parts of the province, and every one of them would be invalid. The only good marriages would be those solemnized by a clergyman between two persons both of whom were members of his own congregation and church and were resident in the same locality. Such a result need only to be stated to be repudiated as based upon a totally erroneous construction of article 129 and as imputing to the legislature an intention almost inconceivable.

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In addition to what I have said the limited construction put upon the article 129 by Mr. Mignault would leave a large portion of the non-Roman Catholic population of Quebec without any means of being legally married at all. Thousands of immigrants are coming yearly to Quebec. Many of them are not Roman Catholics. Some belong to the Greek Church; some do not belong to any Christian church. If the construction of article 129, which Mr. Mignault is driven logically to contend for, is maintained, none of these people could be married in Quebec at all.

And yet there does not seem to be any halting place between that construction of the article contended for by Mr. Mignault, and the broad construction which I submit is the correct one, and which gives unrestricted power to every priest, rector, minister and other officer authorized by law to keep registers of acts of civil status, to solemnize marriage under license between any two contracting parties not prohibited by law from intermarrying and irrespective of their religious beliefs or connections, or their residences or domiciles. Such marriages need not necessarily be solemnized in a church or chapel of the officiating clergyman. They may be solemnized (as outside of the Roman Catholic and Anglican churches is generally the case) at a private residence or other place and this from the absence of any requirement to the contrary. Those of the Protestant churches, outside of the Anglican, have, as I have said, no defined "parishes" or areas within which alone their jurisdiction extends. The members and adherents and persons who attend their religious services and form part of their congregations do not necessarily come from any particular defined locality.

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They may reside in any part of a city or in its adjacent suburbs. Locality, therefore, as determining the jurisdiction of the clergyman to marry, must be eliminated, and either the broad construction of article 129, which in determining the power and jurisdiction of the clergyman to marry, disregards alike the domicile and the religious opinions or connections of the parties, or the narrower one which confines such jurisdiction to the members of the church of the officiating clergyman, must be adopted. As a matter of fact, I understand that all these marriages by Protestant clergymen outside the Anglican Church and a large number of those within that church also are solemnized under license and not after publication of banns. The only security which the law provides in such marriages, against the existence of legal impediments, lies in the bonds which the applicants for the license are obliged to give before obtaining it.

Objections were raised that this broad construction, placed upon article 129, precluded the invocation or application of many of the articles of the Code providing for "oppositions to marriage." These articles, it was argued, would be without any effect if such a construction prevailed and their object to prevent clandestinity defeated. The short, and to my mind, complete answer to such objections is, first, that they apply equally forcibly to marriages solemnized by Roman Catholic priests under dispensation from the publication of banns by the bishop, and, secondly, that these articles were never intended to apply to marriages solemnized under license.

Their proper application and the only application which, it seems to me, gives them any efficacy and usefulness is with respect to marriages solemnized

after publication of banns in the churches where parishes or other territorial boundaries limiting the clergyman's jurisdiction exists. Proper legal effect can be given to them and the object they were enacted to carry out, if they are held as applicable only to marriages so solemnized.

It was conceded at the argument, as I understand, that there never had been and was not now any doubt as to the validity of a marriage under license by a non-Roman Catholic clergyman, of two competent contracting persons, one of whom only was a Roman Catholic. But if that is so, if such marriages are legal and valid, then the entire force of Mr. Mignault's argument respecting the limited effect to be given to article 129, is destroyed. I am unable to appreciate the force of much of the reasoning against the validity of such marriages where both persons are Roman Catholics. I repeat again, I fail to find any logical resting place between the broad proposition that article 129 authorizes the solemnization of marriages by any of the persons mentioned in the article, between any two persons competent by law to intermarry irrespective altogether of the religious belief or affiliations or connections of either or both, and the one contended for by Mr. Mignault that the contracting parties must both be members of the church of the officiating clergyman and residents within his spiritual jurisdiction. If the non-Roman Catholic clergyman qualified to solemnize marriage under article 129, can legally do so between two persons, one of whom is a Roman Catholic, why can he not do so in the case where both parties are Roman Catholics ?

The language of the article does not, in my opinion, permit of the drawing of any such distinction.

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It would seem to me that either the argument must prevail as to the absence of any limitations upon the power of the clergyman authorized to solemnize marriage beyond the competence of the contracting parties to intermarry, or the contrary one that non-Roman Catholic clergymen can only legally solemnize marriage between two members of the church or congregation of such officiating clergyman. If the latter limitation must be read into article 129, then what becomes of the concession that marriages solemnized by or before a Protestant clergyman between two competent contracting parties, one being a Roman Catholic, are good ?

Article 127 of the Code was invoked as rendering null and void a marriage of two Roman Catholics unless solemnized by a priest of the Roman Catholic Church. But this article, in my judgment, has reference only to impediments to marriage existing in the *parties themselves* and has no reference to the competency of the officiating clergyman who solemnizes the marriage. From what I have already said, it will be apparent that in my judgment the competency of all priests and clergymen authorized by law to keep registers of Acts or civil status is unrestricted with respect to the marriage of all persons competent to intermarry irrespective of their religious faith. Once that conclusion is reached the answer to the question put to us is plain.

Article 127 must be construed, having regard to its place in the Civil Code and its context. We find the article in the chapter headed "Of the Qualities and Conditions necessary for contracting Marriage." And amongst the disabilities in that chapter enumer-

ated are, want of puberty, impotency, minority, affinity and relationship. All disabilities in the parties.

The articles in the chapter previous to article 127, deal with these disabilities. Then article 127 says:—

127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity *or from other causes*, remain subject to the rules hitherto followed in the different churches and religious communities.

These words, "or from other causes," must be confined to those within the purview and scope of that chapter, they must be qualities and conditions existing in the parties themselves and not in the clergyman who may marry them. That whole chapter deals with the competency of the *parties* contemplating matrimony and section 127 must be confined to disabilities of that class. The competency of the officer solemnizing the marriage is dealt with and defined in the succeeding chapter headed, "Of the Formalities Relating to the Solemnization of Marriage." If you construe article 127 as extending in any way to the formalities relating to the solemnization of the marriage, you introduce hopeless confusion. The chapter in which article 127 is found deals with one subject-matter, namely, disabilities in the parties themselves, which now belongs exclusively to the Dominion Parliament to deal with. That in which article 129 is found deals with the subject-matter of the solemnization of marriage, with which the provincial legislature is now alone competent to deal.

I would construe the words "other causes" following relationship or affinity not as *ejusdem generis* with these two disabilities simply, but with all the disabilities of the parties mentioned in the chapter and not as extending to any rules, regulations or decrees of any church relating to the place where the

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marriage should be solemnized or the particular priest or clergyman before whom it should be solemnized. But whatever they may cover beyond the disabilities expressly mentioned in the chapter, they cannot extend to the competency of the officiating clergyman who solemnizes the marriage. That is dealt with exclusively in the next chapter.

To put the construction upon article 127 contended for by Mr. Mignault, would not only do violence to the express language of article 129, but would, in my opinion, radically alter and change the law which up to the passing of the Code existed in Quebec as to the competency of at least Anglican and Church of Scotland clergymen to marry any two competent persons, irrespective of their religious affiliation or connections. To make such a radical change would require the use of clear and definite language which I do not find in the article invoked.

There is no half-way house or halting place between the two contentions. I adopt the broad construction of the article because I think it is a fair and reasonable construction of its language; and that such a construction has been practically adopted and followed ever since the Code was enacted.

If it is held that the language of the article is doubtful and ambiguous and we are driven to ascertain its meaning by reference to the state of the law antecedent to the Code, then as I have attempted to shew there can be no reasonable doubt on that point, and the broad construction of the article ignoring the religious faiths or affiliations of the contracting parties to the marriage must be adopted.

I, therefore, would answer both questions (*a*) and (*b*) in the negative, holding that the law of the

Province of Quebec does not render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding which takes place in such province,

(*a*) between persons who are both Roman Catholics, or
(*b*) between persons, one of whom, only, is a Roman Catholic.

Third question:—

As I have answered both parts of this second question in the negative my answer to the third question is, perhaps, unnecessary, but to avoid misunderstanding I answer it in the negative.

IDINGTON J.—The questions submitted raise many grave issues. But the conclusions I have reached are such that, though I purpose answering each question, it seems to me my expositions of reason relative thereto will be better understood by my first disposing of sub-section (*a*) of the second question.

That question is as follows:—

2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province,

(*a*) between persons who are both Roman Catholics, or,
(*b*) between persons, one of whom, only, is a Roman Catholic.

As I understand the contention set up, all who have been either in infancy or in later life baptized according to the rites of the Roman Catholic Church, fall within the definition in the question.

Men may, and women may, not find themselves honestly able to conform to the faith of those who procured their infant baptism, and yet be averse to and honestly unable to conform to the creed of another church. If the claim made be well founded they can-

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not intermarry; and neither man nor woman so situated can marry one who has conformed to the original faith of their baptism; yet it is suggested he or she so unable to conform may lawfully marry a pagan.

Though the language of the Code seems clear, and I accept the construction thereof contended for by Mr. Lafleur, I think it due to the argument, entirely founded on the law of France at the time of the conquest, put forward by Mr. Mignault, and to the need of clearing away, so far as I can, the misconceptions on which it appears to me to be founded, to deal briefly therewith.

In the articles of the Quebec capitulation, on the 18th September, 1759, the following concession appears:—

> The free exercise of the Roman religion is granted, likewise safeguards to all religious persons as well as to the Bishop, who shall be at liberty to come and exercise freely and with decency, the functions of his office, whenever he shall think proper and until the possession of Canada shall have been decided between their Britannic and Most Christian Majesties.

In the articles of the capitulation of Montreal, on the 8th September, 1760, appears the following:—

> Granted as to the free exercise of their religion; the obligation of paying the tithes to the priests will depend on the King's pleasure.

These were followed by and merged in the Treaty of Paris, 10th February, 1763.

Article 4 ends thus:—

> His Britannic Majesty on his side agrees to grant the liberty of the Catholic religion to the inhabitants of Canada; he will consequently give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Romish Church, as far as the law of Great Britain permit.

How can there be found in such clear and express language anything except the liberty assured thereby

to the inhabitants of Canada, whereby His Majesty's new Roman Catholic subjects "may profess the worship of their religion?"

The last part of the sentence is suggestive of restrictions conflicting with the pretensions set up for an extension of church power, not expressed.

How could it ever enter into the mind of any one that this language giving people individually a liberty to profess a religion, had in fact handed them over to another power or authority to prevent them from exercising the fullest liberty to depart from such profession of faith as and when and under such circumstances as they might, or any one or more of them might, desire and so far as they might desire ?

Yet, in the last analysis the claim made is of a right in some one to deprive descendants of these people, or others coming, no matter whence, into Quebec, who have been baptized by the authority of the Roman Catholic Church here or abroad, of the liberty to intermarry unless in conformity with the rites of that church. Surely that is a claim of dominion which savours not of liberty.

Mr. Mignault answers by an appeal to the general principle relative to the rights of the conquered, as is usually conceded, to enjoy until changed the old law of property and civil rights, and to the effect of the Quebec Act passed in 1774. I will first examine the general principle and such facts as we have to apply it and then return to the consideration of that Act.

The Master of the Rolls, Sir William Grant, in *The Attorney-General* v. *Stewart*(1), is reported as citing, apparently with approval, a passage from Blackstone, vol. 1, page 100.

(1) 2 Mer. 143, at p. 160.

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Lord Mansfield, in the case of *Campbell* v. *Hall* (1), (Lofft's report being preferable, by reason of the arguments in the case given therein, to the report by Cowper), lays down the law broadly

> that the laws of a conquered country continue in force until they are altered by the conqueror,

and again:—

> Neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered nation.

In 2 Peere Williams Reports, page 75 (A.D. 1722), is a note of an anonymous case wherein the Master of the Rolls said it was determined by the Lords of the Privy Council, upon an appeal to the King in Council, from the foreign plantations, amongst other things, as follows:—

> 2ndly. Where the King of England conquers a country, it is a different consideration; for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But,
>
> 3rdly. Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact anything that is *malum in se* or are silent; for in all such cases the laws of the conquering country shall prevail.

This last form of expression of the opinion of the time commends itself as the most compatible with reason on the subject now in hand. Lord Mansfield had not to deal specifically with the question of religion.

Though in that tolerant spirit, which he had, he incidentally rebukes Coke's intolerance toward conquered infidels, he did not quarrel with the definitions I have quoted, which were before him.

As regards religion, the law of the conquered

(1) Lofft's Reports 655; 1 Cowper 205.

country here in question was not silent, but, as I conceive it, absolutely repugnant to the rights of the conquerors or those they invited there.

Surely, at least that part of the laws of a conquered nation which had been directly aimed at those professing the faith of the conquerors, could not be held to prevail, for an instant, over the conquering people.

Such incompatibility as existed between the respective laws of France and of England at the time in question, in relation to religion and marriage, rendered, I submit, the continuation of the law of the former, as applicable to any but those voluntarily conforming thereto, an impossibility in a free country. It was quite compatible with reason and a proper spirit of toleration to deal with the question as it was dealt with in the Treaty of Paris. The doing so could not imply that the disabling and penal laws of France bearing upon Protestants or others not professing the Roman Catholic religion must continue to operate in Quebec or only be held partially abrogated.

The remarkable development of eighteenth century freedom of thought in both countries might indicate an indifference.

Unfortunately, whatever spirit of toleration was then in fact abroad the laws of each of these countries at that time were essentially repugnant to each other's state religion and despite the influence of learning, literature and philosophy, such laws were maintained. From this condition of things, how can we infer the recognition of the marriage laws of France as being predominant ?

The acts of the conqueror emphasize the contrary thereof.

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The Royal Proclamation of October 7th, 1763, foreshadowed

> a council and assembly of representatives of the people to make laws * * * * for the peace, welfare and good government, as near as may be agreeable to the laws of England * * * * and in the meantime, and until such assemblies can be called as aforesaid, all persons inhabiting in or resorting to our said colonies may confide in our Royal protection for the enjoyment of the benefit of the laws of our realm of England.

In the joint appendix submitted to us, the late Sir John Macdonald in his opinion relative to the power to issue marriage licenses, sets forth the following facts:—

> Express power to issue marriage licenses seems to have been given in every commission of every Governor-General of Canada, or in the instructions accompanying such commission.
>
> In the instructions addressed to the Hon. James Murray, as Captain-General and Governor-in-Chief of the Province of Quebec, dated 7th December, 1763 (the first Governor after the conquest), it is provided in the 37th paragraph, as follows:—
>
> "And to the end that the exclusive jurisdiction of the Lord Bishop of London may take place in our province, under your Government, as far as conveniently may be, we do think fit that you do give all countenance and encouragement to my exercise of the same, excepting only the collating to benefices, granting licenses for marriage and probate of wills, which we have reserved to our Governor and our Commander-in-Chief of our said province for the time being."
>
> All subsequent commissions or instructions seem to contain the same power.

If these acts of His Majesty with whom, on the high authority I have referred to, rested the power to modify the law, do not under the circumstances I have adverted to demonstrate sufficiently that the law of France in regard to marriage was thereby displaced, save what the treaty bound him to observe, I am at a loss to know what would.

We cannot forget in this regard the "Royal Supremacy Act," which, if anything were needed, would

supply the kingly authority and impliedly create a duty which presumably was observed.

The French law, so far as capacity for marriage or provision for its celebration is concerned, had thus been abrogated save so far as the liberty assured by the treaty to those professing the Roman Catholic faith.

The "Quebec Act" of 1774 set aside as of and from the 1st of May, 1775, the Royal Proclamation, the commission and ordinances made thereunder, as inapplicable under the circumstances, but by its terms "for the time being" clearly implied them as valid until said last date.

Then the following sections of said Act define the religious situation thereafter:—

5. And for the more perfect security and ease of the minds of the inhabitants of the said province, it is hereby declared that His Majesty's subjects professing the religion of the Church of Rome of and in the said Province of Quebec, may have, hold, and enjoy the free exercise of the religion of the Church of Rome, subject to the King's supremacy, declared and established by an Act made in the first year of the reign of Queen Elizabeth, over all the dominions and countries which then did, or thereafter should, belong to the Imperial Crown of this realm; and that the clergy of the said church may hold, receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion.

6. Provided, nevertheless, that it shall be lawful for His Majesty, his heirs or successors, to make such provision out of the rest of the said accustomed dues and rights, for the encouragement of the Protestant religion, and for the maintenance and support of a Protestant clergy within the said province, as he or they shall from time to time think necessary or expedient.

Section 8 enacted that all His Majesty's Canadian subjects, the religious orders and communities only excepted, might

also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all others their civil

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rights in as large and ample a manner as if said proclamation * * had not been made, and as may consist with their allegiance to His Majesty * * * and that in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada as the rule for the decision of the same * * * until varied.

Ordinances touching religion, etc., were not to be in force without His Majesty's approbation, and nothing in the said Act was to prevent His Majesty and his successors from constituting courts of criminal, civil or ecclesiastical jurisdiction.

The "customs and usages" preserved to the people in section eight are relative only to their property.

The Royal supremacy is reserved and the clergy of the Roman Catholic Church are confirmed in their accustomed dues and rights "with respect to such persons only as shall profess the said religion."

The Protestant religion is to be encouraged and the maintenance of a Protestant clergy is provided for.

I fail to understand how, in face of all this, there could ever have been anything implied that would restrict the personal liberty of any one either baptized by the rites of the Roman Catholic religion or even professing same, from being married by any legally constituted authority.

In the treaty it was liberty for those "professing the worship of their religion" that was agreed to.

In sweeping aside the proclamation, etc., it is also clearly expressed that "subjects professing the religion of the Church of Rome" may enjoy the free exercise of their religion. Nobody concerned themselves with those who had merely been baptized and later chose to resort elsewhere for marriage. How can such people be said to be professing the religion

of the Church of Rome ? How can they be heard to set up such a pretension to invalidate their own deliberate act ?

The statement above as to the instructions given the Government of Canada relative to marriage licenses shews that the rights at least of the clergy of the Church of England, authorized by the Crown in regard to marriages, never were suspended; and the facts shew were continuously asserted.

Indeed, may it not be said that a legal duty rested upon them to officiate as witnesses and otherwise so far as necessary to render a proposed marriage valid for those asking it, no matter of what faith ?

In *Davis* v. *Black*(1), Denman C.J. assumes such full right and duty.

The statute of 32 Henry VIII. ch. 38, sec. 2, cited therein says in parenthesis, after referring to marriages of lawful persons ("as by this Act we declare all persons to be lawful that be not prohibited by God's law to marry").

This Act, though repealed as to pre-contracts, is said by some one to stand so far as its declarations relate to other matters.

Others than the clergy of the Roman Catholic Church, impliedly authorized by the terms of the treaty, and of the Church of England, authorized by what I have referred to, might require express authority to solemnize marriages, and such authority was given from time to time in a great many instances.

In 1795, an Act, 35 Geo. III. ch. 4 (L.C.), was passed imposing upon the clergy the duty of keeping registers of baptisms, marriages and burials. This applied equally to the Roman Catholic priest in

(1) (1841) 1 Q.B. 900.

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charge of a parish and to the Protestant clergy doing the parochial or clerical duty of or for a parish or Protestant church or congregation, and revoked an ordinance of April, 1667, of the French King, and a declaration of the 9th April, 1736, of another French King, so far as relates to the registers there in question only.

A uniform system of such registrations and the enforcement thereof upon the clergy in question, thus constituted them all public officers, and, if it was not done before, thereby cut the connection in that regard, between the old law and the Roman Catholic clergy.

It casts no doubt on the right or duty of the Anglican clergy to perform marriage, but rather recognizes it.

From this time till the consolidation of the Lower Canada statutes, in 1860, there were a number of Acts varying in form enabling various Protestant and other churches, or those in charge, to keep the like registers.

In relation to some of those as well as justices of the peace who had performed marriages there were confirmatory Acts passed.

Then, later, as to the Church of Scotland ministers, an Act for removing doubts, 7 Geo. IV. ch. 2 (L.C.), was passed. It not only was confirmatory of past ceremonies, but empowered as to the future as follows:—

> That all marriages which have heretofore been or shall hereafter be celebrated by ministers or clergymen of, or in communion with the Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever, anything in the said Acts or in any other Act to the contrary notwithstanding.

Another church, later, gets an Act enabling its minister or his successor to obtain and keep registers

which when kept

shall have the same effect as if it had been kept by any minister in this province of the Established Church of England or Scotland.

As to the Church of England, its clergy were not, since long before the conquest of Quebec, by law restricted from marrying any persons of any creed otherwise eligible to be married. The "Lord Hardwicke Act" never extended beyond England and Wales except so far as introduced by local legislation. The parallel claimed between that Act and the Quebec Code and its relation to the Roman Catholic church there fails sadly. Under the former any one but Jews or Quakers could get married, but under the latter none can, in that church, save those in actual communion with the church.

And the Church of Scotland had by the Act just quoted such comprehensive powers conferred upon its ministers or clergymen that I cannot see any restriction therein or reason for implying any.

Although some of the other enabling Acts are not in as express language as the latter, and the power to marry rests on the implication of the enactment enabling the ministers to keep registers, yet I see no restriction in the language used implying that they cannot register therein marriages of Roman Catholics who choose to apply therefor.

The question submitted does not impose upon us the interpretation of all these Acts.

If any doubt existed before the consolidation of the statutes it seems to have been thereby removed to a very large extent.

And then article 129 of the Code is as follows:—

129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize marriage.

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But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs.

The authority to keep registers is made the basis of action, yet the conscience of him applied to is properly spared from the discharge of a duty which the doctrine or belief of his religion or discipline of his church forbids. The language used dispels all doubt.

I have carefully considered the many suggestions and arguments put forward to cut down this express language, which to my mind is as clear as it is enlightened, but I find no warrant for cutting it down.

So far from the historical argument helping to do so, it seems to effectually destroy any of the pretensions for reading into the Code what is not there.

It would be rather anomalous to find the Parliament of Old Canada sanction, either in the Consolidated Statutes of Lower Canada or the Code, amendments that would cut down the privileges that the liberality of Lower Canada had extended to the Anglican and Presbyterian churches and probably others.

Nor do I think article 127 furnishes ground for doubt.

I may observe that Mr. Mignault's argument that the statutes enabling Protestant clergymen to marry are confined in their operation to marriages between those belonging to the same faith or form of religion as the clergymen so enabled and performing the marriage ceremony, must if well founded lead to remarkable and, I venture to think, undesirable results. If it is correct, then an Anglican cannot be married in Quebec to a Presbyterian woman or *vice versa;* and so on through the whole list of those other churches

of which the ministers or clergy are enabled to perform the ceremony.

The language of those Acts does not, in my opinion save possibly in the case of the Jews and Quakers, warrant any such contention.

Indeed, if correct, what authority would a Roman Catholic priest have to solemnize marriage between a Catholic and a Protestant? It is no answer to say that by the rules of the Roman Catholic Church a dispensation can be had from the church authorities permitting such marriage. The Code, which is the law for all, treats all alike and is the basis of action and limit of authority for each and all.

The Roman Catholic Church may forbid its priests to solemnize marriage in such cases unless in the case of a proper dispensation. That is its right which no one can complain of, but when it so directs and grants a dispensation it does not thereby add to the statutory authority.

Counsel did not argue against the possibility of the marriage of a Catholic and Protestant under the law of Quebec and the sub-question (*b*) of the second question was not argued.

Not only does the Code fail to make any distinction between the powers given each of those authorized to keep registers save in the details leading up to the actual solemnization, but also the declaratory statute of the 14 & 15 Vict. (1851), ch. 175 (Canada), was evidently designed to put an end to discrimination or preference.

As to these disturbing suggestions and their bearing on past marriages, I may refer to the case of *Catterall* v. *Sweetman* (1). Dr. Lushington held that

(1) 1 Rob. Ec. R. 304, at pp. 317 and 320.

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as the Act there in question, being a New South Wales Act, much like many of the Acts of Quebec, did not expressly declare a marriage supposed to have taken place under the Act yet not attended with all the formalities prescribed in the Act, null or to be null by reason of such omissions, it could not be held null. See also *Catterall* v. *Catterall*(1).

I have no hesitation in answering the second question in both its sub-divisions in the negative.

Before proceeding to dispose of the first and third questions which I propose treating together as the answers must in the main be founded on the same reasons, I desire to call attention to the nature of the bill submitted. Its brevity may be commendable, but thereby blending too many things in one sentence is very confusing. If a marriage ceremony, as it assumes, has been "duly performed according to such laws" as it refers to, does it need ratification ? Again is the "duly performed" referred to in that phrase to be taken as relating only to the validity of the ceremony itself, notwithstanding the differences in religion, etc. ? Or is it intended to cure any and every want of capacity in the parties ? And is it intended to prevent any questions being raised anent any impediment that may have existed and which, according to the law of the place where the marriage took place, may have rendered the marriage null or voidable, although the ceremony itself may have been perfect so far as mere form is concerned ?

Again the retrospective part of the bill might from some points of view be well maintained; yet the prospective feature of it be quite untenable, and *vice versâ*.

(1) 1 Rob. Ec. R. 580.

The legislative validating of marriages which have been called in question for want of authority in the officer who had performed the ceremony or made the record thereof where ceremony was not required, or for the non-compliance with other details required by law in relation to marriage, has many precedents.

We have examples before us in the Joint Appendix filed herein containing the Acts of 44 Geo. III. (1804), ch. 2 (Lower Canada), and 1 Geo. IV. (1821), ch. 19 (Lower Canada). Each of these avoids some of the objectionable things in this bill.

If there are other existing marriages liable to be called in question for similar wants of form or by reason of any impediment, it may be that Parliament, having assigned to it the exclusive jurisdiction over the subject of marriage, has jurisdiction to declare such marriages good or to be held good. In that sense, part of the bill may be well founded.

There are, however, cogent reasons leading to the conclusion that in order to satisfactorily remedy such a state of things in Canada, concurrent legislation on the part of Parliament and of the local legislature would be the safer plan.

When a question was raised of cutting down the old number necessary to constitute a grand jury, such a course was adopted and some corporations or corporate powers are founded on concurrent legislation.

I may point out further that the bill as framed extends to foreign marriages as well as those which may be supposed to have taken place in Canada. Is it competent for Parliament or for it and a legislature combined thus to interfere ?

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It has been pointed out that the enabling Acts dealing with Jews and Quakers respectively, seem confined to cases of parties of the same faith as the officiating officer performing the marriage ceremony. In such case, clearly the concluding part of the first clause of this bill would hardly be a proper exercise of the power of Parliament unless by way of concurrent legislation such as I have suggested.

The second clause of the bill deals with the rights and duties of the married parties and of their children, the issue of such marriages, in a very sweeping manner. For aught we know, many cases may exist where all the questions involved have been tried out in a competent court and adjudicated upon long ago.

The provincial legislature, it has been said, may take one man's property and give it to another, but Parliament cannot do this except in some way incidental to its execution of a power exclusively assigned to it.

Does not this second clause go too far ?

I cannot, therefore, answer this question by a simple yes or no; nor can I segregate as sub-section (*b*) suggests, the good from the bad. The bill, if passed as it stands, might operate in the North-West Territories, of which nothing was said in argument.

I can only answer by indicating what in my opinion are the limits of the power of Parliament in this regard and leave it for those concerned to decide if any part of this bill falls within same.

The important question raised in argument and by these questions is that of the relative powers given Parliament and the provincial legislatures respecting marriage, the former being assigned the exclusive

legislative authority over "marriage and divorce" and the latter over "the solemnization of marriage."

It seems to me that in order to appreciate clearly the relation of these powers, we must assume, for argument's sake, the Dominion to have exercised all its powers and enacted a Code relative to all the substantial questions involved in marriage and divorce, and then ask ourselves what is in such case implied in the words "solemnization of marriage." Can anything be done, in way of solemnization, after due compliance with everything required or possible to be required, when the former power has been exhausted, to add to the legal strength of the tie thereby formed or change the nature of the obligations thereby incurred or the consequences to flow therefrom ?

If we found such apparently conflicting powers in any other instrument, how should be interpret them ?

At once we should seek for the plain ordinary meaning of the terms "marriage" and "the solemnization of marriage."

If we turn to the Century Dictionary, we find marriage defined, 1st, "the legal union of a man with a woman for life," etc. 2ndly. "The formal declaration or contract by which act a man and a woman join in wedlock." 3rdly. "The celebration of a marriage, a wedding." And again, "civil marriage, a marriage ceremony conducted by officers of the state, as distinguished from one solemnized by a clergyman."

If we turn to Murray, we find, amongst others, this definition, "Entrance into wedlock; the action or an act of marrying; the ceremony or procedure by which two persons are made husband and wife." And if we turn to the "Century" again for the meaning of "solemnization" we find that defined as "The Act of

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solemnizing; celebration." If we turn to the Imperial Dictionary "solemnization" is thus defined:—

> The act of solemnizing; celebration. Soon after followed the *solemnization* of the marriage. Bacon.

The title of 4 Geo. IV. ch. 76, has been referred to as justifying the giving of an extended meaning to the term "solemnization of marriage."

The Century Dictionary refers me to the Book of Common Prayer and quotes therefrom: "The day and time appointed for solemnization of matrimony."

The second section of said 4 Geo. IV. ch. 76, in terms requires the publication of banns for three Sundays preceding "the solemnization of marriage." When banns are replaced by license the latter, as well as the former, I submit, do not necessarily form a part of "the solemnization." It was quite appropriate in a plenary parliament to call such an Act one for solemnization of marriages. It is quite a different thing, when powers are or may be as here divided, to use the name of an Act to supplement the dictionary.

I submit "Lord Hardwicke's Act" also in its recital distinguishes clearly the publication of banns from the solemnization of matrimony.

If we look at any passages incidentally discussing these questions, we find solemnization refers invariably to the ceremony. And one of the best illustrations is, accidentally as it were, supplied by Pollock and Maitland in their chapter on marriage in the history of English law. At foot of page 377, in vol. 2, a case in itself well worth considering is referred to and ends thus: "They preferred the unsolemnized to the solemnized marriage." In the chapter on Marriage Laws of Scotland, in Eversley on Domestic Re-

lations, will be found examples of how other notices may be substituted for banns and the latter may be used in Scotland for a marriage to take place in England.

If we found a party given, for valuable consideration, the comprehensive power, possession or property, indeed the whole, determined to use it and to another assigned the mere right to define the form of asserting such right, of which there were many modes known, and the latter refused to apply either of those that could be satisfactorily used in the exercise of the substantial power, what would we be apt to hold in such case? Would we interpret the instrument so that the power and indeed the purpose thereof would be defeated? Or would we so hold that he attempting to defeat the whole purpose or convert it into something else, should succeed?

However that may be, this is not an ordinary instrument. It is but the outline of what was meant to found and form the government for, a great state. And as I have heretofore said, we must in the interpretation of its terms and construction of it as a whole, view it if we can as statesmen should, even if we be not such. We must summon to our aid history and especially constitutional history, and some knowledge of the social structure if we would understand aright how to harmonize the various parts when apparently conflicting, and as here by the literal meaning of the terms, even in actual conflict.

"Marriage and divorce" literally cover the whole field and leave nothing for the words "solemnization of marriage."

We know that those engaged in the formation of this frame of government had first assigned the

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whole field to the Dominion Parliament, and as an historical fact that the power assigned to the provincial legislatures as it stands was the result of representation made by those having a care for religion. We know also as a matter of history that marriage amongst the Romans, it is said even from the time of the twelve tables, might be the result of consent merely, though concurrently therewith for centuries, forms of solemnization were almost universally adopted, and as the use thereof died away mere consent became almost universally, for centuries, the common mode of constituting marriage; that by degrees as the Christian religion gained the ascendancy and its bishops greater control, the sanction of the Christian Church's solemnities was advocated, and in many places added by law or practice in various ways; yet that, outside of England, consensual marriage prevailed over western Europe till the Council of Trent, and thereafter its decrees prevailed directly in some places, indirectly in others, until in modern times men's views so changed that in France and elsewhere the law treated the matter in an entirely different way by substituting the civil officer as the witness and his records as the means of perpetuating the necessary legal evidence of that upon which so much depends.

It is common knowledge that this did not and does not satisfy the hearts and minds of vast numbers of people of Roman Catholic and Protestant churches. Even, of those who care little for the usual religious ordinances, many think the solemnities of a church marriage, or marriage by a clergyman, even if not in a church, tend to add to the strength of the bond of union by the greater sanctity of the occasion and a

degree of sentiment that the coldness of a magistrate's office is destitute of.

The wise men having in charge the formation of our Confederation, tried to satisfy this respectable feeling by inserting the power given the legislatures relative to the solemnization of marriage. It fitted in with the past and no jar was given to the state or to the feelings of any one.

But after all, what does it amount to in law ? The substantial part of the whole field or subject-matter was assigned to the Dominion. And, before going further, let us examine the language so assigning it in section 91 of the "British North America Act."

Parliament is

> 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; * * * 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 of subjects next hereinafter enumerated.

Could language more comprehensive be used to give efficiency to the power over the subjects of "marriage and divorce" which are amongst those so enumerated ? And when heed is given to the words "notwithstanding anything in this Act" can there be any doubt that, if a provincial legislature either refused or failed to furnish adequate means of solemnizing any marriage between those Parliament had declared capable of marriage, and of whom in such case it had declared that by their consent they were to be held as married to all intents and purposes, they must be in law by virtue thereof held to be married ? Can there be any doubt in such a case that Parliament would be the only power which

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could, by direct enactment or by decree of any divorce court it had constituted, dissolve such a union as might have been formed by virtue of such legislation? Or can there be any doubt of the competency of Parliament to invoke its exclusive power over the criminal law and to declare that any one so married should on marrying during the life of the other party thereto, unless the tie were dissolved by Parliament or by a divorce court of its creation, be guilty of bigamy? Or can there be any doubt that all the laws that Parliament has enacted or may enact relative to the crime of failing to support a wife or child, would be applicable in such a case?

The word "marriage" is not, as I conceive its use in this Act, to be interpreted as only such form of marriage as the laws of England had deemed marriage, or part of this country at the time of Confederation had deemed such.

It is to be taken for the measuring of the power, in the widest sense that the word can have a meaning in any civilized country, including, for example, the widest sense in which any one of the court engaged in resolving the case of *The Queen* v. *Millis*(1), would have held it to mean; or, for example, in the sense that so long prevailed over Western Europe and up to recent years in Scotland; in short, consensual marriage of any kind.

In *Beamish* v. *Beamish*(2), it was suggested, at page 353, that the ruling in *The Queen* v. *Millis*(1) had not been held to extend to the colonies and is supposed to be left open. And see the case of *McLean* v. *Cristall*(3), there cited, but not in our library. No

(1) 10 Cl. & F. 534. (2) 9 H.L. Cas. 274.
(3) Perry Oriental Cases, 75.

argument was made here, expressly on that point. It may be open to argue that such holding as in the *Millis Case*(1) is not, and that the holding by Sir William Scott in *Dalrymple* v. *Dalrymple*(2), is law in Canada unless where declared otherwise. See also *Lightbody* v. *West et al.*(3). Parliament in such case may not need to regard solemnization as necessary to constitute marriage. It is, however, not necessary to, and, in absence of argument directed thereto, I cannot press that point further than suggestion.

Even if the *Millis Case*(1) is law here, it would, I conceive, be quite competent for Parliament to enact according to the exigencies of each case. It might either enact that a consensual marriage, as indicated above, of such persons as it declared eligible, should be held valid, in cases of the default of the legislature of any province to provide for all those therein found eligible to intermarry, such suitable mode or modes of solemnization of marriage as would adequately enable them to be married; and it might also alternatively enact that such persons so consenting, pursuant to its authority, should be held to be married, upon their conformity with any one of such existing forms of solemnization of marriage as a local legislature might have, by any competent Act required, or might thereafter so require, or by such mode of civil marriage as it might provide.

It might also, if necessary, provide for cases of intermarriage in the cases of parties domiciled in different provinces.

On this head of the conditional legislation by Par-

(1) 10 Cl. & F. 534. (2) 2 Hagg. Cons. R. 54.
(3) (1902) 87 L.T. 138, at p. 141.

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liament, see the case of *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion*(1), and especially at 369, and Cooley on Constitutional Limitations, pp. 164 and 165, and notes thereto. I see strong arguments against the assumption by Parliament of dispensing with local forms of solemnization so long as reasonably provided within what I have no doubt was the original purpose.

There is not, I conceive, any difficulty in working out harmoniously the seemingly conflicting provisions so that the purpose thereof, to which I have adverted above, may meet the views and proper feelings of all, so long as the aspirations of free men are respected and not sought to be controlled by some power or authority free people are entitled to disregard.

I am not implying that there must of necessity be either in Parliament conditional legislation or concurrent legislation therein and in the legislatures. For I have no doubt that in the case of a conflict between the two powers, brought about by any legislature engrafting upon its form of solemnization something in the nature of an impediment or right to dissolve the tie of marriage believed by those concerned to have been constituted, that the power of Parliament should be held to be paramount on this subject of the complete constitution of the legal status of husband and wife.

To hold otherwise, would be to give to the power naming a mere form, the power to swallow up the substantial power given over the whole field. Indeed, that was the attitude in argument to such an extent that it seemed to be thought that to give it validity

(1) [1896] A.C. 348.

marriage must have a provincial form observed and that if the legislature of a province saw fit to attach any such condition as it chose to any form of solemnization it provided it could thereby debar those refusing to comply therewith, from marrying even if such conformity involved the impossible thing of a man honestly professing a faith he had not. It is idle to say that case has not arisen, for it is the very case that elaborate argument in effect says has arisen; indeed, is the root of the whole matter in controversy.

I need not dwell upon the desirability of precautions being taken against secret marriages or the case of those under parental or other guardianship committing youthful folly. I need not elaborate the question of clandestinity. But when we find clandestinity has been given a definition which implies that those once baptized in a certain church must conform to the marriage ceremony of that church and all the regulations thereof, as conditions to be observed preceding the ceremony, or remain unmarried, or if marrying elsewhere, that then such marriage carries in it by virtue of clandestinity an impediment invalidating it, I submit that is *ultra vires* any provincial legislature to enact.

I am glad to say I have found that Quebec never did legislate in any such way or attempt any such things.

But the claim has been made and seems to have been maintained in some cases. Whatever may be the law as to these cases under past legislation, they can be no longer valid once Parliament takes possession of the field assigned to it by the "British North America Act," respecting marriage and divorce.

Once it has exhaustively dealt with the power as-

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signed to it, then it will be clearly incompetent for any local legislature to do more than provide for or require submission to such mode of solemnization, as it sees fit. These modes cannot properly impose any religious test which honest men and women cannot accede to, nor enact any such impediment to marriage, if Parliament see fit to declare otherwise.

It might as well enact that the solemnization forms it prescribed were only to apply or be available in the case of a black-haired man marrying with a fair-haired woman, or a fair-haired man with a black-haired maiden.

Another view is presented for which much can be said. It is this, that while Parliament has the plenary power which the language of the Act is capable of, and it may be held must mean; yet it may be well within the power of the legislature to enact any reasonable mode of solemnization to be observed before the consummation of the marriage and add for default thereof such reasonable sanction in the way of penalties as may be calculated to induce the due observance thereof.

Thus effect is given to all the language used and probably the full effect intended.

It has been assumed such legislative power over solemnization implies of necessity control of all marriage licenses and, indeed, all that precedes and leads to the solemnization. I cannot agree in this. I think it is quite competent for Parliament to provide and insist upon a Dominion license for such cases as it enables a solemnization to be provided for by a provincial legislature, or such other cases as it may constitute a marriage by way of a marriage by consent; not only the idle form that the license has too often

become, but one designed to secure compliance with such set of rules for determining and declaring who, in the judgment of Parliament, can marry, and who must not. Parliament alone has the power to determine all questions relevant thereto, and can debar any provincial license from having any effect unless and until the conditions precedent which Parliament has enacted have been found to have been satisfied or complied with.

Once these Parliamentary conditions have been fulfilled, the province can impose no prohibitive barrier under pretext of providing for solemnization. I do not say that a license required by a province merely as a preliminary to solemnization, would be, as, of course, *ultra vires* a provincial legislature. I need not follow that subject further. I desire only to indicate wherein the assumption heretofore made relative to the question of marriage license as necessarily part of the "solemnization of marriage" within the "British North America Act" leads to error, indeed is, I submit, a misconception involving or resulting from confusion of thought.

In itself, I see nothing of material consequence. I do see, however, that a sanction is sought therein for what seems unwarranted ground taken to give a vitality to the doctrine of clandestinity and thereby constitute it a matter of undue importance and, indeed, an impediment.

By using in argument the accidental application thereof in the Code, counsel seemed to think it might by this means be imported into the interpretation to be given the Act I am now dealing with. We must, if we would clearly apprehend these provisions of the

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"British North America Act," lay aside the Code for a moment.

I think no foundation should be laid by an extension of the minor one of the supposed conflicting claims to create future mischief or make a source of grievance where none should exist. The utmost publicity can be secured by either Parliament or legislature without the local legislature or those resting on its authority creating an impediment and constituting a divorce court to try the question of that impediment.

It seems to me all such things as impediments of any kind and consequence thereof including the judicial power to pass thereon must rest in and be dealt with by the power of Parliament. A clear perception being had of what solemnization of marriage means, and I think it means no more, no less, than it really is, and the rest is clear and the respective spheres of legislative action are then made clear.

If the bill in question were made to cover the whole ground I have indicated as within the power of Parliament, it would assuredly enable people, so long as otherwise eligible, to marry though now possibly by local legal conditions unable to do so. It could be made thereby clear that, notwithstanding any differences in the religious faith of those so marrying and without regard to the religion of the person performing the ceremony they must be held as married.

If the bill in question, as it stands, can be read in any of its parts so as to fall within this power which I have indicated Parliament possesses then such part may be held competent for Parliament to enact.

I need not repeat my difficulties in the way of finding such part.

I assume, however, from the whole submission of the questions before us, that the root of the trouble is to be found in the religion of the parties to be married and the religion of the officer who may be appointed to perform a marriage ceremony differing from those to be married.

I have no hesitation in answering that Parliament can so effectively deal with the matter that there can be no difficulty in Roman Catholics marrying each other or a Roman Catholic and a Protestant marrying each other without resorting to a priest of the Roman Catholic church, appointed by it for the purposes of the marriage service or ceremony, to perform the ceremony of marriage; and hence can remove or dispense with any condition of things, by reason of religion, that may be now supposed in law to debar such marriages. It cannot, however, impose on the clergy of that or of any other church against the will of the church the duty of performing such ceremony.

I apprehend that this answers substantially what questions one and two are in truth aimed at.

I have already indicated how I think the retrospective part of the bill should be dealt with. I may add that in the judgment in *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion*(1), it is stated by Lord Watson that the Dominion Parliament's enactments, so far as within its competency, must override provincial legislation, but that Parliament has no authority conferred upon it to repeal

(1) [1896] A.C. 348, at p. 366.

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directly any provincial statute; and that can only be effected by a repugnancy between its provisions and the enactments of the Dominion.

On this principle the court pronounced therein against the authority of Parliament to repeal, by the "Canada Temperance Act of 1886," the old Provincial Act of 1864, and proceeded to lay down in express terms the limits of authority in this regard as follows:

> It appears to their Lordships, that neither the Parliament of Canada nor the provincial Legislatures have authority to repeal statutes which they could not directly enact.

I am not clear that this part of the bill does not infringe in principle on what is thus laid down, and must be observed in legislating.

I have assumed that though question three is put alternatively I am not entitled to take it for granted that my personal view as to question two will ultimately prevail. Until it does, I presume I am expected to answer the third question and have accordingly done so.

I may be permitted to point out that the condition of the law as existent in any province in relation to these questions of marriage and divorce continues until changed by a competent authority. But it has never, since the "British North America Act" came in force, been competent for any local legislature to change any of these things falling within the subject matter of marriage and divorce.

I may also be permitted to point out that divorce in said Act means and must cover every matter of substance or form that the word implies and is not, in my humble opinion, to be confined to the ordinary divorce bills passed by Parliament.

As to the objections strongly pressed by counsel for Quebec that we should not answer the second question, I may observe that incidentally to dealing with the like questions in a recent reference I assumed that private rights might be touched and urged all I could in the same direction as counsel do now argue as ground of refusal to answer. The Judicial Committee's judgment indicates such objections were hardly worthy of notice. If I understand their Lordships aright, the statute creates this court *pro tanto* an advisory board. They suggest the answers need not bind. But, I respectfully submit, we and the other colonial courts have been told more than once that their Lordships' judgments bind us at least and we follow them. Hence their judgment in this case must bind us and all colonial courts, notwithstanding the large powers of self government, the judgment informs us Canada is possessed of.

I admit this case involves in a two-fold way what I had conceived to be the vicious principle of interrogating judges.

It involves, I respectfully submit, the sweeping aside of the modern constitutional doctrine of separating the judicial, legislative and executive functions of government and I fear imperils private rights in a way that seems to deprive those concerned of trial by due process of law.

The answer is the statute is held by the court above as binding us, and I respectfully submit in such case the duty is clear and I have tried to discharge it, feebly it may be, but as well as I know how. I find no power given therein to remonstrate. I am not, as a Privy Councillor possibly is, entitled by con-

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stitutional law and custom to remonstrate. I have only the limits of a statute to define my duty once the statute is held as it has been not to be *ultra vires* and to be operative despite the indirect results likely to bear on private rights.

The ultimate consequences of this grave change in our mode or form of government the men of later times alone can accurately comprehend and deal with. I fear Quebec is late.

My answers, therefore, are as follows:—

As to the first question; it is an impossible bill as it stands.

If I must answer categorically, then I say as follows:—

The retrospective part would be good as part of a scheme for concurrent legislation by Parliament and Legislatures confirming past marriages which probably neither can effectively do.

The prospective part, so far as possible to make it an effective prohibition of religious tests may be good, but doubtful, and the probable purpose can be reached by a better bill.

As to the second question, I answer "No."

As to the third question, sub-section (*a*) I answer yes, to be concurred in by the respective legislatures of provinces concerned; and to sub-section (*b*) I answer yes, if and when a province fails to provide adequate means of solemnization.

DUFF J.—The first and third questions must, in my opinion, be answered in the negative. I agree generally with the reasons given by my brother Davies in support of this view, but I desire to add two observations. First, I should not wish to express any opin-

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ion upon the question of what observances in point of form were necessary or sufficient to constitute a valid marriage in the provinces other than Quebec at the date of the passing of the "British North America Act." The point has not been discussed and in the absence of argument I do not feel qualified to deal with it in a satisfactory manner. Secondly, the doctrine of necessarily incidental powers has never been defined with precision. I do not think it has reached that point of development at which it is safe or wise to attempt to formulate it definitively; and it ought, I think, to be applied only with great caution. It can have no possible application to the question before us. The union effected by the "British North America Act" was the result of a compact among the colonies thereby brought together. The Act itself, in the first two paragraphs of the preamble, expressly recognizes the federal character of the union to be created. With respect to legislative powers, some of the powers possessed by the provinces so united by the Act were assigned to the Dominion, others were specially reserved to the provinces themselves and in Lord Watson's well-known words "in so far as regards those matters which by section 92 are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act." *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (1).

It has been found in applying the Act that the

(1) [1892] A.C. 437.

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fields of legislative jurisdiction in some cases overlap. In such cases, either authority may legislate and when conflict occurs in the common territory it is settled that the Dominion legislation must prevail. But outside any such common domain, each has exclusive dominion over the field assigned to it; and the failure of a province to legislate, however capricious or unreasonable its conduct may appear, affords no ground or excuse for the invasion by the Dominion of a sphere which is wholly witheld from its jurisdiction. The remedy in such a case does not lie by way of appeal to the Dominion Parliament but rests with the body that in the last resort exercises the political sovereignty of the province itself. The special provisions of sections 93, as Mr. Smith observed, only bring into relief the rigour of the general rule.

Legislation in terms of the proposed bill and any legislation on lines suggested in the third question would, in my judgment, be legislation on the very subject of "Solemnization of Marriage" which, by section 92, is withdrawn from the general subject of marriage and assigned to the provinces exclusively, and such legislation consequently would be *ultra vires* of Parliament.

As to Question 2, which reads as follows:—

2. Does the law of the Province of Quebec render null and void unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province?

(*a*) between persons who are both Roman Catholics, or

(*b*) between persons one of whom, only, is a Roman Catholic.

Both branches of this question must, in my opinion, be answered in the negative. The question is whether, in the cases mentioned, or either of them,

the requirements of the law in respect of all other matters being duly observed, Catholic priests alone are competent to celebrate marriage. The central provisions of the Civil Code relating to this subject are found in articles 128 and 129. The first of these requires that marriage shall be solemnized openly, and by a competent officer recognized by law.

Article 129 is in the following words:—

129. All priests, rectors, ministers and other officers, authorized by law to keep registers of acts of Civil Status, are competent to solemnize marriage.

But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs.

By chapter 20 of the Consolidated Statutes of Lower Canada, 1860, which was in force at the time the Code became law, the priests and ministers of the Protestant churches or congregations mentioned in sections 16 and 17 of the Act were authorized to keep registers of acts of Civil Status, that is to say, of baptisms, marriages and burials. By the express terms of article 129, therefore, all such priests and ministers are, in respect of the solemnization of marriage, competent officers "recognized by law" within the meaning of article 128. In the case of marriages by the Roman Catholic clergy the marriage must in the absence of a dispensation by the proper authority, be preceded by the publication of banns as required by articles 57, 58 and 130. Protestant ministers are, however, authorized by the provisions of articles 59 and 59(*a*) to solemnize marriage in the absence of banns, where the parties "have obtained and produce" a marriage license under the hand and seal of the Lieutenant-Governor. It is my opinion that ex-

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cept in cases in which there is some specific statutory restriction, a Protestant minister, competent to celebrate marriage by reason of being authorized to keep a register of acts of civil status has, when acting pursuant to such a license, authority to solemnize matrimony between any two persons lawfully capable of contracting marriage together, and that his authority is not in any way restricted by reason of the religious faith or the ecclesiastical affiliations of such persons.

Mr. Mignault's first and principal contention is a general one and it is this: although, he says, according to the words of article 129 read literally, such a minister is competent to celebrate marriage between any two parties capable under the law of entering into that relation with one another, nevertheless, reading that article in connection with other provisions of the Code dealing with the subject and by the light of the history of the law, it must be construed as conferring only a limited authority; and that authority so limited is to solemnize marriage between persons who are, or one of whom is, a member of the communion to which the officiating minister belongs and domiciled in the parish of which he is in charge where that communion has connected with it a parochial system, or between persons who are or one of whom is a member of the communion and of the congregation to which he ministers where there is no such system.

According to this view, a Presbyterian clergyman is incompetent to marry two unbelievers or two Anglicans; and the view it is admitted if accepted must necessarily involve the conclusion that the law of Quebec makes no provision for the marriage of per-

sons who are not connected with any of the religious persuasions whose ministers are specifically authorized by a statute to keep registers of acts of Civil Status. One cannot, of course, bring oneself to adopt a construction having such consequences without examining very critically the reasoning upon which it is based; and it may be observed that we are asked, in adopting it, to refuse to give effect to the words of the articles quoted according to their ordinary meaning, and to arrive at this most extraordinary result by discovering in the law a restriction which the authors of it have left unexpressed. The main argument by which this interpretation is supported, may be stated in this way. It is said that according to the law in force at the time the Civil Code came into effect the jurisdiction of priests and ministers in respect of the solemnization of marriage was limited to persons who were members or one of whom was a member of their respective churches and congregations. It is argued that on this subject of marriage the provisions of the Code were intended to be declaratory of the law as it then existed and that it is only by construing it in the manner now proposed that full effect can be given to its various provisions on this subject.

A brief reference to the history of the law upon the points in controversy is therefore necessary.

The provisions of the law relating to the solemnization of marriage in force in Quebec, at the date of the cession (1763) in so far as we are concerned with them are stated by Pothier (Bugnet's Edition) 6th vol., articles 349, 354 to 360. It was essential to the validity of a marriage that it should be celebrated

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"in facie ecclesiæ" and, in the absence of a dispensation, only after the publication of banns; and the general rule was that the ceremony must be performed by the "proper curé" of the parties; that is to say, by the curé of the parish in which one of the parties was domiciled. It was, however, competent to the bishop, or to a curé acting with the permission of the bishop or with the permission of the "proper curé" of the parties, to perform the ceremony. The law further required the officiating priest to record in an official register a statement of the particulars of each marriage solemnized by him, which was signed by him, by the parties to the marriage, and by at least two witnesses of the ceremony. Under the French Régime the public exercise of the Protestant religion was not tolerated by the law of Canada, and, consequently, the curé within the meaning of this law was necessarily a Roman Catholic priest. The change of sovereignty, which took place in 1763, naturally brought in its train substantial modifications. The conquest was followed by the influx of a considerable Protestant population, coming in part from the United Kingdom and in part from the British colonies to the south. Steps were immediately taken by the Imperial Government (as appears from the Instructions to Governors in 1763, 1768, 1775, and 1786; see Shortt and Doughty, pp. 139, 140, 141, 217, 218, 425-427, 556-559) for the introduction of a beneficed Protestant clergy under the patronage of the Crown and subject to the ecclesiastical jurisdiction of the Bishop of London; and later under the sanction of the "Quebec Act," 1774, and the "Constitutional Act," 1791, and other Imperial legislation, provision was made for their support out of the pub-

lic funds of the colony. It was from the outset assumed that these clergy were competent to solemnize marriage, and it is admitted that from the first, marriages were in fact solemnized by them. No express statutory authority in this behalf was conferred upon the clergymen of the Church of England until 1861; but during the century which had then elapsed since the conquest, various Acts of the Canadian legislatures had conferred authority to celebrate marriage upon the ministers of other Protestant denominations, and these and other statutes shew that the competency of the Anglican clergy in this respect had always been assumed by the legislative authorities; and there can be, I think, no possible question (apart altogether from the implications arising from the change in the sovereignty itself) that a grant of such authority was involved in the provisions to which I have referred, which are found first in the royal instructions to the governors, and afterwards in the Imperial legislation.

From the date of the cession down to the passing of the Quebec Act in 1774, "such laws were in force" (to use the words of Baron Parke, speaking for the Judicial Committee in *Beaumont* v. *Barrett*(1)), "as the King, by his supreme authority, may choose to direct," subject always, of course, to the provisions of the Treaty of Paris, which the King had no constitutional authority to violate. Chitty, Prerogatives, p. 29. There seems to be no reason to doubt that an effective "direction" in this regard might be given, by commission or by instructions under the King's sign manual, as well as by order-in-council:

(1) 1 Moo. P.C. 59, at p. 75.

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Cameron v. *Kyte*(1). The Instructions which accompanied General Murray's Commission contain a sufficient declaration that the royal supremacy in matters ecclesiastical extends to Quebec, and this necessarily involved such alterations in the existing law as might be required to confer on the clergyman appointed to benefices under the authority of the Crown the jurisdiction to solemnize marriages. This jurisdiction was confirmed by the "Quebec Act" which expressly recognizes the royal supremacy as declared by 1 Elizabeth ch. 1.

The contention made by Mr. Mignault is that all grants of authority to marry, made since the cession, whether by express statutory enactment or otherwise, were subject to the condition that one at least of the intended consorts should be a member of the communion and congregation of the minister performing the ceremony. Whether the competence of these ministers in this regard was so limited is altogether a question of the intention of the law making competence. I think there is overwhelming evidence against the existence of an intention so to limit their authority except in those few cases (I think there is only one) in which the restriction is expressly declared.

First, as to the Church of England. In the Instructions to the Governors already referred to, we find repeatedly expressed intentions with regard to the status of the Anglican Church in Canada and with regard to cognate matters, which appear to be incompatible with the view that at that time any idea was entertained of placing any restriction upon the

(1) 3 Knapp 332, at p. 346.

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jurisdiction of its clergymen in respect of the celebration of marriage. (See Shortt and Doughty at the pages already referred to.) In 1795, an Act was passed (35 Geo. III. ch. 4) requiring the Protestant clergy in charge of parishes, churches and congregations to register in official registers to be kept by them "all baptisms, marriages and burials as soon as the same shall have been by them performed." (Section 1). There is in this statute no express declaration touching the legal competency to celebrate matrimony of the clergy to whom the Act was intended to apply; their competency in that respect is assumed. There can be no doubt that the Act applied to all clergymen of the Church of England in charge of parishes, churches and congregations; and what is noteworthy for our present purpose is that the Act contains no hint of any limitation upon the authority of the ministers affected by it in respect of the classes of persons who might contract marriage under their ministry. The language of the Act of 1860, ch. 20, Consolidated Statutes of Lower Canada, section 16, is absolutely unqualified.

All regularly ordained priests and ministers of either of the said churches

(meaning churches and congregations in communion with the United Church of England and Ireland or with the Church of Scotland)

have had and shall have authority validly to solemnize marriage in Lower Canada.

The case of the Church of Scotland is equally clear. An Act passed in 1827, 7 Geo. IV. ch. 2, enacts

that all marriages which have heretofore been or shall hereafter be celebrated by ministers or clergymen of or in communion with the

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Church of Scotland, have been and shall be held to be legal and valid to all intents and purposes whatsoever;

and this sweeping declaration is in substance repeated in the provision above quoted from the Act of 1860. With respect to other Protestant denominations, a series of statutes was passed during the period that elapsed between 1829 and 1861, authorizing the ministers of various denominations and communions in charge of churches or congregations to keep registers of baptisms, marriages and burials. In some cases, the authority to solemnize marriage is given expressly; in others, it is given by implication. In one case only, in the Act relating to the Society of Friends, the enabling provisions of the Act are limited in their application to marriages between persons one of whom is a member of the communion according to whose usages the ceremony is to be performed. An intention to create a similar restriction is indicated, although not very clearly expressed, in the Act of 9 & 10 Edw. IV. ch. 75, which relates to persons who profess the Jewish religion. There may be, although our attention has not been called to them, other special cases in which similar restrictions are imposed by special statutes. The existence of such isolated instances is not material to my present purpose, which is to point out that the legislative enactments dealing with this subject of solemnization of marriage by Protestant clergymen and ministers, before the Code came into force, are expressed in such terms as to negative the theory that, as a rule, the authority of such clergymen and ministers in respect of that subject was intended to be or was regarded as affected by any restriction such as that now contended for.

The alteration effected in the law of marriage, as it stood at the time of the cession, by this recognition of the competence of all Protestant ministers to celebrate marriages was fundamental. The law in force under the French Régime pre-supposed two things; a single church in union with the State, and a complete, or at all events, a very extensive parochial system. Given these two things, the application of the law was simple and certain; but to marriages celebrated by the ministers of Protestant denominations, having no parochial organization connected with them, some important requirements of that law became impossible of application. The rule, for example, which in effect limited the jurisdiction of the curé of a given parish to the solemnization of marriage between persons, one of whom was domiciled within his parish, is a rule which utterly fails of application to the matrimonial jurisdiction of the minister of a Protestant church or congregation whose jurisdiction in that behalf has no relation whatsoever to a defined territory or to the connection of the parties with his particular faith or communion.

The theory of the older law, namely, that there is one curé who, for the purposes of celebrating marriage, is the "proper curé" of the parties (or at most two, one of whom is their "proper curé") necessarily falls to the ground where marriages by such an officer are in question. For this reason, I am unable to agree with Mr. Mignault's argument that article 63 of the Civil Code, read together with the provisions of the law relating to oppositions, requires us to hold that the law of Quebec, as it stands to-day, is framed upon the assumption that, with regard to any two intended consorts about to be married in that province,

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there is one person who is solely qualified, or a fixed, limited and ascertained number of persons who are exclusively qualified, to celebrate marriage between them. So to hold would, in my judgment, be tantamount to disregarding the course of legislation on this subject during the century succeeding the conquest.

This view of the powers of the Protestant clergy derived from these various sources is confirmed by the law and practice relating to marriage licenses. It is not disputed that the practice of solemnizing marriages without the publication of banns, and in disregard of any supposed requirement that marriage should be celebrated *in facie ecclesiæ,* under the authority of a license granted by the Crown, became at an early date a general practice among Protestant ministers. Prior to the year 1871 there appears to have been no statutory enactment expressly authorizing the granting of such licenses in Quebec; the granting of them was considered to be a proper exercise of the royal prerogative and the practice received statutory recognition in various enactments,—for example, 35 Geo. III. ch. 4, sec. 4 (which was reproduced in the Consolidated Statutes of Lower Canada, 1860, ch. 20, sec. 6) and article 59 of the Civil Code. Provision was made by ch. 4 of the Consolidated Statutes of Lower Canada, 1860, sec. 1, for the application of the fund derived from these licenses in liquidation of the "Rebellion Losses" debentures, and no doubt appears to have been entertained at any time as to the validity of them or as to their sufficiency in point of law to legitimize marriages solemnized with publication of banns at any time or place when acted upon by a Protestant minister in charge of a church or congregation of any of the various communions where ministers were in-

vested with a general authority to keep registers of acts of Civil Status.

This view is clearly correct. At common law authority in respect of marriage licenses was vested in the King as an incident of the royal supremacy in matters ecclesiastical.

Such licenses, of course, were not confined to dispensations from the publication of banns. Licenses were granted for the solemnization of marriage at any convenient time and place, (Halsbury, Laws of England, "Ecclesiastical Law," par 1388, note (*h*)); and dispensation from observance of the requirement that the marriage should take place *in facie ecclesiæ* was one of the normal objects of a marriage license. The statute of Henry VIII. (25 Hen. VIII. ch. 21), vested a right to grant such dispensations in the Archbishop of Canterbury, but the statute left the Royal Prerogative unimpaired. Chitty, Prerogatives, p. 53. The effect of the Commission and Instructions to the Governors of Quebec between the Treaty of Paris and the "Quebec Act" was, to vest in the Governors the legal authority and possibly even the sole legal authority, (see paragraph 32, Instructions 7th Dec. 1763), to exercise this dispensing power in the colony. The existing law of Quebec was to that extent amended through the exercise of the legislative authority of the Crown as evidenced by the Royal Instructions. The Quebec Act, in recognizing the royal supremacy, recognized the existence of this incident of the Prerogative as part of the law of Quebec, and licenses for the solemnization of marriage without banns, and at any time and place, continued to be issued under the authority of the Governor in professed exercise of the Prerogative down to the enactment of the Civil Code in 1866.

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In granting these licenses the Governors acted under the authority of these Instructions. (Paragraph 37 of the "Instructions to Governor Murray" of 7th December, 1763, is the typical provision.) The following interesting observations are taken from an article by the late Mr. Justice Girouard in 3 Revue Critique, p. 282:—

> La licence n'est pas seulement une dispense de la publication des bans; c'est encore un ordre, un décrêt à tout ministre protestant de marier les parties qui y sont désignées, sans bans, à l'endroit et à l'heure qu'il leur plaira, pourvu qu'il n'y ait pas d'empêchement. Jusqu'à ces dernières années, elle émanait uniquement du Bureau des Prérogatives, *Prerogative Office*, au nom du Gouverneur-Général du Canada, et elle était expédiée par des agents, répandus dans toutes les parties du pays, qui signaient comme *Deputy-Governors*. Dans la pratique, ces licences étaient signées en blanc par le *député gouverneur*, et remises à une foule de gens qui les remplissaient et les vendaient. En voici la formule textuelle:—
>
> "To any Protestant minister of the Gospel. — Whereas there is a mutual purpose of marriage between ———— for which they have desired my license and given bond, upon condition that there is no lawful let or impediment, pre-contract, affinity or consanguinity, to hinder their being joined in the holy bonds of matrimony; these are therefore to authorize and empower you to join the said ———— in the holy bonds of matrimony, and them to pronounce man and wife."
>
> Avant le code, il n'y avait aucune loi dans le pays qui autorisait l'émission de ces licences; néanmoins, le droit n'en a jamais été nié à la couronne, dont il est, paraît-il, une des prérogatives; et c'est parce qu'il est un droit de prérogative royale qu'il existe dans ce pays, sans y avoir été introduit par une législation spéciale.

In 1871 an Act was passed by the Legislature of Quebec (now reproduced in articles 1494 to 1499 of the Revised Statutes of Quebec (1909)), providing that such licenses should be furnished to all persons requiring them who should previously have given a bond in the form prescribed by the statute. The bond is conditioned upon there being no

> lawful let or impediment, pre-contract, affinity or consanguinity, to hinder their being joined in Holy Matrimony and afterwards their living together as man and wife.

In other words, all parties capable of intermarrying are entitled to obtain a license authorizing the marriage of them by any competent Protestant minister without reference to the place of residence or the religious creed of either of them. This seems hardly consistent with the view that, as a rule, the competence of Protestant ministers in respect of the solemnization of marriage is subject to restrictions with reference either to the domicile or to the religious faith of the parties; and, of course, the practice established by this system of granting marriage licenses to all persons competent to intermarry was, and was intended to be, utterly subversive not merely of the letter, but of the principle of the older law by which, as a rule, marriage must be celebrated, *in facie ecclesiæ,* and by the incumbent of the parish of one of the parties.

I think, therefore, that the proposed construction of article 129 cannot be supported. It was freely admitted by Mr. Mignault (and with him I agree) that assuming his construction of that article to be rejected, an affirmative answer to this question if supported at all could only be justified on one of the two following grounds:—

The first of these grounds is that the effect of article 127 is to incapacitate Roman Catholics from contracting a valid marriage in the absence of a Roman Catholic priest.

That article reads as follows:—

127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes remain subject to the rules hitherto followed in the different churches and religious communities.

The right, likewise, of granting dispensations from such impediments appertains as heretofore, to those who have hitherto enjoyed it.

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It is asserted, and it is not disputed, that in the eye of the Roman Catholic Church, clandestinity is an impediment; but the question is, is it an impediment within the meaning of this article? I desire to refrain from saying anything as to the effect of the article upon a marriage affected by an impediment within the meaning of it. For the purposes of this opinion, all that it is necessary for me to say is this: article 127 is grouped with other articles in a chapter which professes to deal with impediments arising out of some personal disability which incapacitates two given persons from intermarrying, that is to say, which disqualifies them from intermarrying under the ministry of a clergyman who, if it were not for such disability, would be competent to validly solemnize matrimony between them. That chapter is followed by another which deals with a different subject, namely, the formalities connected with marriage; and in this latter chapter the qualifications of those persons who are competent to celebrate marriage are dealt with. The impediment that, according to the discipline of the Roman Catholic Church, arises out of the absence from the ceremony of a priest of that church is not an impediment arising from incapacity in the parties themselves in the sense of the chapter in which this article occurs; it is, on the other hand, a matter of the class dealt with in the chapter following. It is, therefore, a matter which (in accordance with the scheme of classification adopted by the authors of the Code) would rather fall to be dealt with in the second than in the first chapter. It appears, consequently, to be opposed to principle to construe the general phrase "other causes" found in article 127 as embracing such an objection as we are considering.

This view of article 127 is borne out by a reference to the passage in the codifiers' report referring to this article. That passage leaves little doubt upon one's mind that in framing the article the codifiers had no thought of an objection of the kind referred to in this question. The following is the passage which is on page 179 of the first report of the Commissioners:—

> There are, in the collateral line, as resulting from relationship and affinity, other impediments which are not of a general character, but applicable only to members of churches or religious congregations, which admit them, as forming part of their dogmas or belief; such is the relationship, in the degree of cousins-german and other more distant degrees, in which marriage is forbidden, according to doctrine of the Roman Catholic Church, although not according to that of Protestant churches.
>
> As that species of impediment could not be governed by general provisions, it became necessary to leave it subject to the rules followed up to the present time by the different churches which recognize it.
>
> It was necessary, at the same time, to leave to the authorities, entitled to grant dispensations from such impediments, the power to do so for the future.
>
> These two objects are provided for by article 11*a*, which is new.

The last point made by Mr. Mignault is this: Roman Catholics, he says, are in a special position by reason of the provisions of the Treaty of Paris, and because of that special position ought to be held to be excluded from the jurisdiction of Protestant clergymen in respect of marriage in the absence of some express provision of the law bringing them within that jurisdiction. It is said that by the provisions of that treaty a guarantee was given to the Roman Catholic Church that the exclusive authority which the clergy of that church enjoyed under the French régime to celebrate marriages between per-

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sons who had been received into its communion should be maintained. I cannot agree with this view.

The Instructions to the Governors to which I have already referred, and other contemporary documents as well as the "Quebec Act" itself, shew conclusively that the view taken by those who were charged with the duty of giving effect to the treaty rights was that the "liberty" conserved by the treaty, whatever its extent, was guaranteed to "His Majesty's new subjects" as individuals; and that there was no undertaking to maintain the corporate authority and jurisdiction asserted by the Church as such. These documents afford a *contemporanea expositio* which cannot be ignored; and the construction they suggest appears to accord with the natural reading of the words of the Treaty of Paris themselves.

Some passages in the documents may perhaps be usefully quoted. In a letter dated 13th August, 1763, from Lord Egremont, the Secretary of State, to Mr. Murray, apprising him of his appointment as Governor, the following account is given of the negotiations relating to the 4th article of the Treaty of Paris:—

> For tho' the King has, in the 4th article of the Definitive Treaty, *agreed to grant the Liberty of the Catholick Religion to the Inhabitants of Canada;* and though His Majesty is far from entertaining the most distant thought of restraining *His new Roman Catholick Subjects from professing the Worship of their Religion according to the Rites of the Romish Church*: Yet the conditions, expressed in the same Article, must always be remembered, viz.: *As far as the Laws of Great Britain permit,* which laws prohibit absolutely all Popish Hierarchy in any of the dominions belonging to the Crown of Great Britain, and can only admit of a Toleration of the Exercise of that Religion; This matter was clearly understood in the Negotiation of the Definitive Treaty; the French Ministers proposed to insert the words, *comme ci-devant,* in order that the Romish Religion should continue to be exercised in the same manner as under their Government; and they did not give up the Point, till

they were plainly told that it would be deceiving them to admit those Words, for The King had not the Power to tolerate that Religion in any other Manner, than *as far as the Laws of Great Britain permit.* (Shortt and Doughty, p. 123.)

The 32nd paragraph of the Instructions, dated Dec. 7th, 1763, is in these words:—

You are not to admit any ecclesiastical jurisdiction of the See of Rome or any other foreign ecclesiastical jurisdiction whatsoever. in the province under your government. (Shortt and Doughty, p. 139.)

This is repeated in the Instructions to Sir Guy Carleton, in 1768, in paragraph 31, and continued in the Instructions to the Governors as late at least as 1786, (Shortt and Doughty, p. 217).

The Instructions to Sir Guy Carleton, of 1775, contain more elaborate prohibitions against the exercise of any ecclesiastical jurisdiction incompatible with the royal supremacy (which, in the meantime had been expressly recognized by the "Quebec Act") in paragraphs 20 and 21. (Shortt and Doughty, pp. 425, 426, 427). The 2nd clause of the first of these paragraphs is in the following words:—

Secondly, That no Episcopal or Vicarial Powers be exercised within Our said Province by any Person professing the Religion of the Church of Rome, but such only, as are essentially and indispensably necessary to the free exercise of the Romish Religion; and in those cases not without a License and Permission from you under the Seal of Our said Province, for, and during Our Will and Pleasure, and under such other limitations and restrictions as may correspond with the spirit and provision of the Act of Parliament, "for making more effectual provision for the Government of the Province of Quebec;" And no person whatever is to have holy orders conferred upon him, or to have the Cure of Souls without a License for that purpose first had or obtained from you.

And in the 8th clause there is this:—

That such ecclesiasticks as may think fit to enter into the Holy State of Matrimony shall be released from all penalties to which they may have been subjected in such cases by any authority of the See of Rome.

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These clauses are reproduced in the Instructions to Lord Dorchester, of the year 1786. These provisions were not the result of inadvertence; they were passed only after the most careful consideration of all questions of right as well as of policy involved, including of course, as of primary importance, the meaning and effect of the treaty stipulation now relied upon. The following passage from the Report of Sir Alexander Wedderburn, December 6th, 1772 (see Shortt and Doughty, pp. 298 and 299), indicates the principles upon which the Government proceeded in framing the provisions on this subject in the Quebec Act as well as the Instructions of January, 1775:—

> The religion of Canada is a very important part of its political constitution. The 4th article of the Treaty of Paris, grants the liberty of the Catholic religion to the inhabitants of Canada, and provides that His Britannic Majesty should give orders that the Catholic subjects may profess the worship of their religion according to the rites of the Romish Church, as far as the laws of England will permit. This qualification renders the article of so little effect, from the severity with which (though seldom exerted) the laws of England are armed against the exercise of the Romish religion, that the Canadian must depend more upon the benignity and the wisdom of Your Majesty's Government for the protection of his religious rights than upon the provisions of the treaty, and it may be considered as an open question what decree of indulgence true policy will permit to the Catholic subject.
>
> The safety of the State can be the only just motive for imposing any restraint upon men on account of their religious tenets. The principle is just, but it has seldom been justly applied; for experience demonstrates that the public safety has been often endangered by those restraints, and there is no instance of any State that has been overturned by toleration. True policy dictates then that the inhabitants of Canada should be permitted freely to profess the worship of their religion; and it follows, of course, that the ministers of that worship should be protected and a maintenance secured for them.
>
> Beyond this the people of Canada have no claim in regard to their religion, either upon the justice or the humanity of the Crown; and every part of the temporal establishment of the church in Canada, inconsistent with the sovereignty of the King, or the

political government established in the province may justly be abolished.

The exercise of any ecclesiastical jurisdiction under powers derived from the See of Rome is not only contrary to the positive laws of England but is contrary to the principles of government, for it is an invasion of the sovereignty of the King, whose supremacy must extend over all his dominions, nor can His Majesty by any act divest himself of it.

* * * * *

The point then, to which all regulations on the head of religion ought to be directed, is to secure the people the exercise of their worship, and to the Crown a due controul over the clergy.

The first requires that there should be a declaration that all the subjects in Canada may freely profess their religion without being disturbed in the exercise of the same, or subject to any penalties on account thereof, and also that there should be a proper establishment of parochial clergymen to perform the offices of religion.

The present situation of the clergy in Canada, is very fortunate for establishing the power of the Crown over the church. It is stated, in the reports from your Majesty's officers in Canada, that very few have a fixed right in their benefices, but that they are generally kept in a state of dependence, which they dislike, upon the person who takes upon him to act as bishop, who, to preserve his own authority, only appoints temporary vicars to officiate in the several benefices.

It would be proper, therefore, to give the parochial clergy a legal right to their benefices. All presentations either belonging to lay pastors or to the Crown, and the right in both ought to be immediately exercised with due regard to the inclinations of the parishioners in the appointment of a priest. The Governor's license should in every case be the title to the benefice, and the judgment of the temporal courts the only mode of taking it away. This regulation would, in the present moment, attach the parochial clergy to the interests of Government, exclude those of foreign priests, who are now preferred to the Canadians, and retain the clergy in a proper dependence on the Crown. It is necessary, in order to keep up a succession of priests, that there should be some person appointed whose religious character enables him to confer orders, and also to give dispensations for marriages; but this function should not extend to the exercise of a jurisdiction over the people or the clergy; and it might be no difficult matter to make up to him, for the loss of his authority, by emoluments held at the pleasure of the Government.

The maintenance of the clergy of Canada was provided for by the payment of one-thirteenth part of the fruits of the earth in the

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name of tythe, and this payment was enforced by the Spiritual Court. It is just that the same provision should continue, and that a remedy for the recovery of it should be given in the temporal courts; but the case may happen that the land-owner is a Protestant, and it may be doubted whether it would be fit to oblige him to pay tythes to a Catholic priest.

The design was, while allowing the fullest liberty of worship according to the rites of the Church of Rome, to preserve scrupulously the Prerogative of the Sovereign as the head of the Church. This object was strictly observed in the "Quebec Act." The provisions contained in the existing Commission and Instructions were abrogated as from May 1st, 1775, and it was provided that in all matters of controversy relating to property and civil rights resort should be had to the laws of Canada. But the King's supremacy in ecclesiastical matters was also expressly declared, a declaration involving (it may be observed in passing), this consequence, that in such a matter as marriage in which civil rights under the law of Canada had their birth in the exercise of ecclesiastical jurisdiction, the King became the fountain of jurisdiction. This view of the effect of the Act was strictly adhered to in the framing of the Instructions to Governors down, at all events, to the date of the "Constitutional Act." And, indeed, three-quarters of a century after the conquest (as late as the year 1842), the authority of the Crown as head of the Church appears to have been invoked at the instance of the Roman Catholic Bishop of Montreal in respect of the establishment of a Roman Catholic Metropolitan See in British North America. On that occasion the following opinion was given by Sir Frederick Pollock and Sir William Webb Follett (a lawyer second to none of the great lawyers of his time) :—

Sir,—We have the honour to acknowledge the receipt of your letter dated the 16th of October last, stating that the Reverend M. Power having been deputed by the Roman Catholic Bishop of Montreal to submit for the approval of Her Majesty's Government a proposition for dividing the Diocese of Kingston into two distinct sees, and for "the formation of an ecclesiastical province to be composed of all the British North American provinces under one Archbishop or one Metropolitan See;" and further stating, that you had received Lord Stanley's directions to state that, as preliminary to advising Her Majesty as to the course which it might be expedient to take in respect to this application, His Lordship would wish us to report to him our opinion whether, adverting to the "Act of Supremacy," and any other Acts of Parliament relating to the exercise within the Queen's dominions of the religion of the Church of Rome, and also adverting to the terms of the capitulations of Quebec and Montreal, in 1759 and 1760, and to the statutes 14 Geo. III. ch. 83; 31 Geo. III. ch. 31, and 3 & 4 Vict. ch. 35, any authority is vested in the Queen to regulate, or in any manner interfere with, the appointment of Roman Catholic bishops or archbishops in Canada, or to determine what the number or what the character of the ecclesiastical functionaries of the Roman Catholic Church in that province shall be ?

In obedience to his Lordship's commands, we have considered the subject referred to us with great care, and beg leave humbly to report that we think, under the terms of the Treaty of Paris of 1763, and of the statute 14 Geo. III. ch. 53, sec. 5, and with reference to the provisions of the statute of 1 Elizabeth, Her Majesty has an authority vested in her to interfere with, and to make regulations respecting, the appointment of Roman Catholic bishops and archbishops in Canada; and with respect to the particular proposal which is mentioned in the letter, we think that the consent of the Crown is properly asked for, and that it may be lawfully given to, the division of the Diocese of Kingston into two sees, if Her Majesty, in her discretion, shall think fit to do so. (Forsyth "Cases and Opinions on Constitutional Law," p. 51.)

* * * * * *

At the date when this opinion was given the Crown no doubt would have abstained from interference in the affairs of the Roman Catholic Church except at the instance of the authorities of that Church themselves. With the progress of modern ideas it may be assumed that, in 1842, English statesmen had learned the wisdom of leaving to each church not only the care of the spiritual welfare of its adherents, but the

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regulation of all matters strictly pertaining to ecclesiastical jurisdiction as well. These documents, however, to which I have referred, shew how repugnant the present proposed construction of the treaty would have been to the ideas of the generation of English statesmen and lawyers who were responsible for carrying its provisions into effect. By the light of history, the argument that in the 4th article the Crown gave bonds to the Hierarchy of the Church of Rome to maintain its ecclesiastical authority over the subjects of the King in Canada, will not bear examination; it falls to pieces in one's hands.

It is proper to observe that in the discussion of this question I have confined myself to the case in which a license has been obtained and the clergymen performing the marriage ceremony acts under the authority of it. In my view of the points in controversy, it is not necessary to consider other cases. I pass no opinion, therefore, upon the question whether, in the absence of a license (and where consequently the publication of banns is a necessary preliminary to the ceremony of marriage) the banns having been published in one church by one priest or minister, the ceremony can, at the discretion of the parties, be validly solemnized at any convenient time or place, and by any priest or minister. The point was discussed, but I express no opinion upon it.

ANGLIN J.—I have already stated my concurrence in the reasons assigned by Mr. Justice Davies for answering the first question submitted in the negative. I am, however, unable to agree in his reasons and conclusions in regard to question No. 2, and must, therefore, express my own views upon it.

Since the majority of the judges of this court are of the opinion that the Dominion Parliament does not possess jurisdiction to legislate in respect of the subject-matter of question No. 2, it is difficult to perceive how an answer to it can be useful either to Parliament or to the Governor-General in Council. It concerns the interpretation of a provincial law dealing with a matter within the exclusive jurisdiction of the provincial Legislatures. I find it almost impossible to believe that it was expected that in the event of this court answering questions Nos. 1 and 3 in the negative it should proceed to answer this second question which would thus have become purely academic.

I think we might well have acted upon the suggestion presented by the Deputy of the Minister of Justice, when, towards the close of the argument, he said:—

> If your Lordships conclude, therefore, that there is jurisdiction, I submit that on no consideration which has been or can be suggested should your Lordships fail to advise upon every point that has been placed before you. On the other hand, if it be determined that there is no jurisdiction to enact the bill a different situation is before your Lordships.
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> * * * * *
>
> If it appears on the reading of this submission that there is in effect one interrogation, that it is divided into clauses having regard to what might follow from the different views which the court might entertain, it is quite open and proper for the court no doubt, to submit that in view of the opinions which are handed in upon certain parts of the interrogation it becomes unnecessary, in the view of the court, to answer the rest. And if the Government upon that submission, entertain a different view, I presume the Government would communicate that to the court for further consideration.
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> * * * * *
>
> The court, in its superior knowledge of the constitution and the working of the laws, may upon the consideration of these questions

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see reason instead of answering categorically to submit points for the consideration of the Government with regard to the matter. That is the situation here. I submit that the matter is in your Lordships' hands here as one interrogation arising out of a situation created in view of the public agitation and the introduction of this bill.

* * * * *

MR. JUSTICE DUFF.—If the substance of No. 1 and No. 3 is answered in the negative—assuming that the substantial question which is to be found in these two questions is answered in the negative?

Mr. Newcombe: If that be the purpose of your Lordship's question I concede immediately that it is a case in which it would be proper for your Lordships if you so consider to submit an inquiry to the Government or to submit any suggestion which your Lordships within the limitation of the Lord Chancellor's judgment may deem proper.

Moreover, counsel representing the Province of Quebec have stated to us the view of the Government of that province (the legislation of which can alone be affected) that, while in the event of the reply to either the first or the third question being in whole or in part in the affirmative, this second question might properly be answered, a reply should not be given to it if the other questions should be answered wholly in the negative. They insisted that an expression of opinion by this court upon the law of Quebec, whatever answer should be given to the second question, especially if it should not be unanimous, and if the Privy Council should, as seems not improbable, decline to deal with this part of the reference, must have a disturbing effect, inasmuch as it would cast doubt upon the status of many married persons in that province and upon the rights of a still larger number of persons in regard to property. They have also called our attention to the fact that there is at present pending, in the Superior Court at Montreal, in Review, a case *inter partes* in which the very point covered by

clause (*a*) of the second question is presented for judicial determination. They further stated that no case has ever come before the courts of the Province of Quebec in which the validity of such marriages as are dealt with by clause (*b*) of the second question has been challenged.

In delivering the judgment of the Privy Council in the recent case of the *Attorney-General for the Province of Ontario, et al.* v. *the Attorney-General for the Dominion of Canada* (1) known as the Companies' Reference, the Lord Chancellor after alluding to the refusal by Lord Herschell, when delivering the opinion of the Judicial Committee in the *Fisheries Case*(2), to answer one of the questions there put "upon the ground that so doing might prejudice particular interests of individuals" and referring to the questions propounded in the *Companies Case*(1), at page 589, as:—

> 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,

added that:—

> 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.

Upon carefully weighing all these considerations, it seemed to me to be eminently proper that before proceeding to deal with the second question we should respectfully represent to the Governor-General in Council the undesirability in our opinion of our answering it since the view of the majority of the

(1) [1912] A.C. 571. (2) (1898) A.C. 700, at p. 717.

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judges of this court is that the Parliament of Canada is entirely without jurisdiction to legislate in the direction suggested; and that we should proceed to reply to that question only upon being officially informed that it is the wish and the intention of the Governor-General in Council that it should be answered notwithstanding the negative reply made to the other questions propounded.

But a majority of my learned brothers have reached the conclusion that we should answer the second question without making any such representation. In deference to their views I proceed to express my opinion upon it.

Being charged to define and declare the civil law of the Province of Quebec upon this question to the best of our ability, it is, in my opinion, our duty as judicial officers of a Canadian civil tribunal to consider and to give effect to the ecclesiastical law, whether of the Catholic or of any other church, so far, but so far only, as it is found to be incorporated in the common (civil) law or the legislature has seen fit to recognize and adopt it and to give civil efficacy to it. We are in nowise concerned with the policy, the propriety or the impropriety, the desirability or the undesirability, of whatever course the legislature has in this regard seen fit to pursue in the exercise of its descretion, which, within the ambit of the jurisdiction committed to it by the Imperial Parliament is, for all judges of civil courts in this country, supreme.

I desire to call attention to the fact that we have no evidence before us of the law of the Catholic

Church bearing upon the questions submitted, other than what is furnished by the documents which have been admitted and are printed in the joint appendix. Except in so far as it is admitted, that law would require to be proved as any other matter of fact. I necessarily proceed upon the assumption that the admitted documents state it as fully as is necessary for the disposition of the questions submitted.

The Civil Code of Lower Canada became law in 1866—the year preceding Confederation. The legislature which enacted it had complete jurisdiction over the subject of marriage in the then Province of Canada. The Fifth Title of the Civil Code deals with marriage. The first chapter of that title treats:—

Of the qualities and conditions necessary for contracting marriage (*Des qualités et conditions requises pour pouvoir contracter marriage*); the second "Of the formalities relating to the Solemnization of Marriage"; the third "Of opposition to marriage; the fourth "Of actions for annulling marriage."

In the first chapter are grouped a number of articles enumerating various impediments which render persons incapable of validly contracting marriage and stating several conditions precedent the non-observance of which, when applicable, invalidates marriage ; (*vide* articles 148-155 C.C.)

The last article of the first chapter, No. 127, reads as follows:—

127. The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities.

The right likewise of granting dispensations from such impediments, appertains, as heretofore, to those who have hitherto enenjoyed it.

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Inasmuch as "relationship" and "affinity" exhaust the genus to which they belong, it is obvious that the "other causes" referred to in article 127 cannot be restricted to impediments *ejusdem generis* with consanguinity and affinity. That would be to deny any effect to the words "other causes." The other causes are therefore necessarily impediments of another kind "recognized according to, the different religious persuasions"—presumably of the parties. Confining the inquiry to the particular subject-matter before us, our attention has been directed to a Decree of the Council of Trent which, subject to a modification to be presently noted, admittedly was in force in, and was recognized as binding by, the Catholic Church in Lower Canada in 1866. That decree contains the following paragraph:—

> Qui aliter quam praesente parocho, vel alio sacerdote de ipsius parochi seu ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentabunt, eos sancta Synodus ad sic contrahendum omnino inhabiles reddit, et hujusmodi contractus irritos et nullos esse discernit, prout eos praesenti decreto irritos facit et annullat.

In the translation furnished to us in the joint appendix this passage is thus rendered:—

> With regard to those who marry otherwise than in the presence of the parish priest, or of the priest who has his permission or that of the Ordinary, and in the presence of two or three witnesses; the Holy Council renders such persons wholly incapable of contracting marriage in that way, and declares the marriages thus contracted null and void as, by the present decree, it dissolves and annuls them.

Under this decree where it is in force and unmodified it is perfectly clear that according to the law of the Catholic Church the marriage of a Catholic contracted otherwise than in accordance with its requirements is invalid. The impediment thus created is known as clandestinity.

Taken by itself, article 127 would clearly have the effect of giving recognition to this impediment as affecting the civil validity of marriages between Catholics in the province and to do so is, in my opinion, beyond doubt within its purpose.

Apart from the contention that by other facultative statutory provisions every clergyman or minister of religion authorized to keep a marriage register is empowered to solemnize marriage between any man and woman, whatever their religion, with which I shall presently deal, the only objection made at bar to the construction which I have put on article 127 is based upon its collocation. It is asserted that the impediment created by the Tridentine Decree concerns merely the qualification of the person before whom marriage is to be solemnized. Upon that assumption it is argued that this cannot be one of the "other impediments" referred to in an article which is found in a chapter devoted to impediments and conditions that affect the capacity of the parties to the marriage; that the "other impediments" covered by article 127 must, under the rule *noscuntur a sociis,* be of that character. While this contention would have much force if the assumption on which it is based were unimpeachable, it will be observed that the Tridentine Decree purports not merely to prescribe "the presence of the parish priest or of the priest who has his permission or that of the Ordinary" as a condition of the validity of the marriage, but that it purports to affect directly the capacity of the parties themselves by declaring them to be *"omnino inhabiles"*—wholly incapable of thus contracting marriage. It professes to create a veritable *inhabilitatio personarum.* Article 127 C.C. deals

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with "impediments recognized according to the different religious persuasions" * * *"empêchements admis d'après les differentes croyances rèligieuses."* In order to give full effect to these words, it seems to me incontrovertible that we must for the purpose of article 127 regard any impediment defined by a religious body as possessing the character which that body declares it to have and as producing the effects which that body ascribes to it.

When it is declared by the Catholic Church that Catholics are incapable of contracting marriage except in the presence of the parish priest, or of the priest who has his permission or that of the ordinary, the expressed intention of the church is to attach a personal incapacity to the parties. If the impediment thus created is to be accepted as it is "recognized by the religious persuasion" and as "subject to the rules of the church" it follows that it is properly included under article 127 C.C. as an impediment which affects the capacity of Catholics to contract marriage.

By the Benedictine Declaration, originally published in 1741, for "those places subject to the sway of the Allied Powers in Belgium" and the Town of Maestricht, and subsequently extended to the Church of Canada and Quebec, as appears by the replies given by the Holy Council of the Propaganda under Clement XIII., in the year 1764, to the vicars of the Diocese of Quebec, and published in 1865 by Mgr. Baillargeon, administrator of that diocese, it is provided that:—

> In regard to those marriages which * * * are contracted without the form established by the Council of Trent, by Catholics with heretics, wherever a Catholic man marry a heretic woman or a Catholic woman marry a heretic man * * * if perchance a marriage of this kind be actually contracted there wherein the

Tridentine form has not been observed, or in the future (which may God avert) should happen to be contracted, His Holiness declares that such a marriage, if no other canonical impediments occur, is to be deemed valid, and that neither one of the persons in any way can, under pretext of the said form not having been observed, enter upon a new marriage while the other person is still alive.

Marriage between a Catholic and a non-Catholic was, therefore, exempted by the Benedictine Declaration from the operation of the decree of the Council of Trent and the impediment which would otherwise have affected at least the Catholic party to such a marriage was thus removed.

Such, according to the documents submitted to us, was the law of the Catholic Church on this subject at the time when the Civil Code of Lower Canada was enacted. It was conceded at bar by counsel instructed by the Dominion Government to support an affirmative answer to the second question that the presence of the word "hitherto" in article 127 precludes the inclusion within it of impediments created or revived by any subsequent laws or decrees of any religious body and that, in the absence of other recognition by the legislature, the recent papal decree known as *"Ne Temere"* does not affect the civil validity of marriages contracted in that province. Although its meaning would perhaps have been clearer had the word "hitherto" preceded the word "recognized" I think that article 127 fairly read may be given the construction which Mr. Mignault put upon it and which he stated has been universally taken to be correct.

By article 156 C.C. it is provided that:—

156. Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by all those who have an existing and

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actual interest, saving the right of the court to decide according to the circumstances.

Having regard to the terms of the Act providing for the codification of the laws of Lower Canada, which directs the commissioners in every case to express the existing law and where they should think proper to suggest an amendment to indicate the same as a suggestion, and to the report of the codifiers which, upon a question as to the purpose of such a provision as that contained in article 156, must, in view of their instructions, be entitled to very great weight(1), there can be no doubt that this article was intended to express the existing law as to the consequences of clandestinity in the solemnization of marriage. As a guide to its interpretation, we are referred by the codifiers to Pothier on Marriage, Nos. 361, 362 and 451. The authority of Pothier as an exponent of the Civil Law of France, which prevailed in Lower Canada prior to 1866, as I shall presently have occasion to shew, is so conclusive that other reference seems unnecessary.

In No. 361, Pothier declares that the penalty of parties who have had their marriage celebrated by an incompetent priest is the nullity of their marriage. In No. 362, he adds that the nullity of marriages celebrated by an incompetent priest is not merely relative but is absolute and can be cured only by a new celebration of marriage by the curé of the parties or with his permission or that of the Bishop He refers to certain cases in which, after public and long continued cohabitation, the courts have refused to hear parties who sought to have their marriages

(1) *Symes* v. *Cuvillier*, 5 App. Cas. 138, at p. 158.

avoided on the pretext that they had been celebrated by incompetent priests. The explanation of the judgments in these cases is not, he adds, that the marriage celebrated by an incompetent priest can ever be valid, or that the vice which attaches to it can be purged by any lapse of time, but that having regard to the circumstances of the cases the applicants were unworthy of being heard and that it should be presumed that the law had been observed and that the priest who had celebrated the marriage had received the permission of the curé. He further says in No. 363 that:—

> The celebration of marriage in the face of the church by the proper curé is not a matter of pure form; it is an obligation which our laws impose on parties who wish to contract marriage from which the parties subject to it cannot withdraw themselves.

The intention having been to reproduce the existing law, we find in this text of Pothier the explanation of the purpose and extent of the discretion which the concluding words of article 156 reserved to the courts. No doubt is thereby cast on the absolute nullity of the marriage not solemnized before a competent officer, which is declared in the same terms and may be asserted by the same class of persons as is provided in the case of the nullity of incestuous marriages. (*Vide* article 152).

But, although the impediment to the marriage of Catholics otherwise than in accordance with its requirements created by the Tridentine Decree should, because that decree so defines its operation be deemed to affect the capacity of Catholics to contract marriage for the purpose of its inclusion within article 127 C.C., it nevertheless has to do directly with the solemnization of marriage, and the right to

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impose or to remove it as a condition of the civil validity of marriage rests exclusively with the provincial Legislatures for the reasons stated by Mr. Justice Davies in dealing with the first question.

To summarize:—

According to the law of the Catholic Church, the marriage of two Catholics solemnized otherwise than as prescribed by the Tridentine Decree is void. That impediment of the church law is recognized and adopted by article 127 of the Civil Code of Lower Canada, and provision is expressly made for judicially establishing such nullity (article 156). By reason of the exempting clauses of the Benedictine Declaration the marriage of a Catholic with a non-Catholic is not subject to this condition under the civil law.

A careful analysis of other provisions of the Civil Code in the light of the history of the civil law of Lower Canada leads to the same conclusion independently of any recognition or adoption of the law of the Catholic Church in regard to marriage. This aspect of the question is fully considered by Mr. Justice Jetté in *Laramée* v. *Evans*(1) and by Mr. Justice Lemieux, sitting in the Court of Review, in *Durocher* v. *Degré*(2). I shall not do more than outline my views upon it.

By article 40 of the Ordinance of Blois (1579), provision was made for the publication of banns, the public celebration of marriage in the presence of four witnesses and the registration of the same — the whole subject to the penalties decreed by the church councils.

(1) 25 L.C. Jur. 261. (2) Q.R. 20 S.C. 456, at p. 471.

By article 12 of the Edict of Henry IV., (1606), it was ordained that marriages not entered into and celebrated in the church and with the form and solemnity required by article 40 of the Ordinance of Blois be declared void by the ecclesiastical judges.

By the Declaration of Louis XIII. (1639), which directed that the Ordinance of Blois should be strictly observed, and interpreted it, it was ordained that proclamation of banns should be made by the curé of each of the contracting parties and that at the celebration of the marriage four trustworthy witnesses should assist,

> besides the curé, who shall receive the consent of the parties and shall join them in marriage according to the form practised in the church.

All priests were expressly forbidden to celebrate any marriage except between their true and ordinary parishioners without the written permission of the curés of the parties or of the diocesan bishop; and it was further ordained that a good and faithful register should be kept of the marriages as well as of the publication of banns, or of dispensations and permissions which should have been granted. Pothier in his Treatise on Marriage, says:—

> It is necessary for the validity of a marriage not only that it shall be celebrated in the face of the church but also that the priest who has celebrated it shall be competent (No. 354). The priest competent for the celebration of marriages is the curé of the parties. The curé of the parties is the curé of the place where they have their ordinary residence (No. 355). Every other priest who has not the permission either of the bishop or of the curé of the parties is incompetent to celebrate it. This is what results from the declaration of 1639 which, after having ordained that the curé must receive the consent of the parties adds: "All priests are forbidden to marry other persons than their true parishioners, without the written permission of the curés of the parties or of the bishop. (No. 360.)"

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The presence of the curé required by our laws for the validity of marriages is not purely a passive presence; it is an act and a ministration of the curé, who must receive the consent of the parties and give the nuptial benediction. That results from the terms of the declaration of 1639, where it is said that the curé will receive the consent of the parties, and will join them in marriage, following the form practised in the church. (No. 350).

See the opinion of Mr. Justice Willes advising the House of Lords in *Beamish* v. *Beamish*(1).

Enacted before the establishment of the Superior Council in Canada in 1663, the "Ordinance of Blois," the "Edict of Henry IV.," and the "Declaration of Louis XIII" were each *proprio vigore* in force in Quebec prior to and at the time of the conquest.

By subsequent ordinances of the French Kings, notably that of April, 1667, and that of April, 1736, further provision was made for the keeping of registers in all parish churches and for their form and the entries to be made therein.

While there has been some controversy as to the effect upon the foregoing laws of the articles of capitulation of the cities of Quebec and Montreal and of the Treaty of Paris (1763), the great weight of authority supports the view that they remained in force after the cession of Canada to Great Britain. See *Stuart* v. *Bowman*(2); *Wilcox* v. *Wilcox*(3).

The Anglican Church was not introduced into Canada as an established church. The exclusive authority of Catholic parish priests to celebrate marriage would, however, be held not to extend to the new Protestant inhabitants of Canada and the right of clergymen of the Anglican Church to solemnize marriage between them would be deemed to have been

(1) 9 H.L. Cas. 274, at pp. 317 to 324. (2) (1851) 2 L.C.R. 369.
(3) (1857) 8 L.C.R. 34.

introduced without express legislation as a result of the acquisition of the country by Great Britain. In my opinion, the Anglican clergy after the conquest also shared with the Catholic priests the right under the civil law to solemnize the marriages of Protestants with Catholics, although the validity of such marriages if not solemnized before the Catholic curé, under the law of the Catholic Church dates only from 1764. This seems to me to be the necessary result of the situation as recognized by their Lordships of the Privy Council in *Brown* v. *Les Curé, etc., de Notre Dame de Montréal*—(The *"Guibord Case"*) (1), and of the doctrine enunciated in *Long* v. *The Bishop of Cape Town* (2).

The Church of England, in places where there is no church established by law, is in the same situation with any other religious body — in no better, but in no worse, position.

While British settlers in British colonies and in conquered and ceded territory are themselves entitled to the benefit of their own marriage laws, and are unaffected in this respect by the laws of the country (*Lautour* v. *Teesdale* (3), the latter, nevertheless, as part of the private law (Salmond on Jurisprudence, p. 484; Holland on Jurisprudence, p. 168), govern the inhabitants until altered by the competent jurisdiction of the new sovereignty. Halleck on International Law (4th ed.) Vol. 2, p. 516; Blackstone (Lewis ed. 1902) vol. 1, pp. 107-8.

The Royal Proclamation of 1763 and the instructions given to the Governors between 1763 and 1774 are invoked in support of the contention that during

(1) L.R. 6 P.C. 157, at pp. 206-7.
(2) 1 Moo. P.C. (N.S.) 411, at p. 461.
(3) 8 Taun. 830.

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this period the English common law was in force in Canada. I am unable to accept this view. (See Chief Justice Hey's Report, 1 L.C. Jurist, Appendix.) But whether it be or be not well founded, by the Quebec Act passed by the Imperial Parliament in 1774, it is expressly enacted (s. 4) that the:—

> Proclamation (of the 7th October, 1763) so far as the same relates to the said Province of Quebec, and the Commission under the authority whereof the Government of the said province is at present administered and all and every the Ordinance and Ordinances made by the Governor-in-Council of Quebec for the time being relative to the civil government and the administration of justice in the said province * * * be and the same are hereby revoked, annulled and made void from and after the first day of May, 1775.

Sections 5 and 8 of the "Quebec Act" are as follows—

> 5. And for the more perfect security and ease of the minds of the inhabitants of the said province, it is hereby declared that His Majesty's subjects professing the religion of the Church of Rome, of and in the said Province of Quebec, may have and hold the free exercise of the religion of the Church of Rome subject to the King's supremacy, declared and established by an Act made in the first year of the reign of Queen Elizabeth over all the dominions and countries which then did, or thereafter should, belong to the Imperial Crown of this realm; and that the clergy of the said church may hold, receive, and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion.
>
> 8. And be it further enacted by the authority aforesaid, that all His Majesty's Canadian subjects within the Province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all others their civil rights, in as large, ample, and beneficial manner as if the said Proclamation, Commissions, Ordinances and other Acts and Instruments had not been made, and as may consist with their allegiance to His Majesty, and subjection to the Crown and Parliament of Great Britain, and that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same; and all causes that shall hereafter be instituted in any of the courts of justice to be appointed within and for the said province by His Majesty, his heirs and successors,

shall with respect to such property and rights be determined agreably to the said laws and customs of Canada, until they shall be varied or altered by any Ordinance that shall from time to time be passed in the said province by the Governor, Lieutenant-Governor or Commander-in-Chief for the time being, by and with the advice and consent of the legislative council of the same, to be appointed in manner hereinafter mentioned.

No new provisions had been made for the keeping of the registers of baptisms, deaths and marriages in Canada between the date of the cession and the year 1795, when the statute 35 Geo. III., ch. 4 (L.C.) was passed. In section 1 it enacts:—

That from and after the first day of January, which will be in the year subsequent to the passing of this Act, in each parish church of the Roman Catholic communion, and also in each of the Protestant churches or congregations within this province, there shall be kept by the rector, curate, vicar, or other priest or minister doing the parochial or clerical duty thereof two registers of the same tenor, each of which shall be reputed authentic, and shall be equally considered as legal evidence in all courts of justice, in each of which the said rector, curate, vicar or other priest or minister, doing the parochial or clerical duty of such parish or such Protestant church or congregation, shall be held to enregister regularly and successively all baptisms, marriages and burials so soon as the same shall have been by them performed.

Section 10 declares that certain registers of the Protestant congregation of Christ Church, Montreal, shall

have the same force and effect to all intents and purposes as if the same had been kept according to the rules and forms prescribed by the law of the province.

Section 11 contains a similar provision in regard to other defective registers; and section 15 of the same statute is as follows:—

15. And be it further enacted by the authority aforesaid, that so much of the twentieth title of an Ordinance passed by his most Christian Majesty, in the month of April, in the year one thousand six hundred and sixty-seven, and of a declaration of his most Christian Majesty of the ninth of April, one thousand seven hun-

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dred and thirty-six, which relates to the form and manner in which the registers of baptisms, marriages and burials are to be numbered, authenticated or *paraphé*, kept and deposited and the penalties thereby imposed on persons refusing or neglecting to conform to the provisions of said Ordinance and declaration, are hereby repealed, so far as relates to the said registers only.

In view of these statutory provisions it would seem incontrovertible that the French law as it existed at the time of the conquest had continued in force in regard to the keeping of marriage registers. Chief Justice Sewell, in *Ex parte Spratte*(1), decided in 1816, says:—

> The British statute, 14 Geo. III., ch. 83, commonly called the "Quebec Act" declared the law of Canada, as it stood at the conquest, to be the rule of decision in all matters of controversy and civil rights.

He adds, at page 96, that:—

> The right of keeping a register of baptisms, marriages and sepultures, with the power of rendering the entries thus made *actes authentiques*, or records, which by the twentieth title of the Edict of 1667 was at the conquest vested in the then parish priests of Canada was, by law, considered to be so vested in them not by reason of their spiritual or ecclesiastical character but because they were by law the acknowledged public officers of the temporal government * * * Under the Ordinance of 1667, which was the law antecedent to the statute 35 Geo. III. ch. 4, the keeping of registers was entrusted to the curés of the Catholic Church and to their successors in office and to such only; and the curés were vested with this authority as priests in holy orders recognized to be such by law and as public officers in their respective stations. The late provincial statute (1795) does not change the character or qualifications of the persons to whom the keeping of registers is now to be entrusted. It extends the power of keeping registers to Protestant ministers but still requires that all persons keeping registers, whether Catholics or Protestants, shall be priests in holy orders recognized to be such by law and to be competent officers in their respective stations * * * In conformity to this general declaration and to the Ordinance of 1667, the fourth section of the Statute also especially enacts "that every marriage shall be signed in both registers by the clergyman celebrating the marriage" who must

(1) Stu. K.B. 90.

necessarily be a priest in holy orders recognized to be such by law, since by the law of Canada a marriage can only be celebrated by such a character.

The learned Chief Justice, of whom Mr. Justice Lemieux rightly observed that he

> has left a great name in the jurisprudence contemporaneous with the events which followed the "Quebec Act,"

clearly considered that in Canada, from the time of the conquest, Catholic priests and clergymen of the Church of England were recognized by law as equally entitled to solemnize and to keep registers of marriage, the former for Catholics and the latter for Protestants, and that the "Quebec Act" was declaratory of this right, which was further recognized by the provincial Act of 1795.

When we find that down to 1866, when the Civil Code was enacted, there is no trace of any other civil authority for the solemnization of marriage by Catholic priests and that their right to solemnize marriage and to keep registers of civil status prior to that time has never been questioned, and when we find that right recognized in the Civil Code as something unquestionably existing, the conclusion seems to be inevitable that, as a result of the reservation in the articles of capitulation of their rights and privileges, and the free exercise of their religion to the inhabitants of Quebec and Montreal, the assurances in section 5 of the "Quebec Act" to the clergy of the Catholic Church that they should "hold, receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said (Catholic) religion," the provision of section 8 that His Majesty's Canadian subjects within the Province of Quebec should hold and enjoy all their civil rights, and the

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continuation of the laws of Canada as the rule for the decision of all matters of controversy relative to property and civil rights — the respective rights of the Catholic clergy and laity *inter se* as they existed at the time of the cession in regard to marriage were preserved.

The French law, so far as it could be applied, governed the keeping of registers by the Anglican clergymen, as the Act of 1795 establishes.

The criminal law of England was, by the Quebec Act, expressly declared to be the law of the province. Commercial and maritime laws of England were subsequently specially introduced. But in all matters of "civil rights" the law of Canada, as it stood at the conquest, was declared to be and remained "the rule of decision." Whether marriage in Quebec should be regarded in the civil courts as a civil contract, or, as would seem to be the better opinion, should be deemed a religious contract producing civil effects, it is for all civil purposes governed by the civil law, and, in view of the foregoing provisions, there can be no reasonable doubt that that law in Lower Canada has been since the conquest, as is declared by Chief Justice Sewell, the civil law which was in force at the time of the conquest. In *Citizens Insurance Co.* v. *Parsons*(1), Sir Montague Smith in delivering the judgment of the Privy Council, at pp. 110-111, said:—

> the law which governs civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada and not the English law which prevails in the other provinces * * *
>
> It is to be observed that the same words "civil rights" are employed in the Act of 14 Geo. III. ch. 83, which made provision for the government of the Province of Quebec. Section 8 of that Act en-

(1) 7 App. Cas. 96.

acted that Mis Majesty's Canadian subjects within the Province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense.

Under the civil law of Quebec at and after the conquest the marriage of two Catholics could only take place in the presence of the curé of the contracting parties or of a priest authorized by him or by the bishop, and all priests were forbidden without such permission to celebrate any marriage other than between their true and ordinary parishioners. (Declaration of Louis XIII., 1639.)

In 1804 and again in 1821 statutes were passed validating marriages which had been theretofore solemnized before Protestant dissenting ministers and justices of the peace. In each of these Acts it is expressly provided that they shall not extend to any future marriages.

As is very clearly pointed out by Mr. Justice Jetté in *Laramée* v. *Evans*(1), the Act of 1827, authorizing clergymen of the Church of Scotland to keep marriage registers and to solemnize marriages, and the subsequent Acts authorizing the ministers of various dissenting bodies to keep registers of baptisms, marriages and burials were all procured, not with a view of affecting the position and rights of the Catholic Church and its clergy and laity, but because of the opinion maintained by Chief Justice Sewell, and generally asserted by the Anglican body that clergymen of that church were alone competent to marry Protestants. The purpose of the legislation would

(1) 25 L.C. Jur. 261.

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appear to have been to relieve dissenting Protestant bodies from that disability by giving to the ministers of those denominations the legal right to keep registers and to solemnize marriage primarily if not solely for the purposes of their respective congregations.

In 1860 these Acts were consolidated in chapter 20 of the Revised Statutes of Lower Canada. Sections 16 and 17 of that Act are as follows:—

16. The Protestant churches or congregations intended in the first section of this Act, are all churches and congregations in communion with the United Church of England and Ireland or with the Church of Scotland, and all regularly ordained priests and ministers of either of the said churches have had and shall have authority validly to solemnize marriage in Lower Canada, and are and shall be subject to all the provisions of this Act. 35 Geo. III., ch. 4; 7 Geo. IV., ch. 2, sec. 2.

17. This Act extends also to the several religious communities and denominations in Lower Canada, mentioned in this section, and to the priests or ministers thereof, who may validly solemnize marriage, and may obtain and keep registers under this Act, subject to the provisions of the Acts mentioned with reference to each of them respectively, and to all the requirements, penalties and provisions of this Act, as if the said communities and denominations were named in the first section of this Act.

There follows a list of the various dissenting bodies which had obtained special statutes.

I read these provisions as declaratory of the right of the ministers of the several religious bodies therein named (Anglican, Scotch and Dissenting) to solemnize within the limits of the territory for which they are authorized to keep registers, all marriages (subject to article 63 C.C. and to the special limitation in the case of Quakers imposed by 23 Vict. ch. 11) except those which the law by other provisions renders them incompetent to solemnize. This, in my opinion, meets the objection so much insisted on at bar that, if the

argument presented by Mr. Mignault should prevail, there would be no provision in the Quebec law for the solemnization of marriages between dissenting Protestants of different religious beliefs or for the marriage of infidels or pagans, or of persons attached to no particular religious denomination.

With matters in this position, the legislature appointed the Commission for the codification of the civil law with instructions to express in the Code the existing law. The report of these commissioners upon the portion of the Civil Code which deals with the subject of marriage contains the following passages:—

> With the object of preserving to everybody the enjoyment of his own usages and practices according to which the celebration of marriage is entrusted to the ministers of the worship to which he belongs several provisions are inserted in this title which although new in form nevertheless have their source and *raison d'être* in the spirit, if not in the letter, of our legislation. * * * Since a change such as that operated by the Code Napoleon, which has secularized marriage and has entrusted the celebration of it as well as the keeping of the registers to officers of a purely civil character without any intervention being required on the part of religious authorities, seems in no wise desirable in this country it has become necessary to renounce the idea of establishing here in regard to the formalities of marriage uniform and detailed rules.

The majority of the Commissioners thus express their opinion:—

> The publicity required by the first part of article 128 is with the object of preventing clandestine marriages which are with good reason condemned by every system of law. An Act so important which interests many others besides the parties themselves should not be kept secret and the best method of preventing that happening is to render obligatory the publicity of the celebration. The word "openly" (*publiquement*) has a certain elasticity which makes it preferable to any other; being susceptible of a greater or less extension it has been employed in order that it may lend itself to the different interpretations which the different churches and religious congregations in the province require to give it according to their customs and usages and the rules which are peculiar to them

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from which it is desired in no way to derogate. All that has been sought is to prevent clandestine marriages. Thus, those marriages which shall have been celebrated in an open manner and in the place where they are ordinarily celebrated according to the usages of the church to which the parties belong are reputed to have taken place openly (*publiquement*).

Taking up the Code and reading it, as it must be read, in the light of the foregoing facts, we find the following provisions which call for consideration in dealing with the question submitted:—

128. Marriages must be solemnized openly, by a competent officer recognized by law.

This is the fundamental provision designed to prevent clandestinity.

Of almost equal importance, having the same object, and being the natural sequence of the provisions enacted for the same purpose, regarding the publication of banns in the church or churches to which the parties belong (articles 130-3 and 57-8 C.C.) is article 63, which says:—

63. The marriage is solemnized at the place of the domicile of one or other of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties.

The latter sentence obviously provides for such exceptional cases as those of persons having no fixed residence (*vagi*) or no residence in the province. The form in which the article is expressed would be inexplicable if it were not thereby intended to prescribe that as a general rule marriage must take place at the domicile of one of the parties. I see no reason why this provision should not apply to Protestants as well as Catholics. The policy which underlies it so requires.

"Domicile" in this article means place of residence (1), and, in the case of Catholics, and probably of Anglicans, who have parochial organization, it means the parish in which the parties, or one of them resides. In the case of a person belonging to a religious body having neither parochial organization nor its equivalent, or of a person belonging to no church, domicile would probably mean the municipality in which he resides. The Catholic parish in Quebec is legally recognized. See R.S.Q., 1909, arts. 4296 *et seq.* It is in the parish church, private chapel, or mission, and for the territory attached to it that the registers are kept (article 42 C.C.). It is the proper curé of the parties, *i.e.*, the parish priest, who is authorized to solemnize the marriage. It is at the church and within the territory for which he is authorized to keep registers that he is empowered to officiate. While in country places the parish and the municipality are coterminous, such cities as Montreal and Quebec are divided into many parishes of which the territorial limits are well defined, and only within them is the curé authorized to discharge his functions and to exercise his rights as parish priest. Every consideration points to his parish being for the purpose of article 63 the domicile of the Catholic at all events.

Publication of banns in the church to which the parties belong, marriage at the domicile and solemnization by a competent officer are the great safeguards provided by the Code against clandestinity. In all countries where the civil law prevails, territorial limitation of the jurisdiction to solemnize marriage appears to have been established for that pur-

(1) *McMullen* v. *Wadsworth*, 14 App. Cas. 631, at p. 636.

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pose — a policy inspired, no doubt, by the Tridentine Decree.

To further ensure obedience to the legal prohibitions in respect to consanguinity, pre-contract and minority, the non-observance of which clandestinity too often serves to cloak, the Code has provided (articles 136 *et seq.*) for formal oppositions being made to marriages by interested persons. The efficacy of these provisions depends upon the restrictions imposed as to the place, time and publicity of solemnization by the articles to which allusion has just been made. Article 1107 of the Code of Civil Procedure, which must be read with the provisions of the Civil Code (article 144 C.C.) requires that the opposition shall be served "upon the functionary called upon to solemnize the marriage," and article 61 C.C. directs that the disallowance of an opposition shall be "notified to the officer charged with the solemnization of the marriage." (See also article 1109 C.P.Q.) By article 65 C.C. the "Act of Marriage" which the celebrant is required to prepare and sign, must *inter alia* state "that there has been no opposition or that any opposition has been disallowed." These provisions accord only with the view that in the ordinary case and as a general rule there must be some one, or at most two defined and ascertainable functionaries charged with the celebration of a marriage and that the jurisdiction of the competent officer mentioned in article 128 is necessarily territorially restricted as indicated in article 63; and that is the only logical outcome of the provisions of articles 130 *et seq.* The purpose of such provisions and their efficacy to attain the object sought by the Legislature — the prevention of clandestine marriages, incestuous marri-

ages, bigamous marriages and marriages between minors without the consent of parents — are well stated by Mr. Justice Lemieux in *Durocher* v. *Degré* (1), at pp. 488 *et seq.* To hold, as is maintained by those who contend for a negative answer to both branches of the second question, that every officer authorized to keep a marriage register is competent to solemnize the marriage of any two persons who come before him, whatever their residence and whatever their religion, provided only they produce to him a license from the Crown, is to destroy at once and completely all the elaborate safeguards which the Legislature has provided to prevent those manifest evils. As put by Mr. Justice Lemieux:—

> Can it be supposed for an instant that the codifiers, after having ordained the publication of marriage (*a*) in the church of the parties; (*b*) before a public officer belonging to the worship of the parties; (*c*) by their curés; (*d*) and after having left to the religious authorities to whom the parties are subject the discretion of granting or of refusing the dispensation of such publication would, after providing for all this series of formalities to be carried out by the curé and the religious authorities in the church of the parties, have left persons after all free to contract marriage before no matter what minister and of a different religion. The idea seems to us neither reasonable nor probable.

Articles 42, 44 and 45 now call for attention:—

> 42. Acts of civil status are inscribed in two registers of the same tenor, kept for each Roman Catholic parish church, private chapel or mission, and for each Protestant church or congregation or other religious community, entitled by law to keep such registers, each of which is authentic, and has in law equal authority.
>
> 44. The registers are kept by the rector, curate, priest, or minister having charge of the churches, congregations, or religious communities or by any other officer entitled so to do.
>
> In the case of Roman Catholic churches, private chapels or missions, they are kept by any priest authorized by competent

(1) Q.R. 20 S.C. 456.

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ecclesiastical authority to celebrate marriages or administer baptism and perform the rites of burial.

45. In the case of Roman Catholic churches, private chapels or missions, the register must be granted under the name mentioned in the certificate of authorization by the bishop, the ordinary of the diocese, the vicar general, or the administrator; and the priest on presenting the register for authentication must exhibit the certificate of authorization.

In these articles the Code expressly recognizes the power of the Catholic bishop to appoint priests for the solemnization of marriage and to confer upon them the requisite authority. Their right to keep civil registers is made to depend upon this authorization of the bishop and their competence to solemnize marriage for civil purposes is in turn made to depend upon their being so authorized to keep registers. (Article 129.)

This latter article, which reads as follows,

129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status, are competent to solemnize marriage.

But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and the discipline of the church to which he belongs,

is the sheet-anchor of those who contend that every officer authorized to keep a marriage register is competent to solemnize any and every marriage. It is, on its face, not a facultative provision. It is declaratory of a legal competence already existing — which in the case of ministers of dissenting bodies had been conferred by the statutes consolidated in the C.S.L.C., 1860, ch. 20, and by subsequent similar acts. It is necessarily general in its terms. It must, as must every provision of the Code, be read with the other articles and be so construed that their efficacy shall

not be destroyed. It is consistent with the limitations which the provisions above discussed necessarily entail. Having regard to the facts that solemnization by their proper curé or by a priest acting with his authority or that of the ordinary, was an essential condition of the validity of marriage by the civil law of Canada at the time of the conquest, that this continued to be the law in respect to Catholics after the conquest, that the instructions to the codifiers were to express the existing law, that in their report they say their object has been to preserve to everybody

> the enjoyment of his customs and practices according to which the celebration of marriage is entrusted to the ministers of the worship to which he belongs,

and that they inserted numerous provisions in the Code compatible only with that intention, I have not the slightest doubt that, upon a proper construction, article 129 cannot be read as conferring the general and indiscriminate power to solemnize marriage which Mr. Lafleur felt compelled to contend for and which would inevitably entail upon the province the very evils which the whole tenor of its enactments in regard to marriage makes it clear it was the purpose of the Legislature of Quebec to obviate.

I am of the opinion that under the various provisions of the Civil Code, quite apart from any impediment created by the laws of the Catholic Church, it is essential to the validity of the marriage of two Catholics in the Province of Quebec that the celebrant should be the parish priest of one or other of them or a priest acting with his permission or with that of the bishop. Since the marriage may be solemnized at the domicile of either party (article 63) this require-

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ment of the civil law seems to be inapplicable to the marriage of a Catholic with a non-Catholic. The effect of the other articles of the Civil Code relating to marriage, which reproduced the provisions of the civil law as it stood at the conquest with some subsequent legislative modifications, therefore harmonizes with that of article 127 C.C., which recognizes and adopts for Catholics the law of the Catholic Church as it stood in 1866 in regard to impediments to marriage other than those enumerated in the preceding articles of the first chapter of the title on marriage. On no other construction of the various articles of the Code dealing with marriage can the obvious policy of the legislature be carried out or can due effect be given to them all. This conclusion is in accord with the great weight of the jurisprudence of the Province of Quebec. In addition to *Laramée* v. *Evans*(1), and *Durocher* v. *Degré*(2), already cited, I may refer to *Globensky* v. *Wilson*(3); *Vaillancourt* v. *Lafontaine*(4); and *Valade* v. *Cousineau*(5).

Against the view supported by these authorities there are only the decisions of two judges of first instance — one in *Delpit* v. *Coté*(6), in effect overruled within two months by the Court of Review in *Durocher* v. *Degré*(2), and the other in *Hébert* v. *Clouâtre* (7).

The effect of the provisions of the statutes and of the Code in regard to marriage licenses must still be considered. Although addressed "to any Protestant minister of the Gospel," the license does not confer

(1) 24 L.C.J. 235; 25 L.C.J. 261.
(2) Q.R. 20 S.C. 456.
(3) M.L.R. 2 S.C. 174.
(4) 11 L.C.Jur. 305.
(5) Q.R. 2 S.C. 523
(6) Q.R. 20 S.C. 338.
(7) Q.R. 41 S.C. 249.

upon him the power or authority to solemnize marriage. (Articles 128 and 129.) That is derived from the law in the case of Protestant clergymen and in the case of Catholic priests from the bishop, whose authorization to solemnize marriage carried with it by law the right to keep marriage registers for civil purposes (articles 44 and 45 C.C.), that right in turn involving the civil competence of the priests so authorized to solemnize marriage. (Article 129 C.C.)

In the Catholic Church the bishop has the power to dispense with the publication of banns. The French law in force in Lower Canada recognized that right for civil purposes, and by articles 59 and 134 C.C. it is continued. The license issued by the Crown is nothing more than a substitute or an equivalent in the case of Protestants for the bishop's dispensation from the publication of banns, which Catholics must obtain if they wish to be married without such publication, and probably also from the obligation of marriage in the church. It is urged that it also does away with the requirement of marriage at the domicile, but I more than doubt that.

Article 57 prescribes that:—

> before solemnizing a marriage, the officer who is to perform the ceremony must be furnished with a certificate establishing that the publication of banns required by law has been duly made; unless he has published them himself, in which case such certificate is not necessary.

By article 59(*a*) it is provided that:—

> In so far as regards the solemnization of marriage by Protestant ministers of the Gospel marriage licenses are issued by the department of the provincial secretary under the hand and seal of the Lientenant-Governor, who, for the purposes thereof, is the competent authority under the preceding article.

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The issue of a license to a minister to solemnize a projected marriage does not confer on him the requisite power to do so. It is an authority to the minister to be chosen, if he be competent by law, to proceed with the marriage without proof of the publication of banns and probably elsewhere than in his church. If the minister be otherwise incompetent to solemnize the marriage, the license has no greater validating effect upon it than it would have if the parties were legally incompetent to contract marriage. The minister is personally protected from any action or liability for damages by reason of any legal impediment of which he was not aware, article 59 (*a*); but beyond that the license has no saving force.

That marriage licenses issued by the Crown are intended solely for Protestants is made clear by a reference to article 59(*a*) and to the R.S.Q. (1909), arts. 1494, 1495, 1497, 1498 and 2943. The provisions for licenses are confined to the solemnization of marriage by Protestant ministers and the fees derived from them are by law devoted to Protestant superior education.

There is nothing, therefore, in the provisions of the law regarding licenses inconsistent with the view that a marriage between Catholics in the Province of Quebec can be validly solemnized only by the curé of one of the parties or by a priest authorized by him or by the bishop.

I express no opinion as to what persons should, for civil purposes, be deemed subject as Catholics to the impediment which has been under discussion. That question has not been asked.

Before concluding this opinion I think it right to

direct attention to the important, but too often overlooked, provisions of articles 163 and 164 of the Civil Code, which are as follows:—

163. A marriage although declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children if contracted in good faith.

164. If good faith exist on the part of one of the parties only, the marriage produces civil effects in favour of such party alone and in favour of the children issue of the marriage.

My conclusions in regard to the second question are that in the Province of Quebec marriages between persons who are both Catholics solemnized before a Protestant clergyman or minister are civilly invalid; marriages between persons one of whom only is a Catholic, commonly called mixed marriages, which would otherwise be legally binding, are civilly valid whether solemnized before a Catholic or a Protestant clergyman or minister. These results flow from the provisions of the civil law of that province taken by themselves; and also from the law of the Catholic Church, so far as it is given civil effect by article 127 of the Civil Code. The recent decree known as *"Ne Temere"* I understand not to be within article 127 C.C. It has not received any other legislative recognition and has, therefore, no civil effect.

I would answer the second question submitted, as to clause (*a*) in the affirmative, and as to clause (*b*) in the negative.

I answer the third question in the negative for the reasons which Mr. Justice Davies has assigned in support of the negative answer to the first question.

As was so aptly pointed out by Mr. Smith, the special and unique provision made by section 93 of the "British North America Act" for federal remedial

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legislation, intended as a protection to religious minorities in educational matters, precludes the idea that, in regard to other subjects assigned to the exclusive jurisdiction of provincial legislatures any general overriding legislative power is vested in the Dominion Parliament.

I would, in addition, merely direct attention to the omission of the Province of Quebec from the 94th section of the "British North America Act," which provides for Dominion legislation for uniformity in the laws of Ontario, Nova Scotia and New Brunswick as to property and civil rights, subject to the approval of the provincial legislatures, as affording another argument of some cogency in support of the negative answer to the third question. "The Province of Quebec is omitted from this section," says Sir Montague Smith, speaking for the Privy Council in *Citizens' Insurance Co.* v. *Parsons*(1), "for the obvious reason that the law which governs property and civil rights is in the main the French law as it existed at the time of the cession of Canada and not the English law which prevails in the other provinces."

There cannot be the slightest doubt that the representatives of Lower Canada insisted that, from the subject of "marriage," which, in the original draft of the confederation pact, was given in its entirety to the Dominion Parliament, should be taken out and assigned to the exclusive legislative jurisdiction of the province, "the solemnization of marriage," in order that the complete control of the Legislature of the Province of Quebec over all that appertains to that subject should be assured and that there should be a

(1) 7 App. Cas. 96, at p. 110.

constitutional guarantee against federal interference with the provisions of its civil law, carefully framed to suit local conditions, in a matter so vital to civil rights.

The following announcement was made by the Chief Justice with respect to the Reference:—

To both branches of the first question, the Chief Justice, Mr. Justice Davies, Mr. Justice Duff, and Mr. Justice Anglin answer "No."

The answer of Mr. Justice Idington is:—

"It is an impossible bill as it stands. If I must answer categorically, then I say as follows: The retrospective part would be good as part of a scheme for concurrent legislation by Parliament and Legislatures confirming past marriages which probably neither can effectively do. The prospective part so far as possible to make it an effective prohibition of religious tests may be good, but doubtful, and the probable purpose can be reached by a better bill."

To the second question—the Chief Justice asks permission to decline to answer the first branch of this question, for the reasons given in the attached memorandum. (See p. 335 *ante*.)

To the first branch of the question — Mr. Justice Davies, Mr. Justice Idington and Mr. Justice Duff answer "No." To that first branch the answer of Mr. Justice Anglin is "Yes."

To the second branch of question No. 2 — the Chief Justice, Mr. Justice Davies, Mr. Justice Idington, Mr. Justice Duff and Mr. Justice Anglin, answer "No."

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IN RE MARRIAGE LAWS.

To the third question—The Chief Justice, Mr. Justice Davies, Mr. Justice Duff and Mr. Justice Anglin answer "No."

Mr. Justice Idington's answer is:—

"As to the third question, sub-section (*a*) I answer "yes" to be concurred in by the respective Legislatures of provinces concerned and as to sub-section (*b*) I answer "yes" if and when a province fails to provide adequate means of solemnization."

THE CITY OF VANCOUVER (DEFENDANT) ..... APPELLANT;

AND

WILLIAM CUMMINGS (PLAINTIFF) .. RESPONDENT.

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*Feb. 23.
*March 21.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Municipal corporation—Repair of highways—Statutory duty—"Unfenced trap" in sidewalk—Misfeasance—Actionable negligence—Notice—Knowledge—Personal injuries—Liability of corporation—Evidence—Findings of jury—"Res ipsa loquitur."

Where a municipal corporation is liable for damages sustained by reason of negligent nonfeasance of the statutory duty imposed upon it to maintain its highways in good repair, the questions of notice or knowledge of the defects do not arise. There is a presumption, in such cases, against the municipal corporation and upon it lies the onus of adducing positive evidence in rebuttal; it is not sufficient to shew that the existence of the defects were not known by the corporation officials. *Mersey Docks and Harbour Trustees* v. *Gibbs* (L.R. 1 H.L. 93), applied; *City of Vancouver* v. *McPhalen* (45 Can. S.C.R. 194) and *McClelland* v. *Manchester Corporation* ((1912) 1 K.B. 118) referred to. Davies and Anglin, JJ., contra.

An unprotected opening in the sidewalk of one of the principal streets of the city, having the appearance of being recently made for some purposes in connection with the laying of gas-pipes, was permitted to remain without proper repair during most of the day, and, at about four o'clock in the afternoon, the plaintiff's injuries were sustained by stepping into the hole while making use of the sidewalk.

Held, affirming the judgment appealed from (1 West. Weekly Rep. 31; 19 W.L.R. 322), Davies and Anglin JJ., dissenting, that evidence of these facts made out a proper case for submission to the jury, and upon which they could return findings of breach of statutory duty and misfeasance on the part of the municipal corporation.

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

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APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Murphy, J., at the trial, by which the plaintiff's action was maintained with costs.

In the circumstances stated in the head-note and more fully referred to in the judgment new reported, the plaintiff, on the findings of the jury, recovered a judgment for $6,000 damages, and this judgment was affirmed by the judgment appealed from. The principal contentions on behalf of the appellant were that there was no evidence to go to the jury in respect of the opening in the sidewalk having been made by or with the consent of the municipal authorities or as to the time it had been there, and that, during the course of the trial, some of the jurymen improperly took a view of the locus and, no doubt, treated what they saw there as evidence.

C. W. Craig, for the appellant.

J. Edward Bird, for the respondent.

THE CHIEF JUSTICE.—I agree with Mr. Justice Idington. The highway was under the control of the appellant corporation subject to a statutory duty to keep it in repair. *City of Vancouver* v. *McPhalen* (2). It was for the jury to say whether that highway was out of repair by reason of some positive act done by the corporation, its officers, servants and others acting under its authority and whether or not the corporation was negligent. There was evidence upon which the case could be left to the jury upon both

(1) 1 West. Weekly Rep. 31; 19 W.L.R. 322.

(2) 45 Can. S.C.R. 194.

points. Assuming, as argued here, that the hole which caused the accident might have been made without the knowledge or consent of the city in view of the duty to repair which is imposed in absolute terms by the statute, the burden of explanation was on the appellants and they have not in any way attempted to meet it. I cannot think, in any event, that any authority given by the legislature to a gas or water company to break up the streets was intended to relieve the municipality from the obligation to maintain them in a safe condition. The right of the company to open the streets was subject to the consent of the corporation and the latter was responsible for any act of the company which might cause the streets to be out of repair.

It is not necessary to say whether the company might not also be made liable. But there is nothing in the acts to which my attention has been drawn which relieves the municipality from the obligation to fulfil its duty with respect to the maintenance of the highways in a proper state of repair.

I would dismiss this appeal with costs.

DAVIES J. (dissenting) agreed with Anglin J.

IDINGTON J.—Each of the parties hereto seems to have been desirous of trying how little evidence may consistently, with success, on either side, be given in an accident case founded on the liability of the appellant, as a municipal corporation, for the repair of its streets.

It is beyond dispute that the accident in question took place in clear sunlight, at four o'clock in the afternoon, on the cement sidewalk in a very busy

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part of the busiest street in the city, by reason of the respondent's foot getting caught in a hole in the sidewalk and that as the result thereof the respondent has been rendered a cripple.

It is quite clear that, at a point two feet four inches from the curb, the hole had been cut of fourteen inches square to enable someone to set in place therein a metal fixture of some kind, probably to connect with some gas or water system as a means of shutting off or letting on the gas or water to an adjacent building.

This fixture as described was of that nature, and not big enough to fill the hole as cut, but, when set therein, left a space large enough to so receive respondent's foot, that he got caught, tripped up, and had some bones broken.

This space, it can clearly be inferred from the evidence, had been partly refilled with clay and odd bits of broken cement by the party who had done the job. The packing had (as we learn because *res ipse loquitur,* and we can well believe it) never been properly done and the street restored by re-cementing it to a safe condition for travelling thereon. Indeed it was palpably an "unfenced trap."

There is no direct evidence when or by whom or by whose direction or authorization it was done.

It is urged for appellant that it is not shewn to have had notice or knowledge of what had been done.

It may, however, be fairly inferred, from what we are told, that it would have been quite impossible to have done the job during that day without attracting the attention of those entrusted, or who should have been entrusted, by the appellant, with the police

and other official oversight guarding that street, in the way that must, in such regards, be established in such communities to enforce the law and protect the public and the municipality's own property.

In a less degree it may also be a fair inference to draw that these officials, or some of them, could not have discharged their duty without observing and calling attention to the matter if the job had been done the night before and so left unguarded all the day of the accident up to four o'clock in the afternoon.

This statute (the City Charter), as it stood when the accident occurred which gave rise to the case of *McPhalen* v. *City of Vancouver*(1), has been amended since the decision in that case, and now reads so that no doubt can exist of the intention of the legislature to give a right of action to those suffering from the municipality's default respecting its duty to repair.

I need not repeat here all I said in that case relative to the liability of a party neglecting an imperative duty imposed upon him by any statute intended to protect and give cause of action to any one suffering by reason of such default. I may refer to the judgment of Mr. Justice Lush in *McClelland* v. *Manchester Corporation*(2), of which report has reached here since, as to a large extent bearing out the view we had taken.

Referring to the views I and others expressed in the *McPhalen Case*(3), and applying the principles set forth therein, and the amendment to the statute, is it not clear that, on such a statute as amended,

(1) 15 B.C. Rep. 367. (2) (1912) 1 K.B. 118, at p. 133.
(3) 45 Can. S.C.R. 194.

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when the facts demonstrate an actual want of repair, causing damage, an action is *primâ facie* of necessity shewn to be well founded, because the statute has not been duly observed or complied with, and hence the party in default called upon to offer some excuse?

Primâ facie the duty is imperatively obligatory and its consequences can only be got rid of by some valid excuse for a failure to discharge the duty so imposed.

This statute is just the same as any other in that regard. The obligation is not qualified by the statute itself in any way. The same principles of law must be adhered to in applying it as in applying other statutes imposing any like duty to repair.

Notice to, or knowledge on the part of, the authorities of a want of repair never formed part of the statute.

American and Ontario cases are cited to shew that some such notice or knowledge of non-repair must be proven by a plaintiff claiming to recover by virtue of the statute. I do not say that no such cases exist as would carry the doctrine of notice or knowledge thus far, for there has been a good deal of confusion of thought in that regard, but no case cited to us from the Ontario authorities carries it so far. Numerous *dicta* can be found apparently doing so. I think we must discard them and also such cases, if any, as carry the doctrine so far.

I will presently consider the question where I think notice or knowledge may become an operative factor in these accident cases. Beyond the line I will indicate I think the doctrine questionable, and, as the late Mr. Beven pointed out, had not found a place in English decisions. Its history helps to shew how it

came about in the United States and Ontario so far as really existent.

When the road-making and the road-repairing duties in America were imposed on municipalities the very conditions of the country required that, in measuring the extent of that duty, due regard should be had thereto, and the variations, especially as to the kind of road, the state of repair, and the superintendence which might be necessary in one place and could not be expected or exacted in another under entirely different conditions.

I suspect the element of notice came to be introduced in connection therewith. Indeed we find the statutes of Maine and Massachusetts, and possibly others states expressly required that municipalities so charged with the duty, should, as a condition of liability, have had reasonable notice of the condition complained of, and that notice was by the courts imputed to them occasionally from very slight circumstances.

In Old Canada (as to that part known then as Upper Canada, now Ontario) the first step taken to render municipalities therein responsible, was by 12 Vict. ch. 81, sec. 190, transferring the powers and duties of justices in sessions, with respect to highways, to the municipal councils of the county.

The next session 13 & 14 Vict. ch. 15, sec. 1, cities and towns were expressly charged with the duty to repair and rendered liable criminally as well as civilly for default.

The later enactment (in one section, indeed in one sentence, which applied to all municipalities) that the non-observance of the duty of repair legislatively cre-

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ated thereby, should be held to be a misdemeanour punishable by fine and further render the municipality responsible for all damages sustained by any person by reason of such default, tended to make courts look at the criminal law liability as the boundary of the civil liability.

Though this was not uniformly agreed to, and the statute later on modified, I suspect the idea of notice or knowledge as part of what might reasonably be required to found a criminal prosecution, became the more readily importable into cases involving only civil liability, than it would have been had the statute been originally framed as the one in question here without expressly giving any remedy.

For a long time the Ontario courts had thus a statute to interpret which is capable of being looked at from a point of view that does not need to be taken relative to this one.

Then again the question constantly arose as to whether or not there was a common law liability independently of the statute, and in seeking for such principles of common law as might create a liability on the part of the municipality as the owner of the road or having jurisdiction over it, in settling the relations thereby created between the municipality and persons it had invited, as it were, to use the road, the questions of notice and knowledge became more closely relevant to the consideration of what should determine the question of liability, than in relation to the simpler question of whether or not a plain statute had been violated and its duties neglected.

So far as the Ontario cases have any bearing on the question, I think this history and these several

considerations must be borne in mind in using such cases. It has been usual also for the purpose of emphasizing the claim and possibly affecting damages to shew gross negligence by giving evidence of long existence of the non-repair. Such prudence, however, is not to be confounded with the question of notice. I may say, however, that the Ontario cases cited to us do not go the length which is contended for herein.

The case of *Castor* v. *Township of Uxbridge*(1), relied on is no authority for the proposition. It was disposed of on the ground of contributory negligence of the plaintiff. No case is an authority binding any one but for, or in respect of, the point of law necessarily decided for the determination of the case.

True, the late Chief Justice Harrison, who was a great authority on municipal law, made, as was his wont, in his opinion in that case, an exhaustive collection of all the cases bearing upon every possible view that the case suggested. In this examination relying upon American authorities alone, he seems to lay down, at foot of page 127, that there is no presumption.

It is to be observed that the case was one arising out of the clear wrongdoing of someone who had no official relation with the municipality or colour of right to do what he had done. It was because the case was of that class and had never, till then, arisen for decision in a superior court that the Chief Justice took such pains.

It is, if I may be permitted to say so, that kind of case alone which can properly give rise to the question of notice. When it is sought to apply the doc-

(1) 39 U.C.Q.B. 113.

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trine to the cases where the road had merely worn out of repair, I think it is entirely misplaced.

No one would think of saying that when the forces of nature have suddenly destroyed or put out of repair a road, or someone has maliciously or negligently wrought the same result, and an accident has taken place as a result thereof, that the municipality must be held as insurers and so, regardless of all opportunity to have repaired the road so destroyed, be cast in damages.

It generally happens in the stating of such a case to any court, that this is its nature and the question of notice or knowledge or opportunity thereof incidentally arises.

I am, despite *dicta* to the contrary, prepared to hold that, unless in some such case as I have suggested, the question of notice or knowledge does not arise, and that in all cases where the accident has arisen from the mere wearing out, or apparent wearing out, or imperfect repair of the road, there arises upon evidence of accident caused thereby, a presumption without evidence of notice that the duty relative to repair has been neglected.

The municipality is bound to take every reasonable means through its overseeing officers and otherwise, to become acquainted with such possible occurrences, and if it has done so can possibly answer the presumption.

It is beyond my province here to further define the limits of that presumption; I am only concerned with giving due consideration to arguments pressed upon us and rested upon the authorities which I have referred to.

In the case of *Kearney* v. *London, Brighton and South Coast Railway Co.* (1), where a railway company was in duty bound to keep in repair a bridge over a highway, a brick fell from it on a passenger below just after a train had passed, and he was held entitled to damages and had no need to shew more than these facts. The decision was upheld in the Exchequer Chamber. The duty was merely to keep in repair. *Res ipsa loquitur* was applied. Why should there be one rule of law as to the evidence needed or presumption arising from evidence in one class of cases involving a breach of duty to repair and another rule for other classes? One would suppose it would if anything be more stringently applied in the case of a breach of a plain statutory duty than in the other. I see no difference. I do, however, see how as a case develops and becomes complicated, other considerations may arise.

In this case the sidewalk was found in the condition described. It clearly was not the result of malice but of work, for a useful purpose, presumably, done by the appellant or someone acting under its express authority.

The charter of appellant contains the following clause:—

218. Every public street, road, square, lane, bridge or other highway in the city shall be vested in the city (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved), and such public street, road, square, lane or highway shall not be interfered with in any way or manner whatsoever, by excavation or otherwise, by any street railway, gas or waterworks company, or any companies or by any company or companies that may hereafter be incorporated, or any other person or persons whomsoever, except having first made application and received the permission of the city engineer in writing.

(1) L.R. 5 Q.B. 411.

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Let it be observed that there is not a word of evidence shewing either gas or waterworks to exist in or be operated in the city. All the reference to such works is that the fixture set in the walk had the appearance of being something put there "for waterworks or gas or whatever it is."

For aught we know the city may own and have in operation both classes of such works.

We are referred to an Act incorporating a gas company many years before but whether it ever got organized or did anything or appeared any place but upon paper we are not told in evidence. What right could the court have before submitting the case to the jury to presume such existed?

In the face of the above quoted stringent provisions of section 218, is it not asking too much to permit the imagination such free scope as to allow it to construct some basis for the theories as to others being liable for damages?

Sweep aside these products of the imagination and there is nothing to be fairly inferred from the facts save that the city may have placed the fixture where placed.

Even if there had been evidence of some such gas works, as provided in the charter got to establish such, I do not see how it could operate without the co-operation of the city authorities. And when so subject to the control of the city as above section 218 implies it must be, it became the duty of the city to protect its walks and those travelling thereon just as much and as efficiently in that regard as if it possessed the works. If it failed to make such stringent regulations and provide for such supervision by its own officers thereof, so as to protect the public and keep itself well in-

formed of all that was being done, then it was, and on this evidence may well be inferred to have been, negligent. It was for the jury to say.

In this connection regard may be had to the rule to be applied herein, laid down in the judgment of Blackburn J. in delivering the opinion of the judges in *Mersey Docks Trustees* v. *Gibbs*(1). In one of the cases and issues raised for consideration therein the contest was relative to the charge delivered to the jury which, according to the bill of exceptions tendered, raised this very issue of non-liability in the absence of knowledge on the part of the defendants there.

The Lord Chief Baron had charged the jury in effect that it was not necessary to prove knowledge on the part of the defendants or their servants of the unfit state of the docks and that proof that the defendants by their servants had the means of knowledge and were negligently ignorant of it, would entitle the plaintiffs to the verdict.

Do we need, even if knowledge or notice is to be an element, anything more in disposing of this case ?

Indeed, when the duty to know is considered and what the Lord Chancellor said, at page 122 of that case, holding that

> they must be held equally responsible if it was only through their culpable negligence that its existence was not known to them.

is fully appreciated, then the field for notice and knowledge to become an operative factor in these cases is an exceedingly narrow one. In any way I can look at this case I see no ground to support the appeal.

(1) L.R. 1 H.L. 93.

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I think the court below right in finding a case to submit to the jury that there had arisen a presumption on the evidence and inferences fairly deducible therefrom, which entitle the respondent to recover upon the statute if the jury chose to draw such inferences.

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

ANGLIN J. (dissenting).—The plaintiff (respondent) was injured as the result of stepping into a hole in a concrete sidewalk in Hastings Street, which is said to be a principal thoroughfare in the City of Vancouver. The hole, which was of such a character that it is clear that it had been purposely cut in the concrete, was about 12 by 14 inches in size and of a depth of two or three feet. In it, extending from the bottom to the surface, was an iron pipe covered by a steel plate apparently about seven or eight inches square and level with the surface of the sidewalk. This steel plate appears not to have been in the centre of the hole. The plaintiff in testifying says that the space left on one side was greater than on the other. He adds that after the accident he noticed that the hole was filled up around the iron pipe with rough broken concrete and clay to within from five to seven inches of the sidewalk. There are also the following questions and answers in his evidence:—

Q. Now around this aperture or hole which was covered by this steel plate, there had been earth and rough pieces of concrete as you said thrown in there, tramped? A. Yes.

Q. Now what did you see within the next—a short time after this accident? A. I saw a gang of men working there across, taking up the pavement on the street going across to that iron structure they were building alongside the Woods Hotel.

Q. What were they doing with relation to this hole, what con-

nection had it with the hole? A. It was running from whatever this plate was for, *gas or water*, they were running from this plate across the street, had the blocks of cement up and digging down somewhere about two weeks later.

That its charter imposes upon the City of Vancouver a duty to maintain its streets in repair, a breach of which renders the city civilly liable to persons injured as a result thereof while lawfully using such streets has been settled by this court in *City of Vancouver* v. *McPhalen* (1). We are now called upon to determine whether evidence of the facts above stated made a case sufficient to submit to a jury upon issues whether there was (*a*) misfeasance on the part of the city rendering it civilly liable to the plaintiff, or (*b*) a breach of the city's duty to repair which entailed such liability.

The only reasonable inference upon the facts in evidence is that the hole in question was cut for the purpose of placing in it the iron pipe which was there at the time the plaintiff was injured. Upon the plaintiff's own evidence this pipe may have been either a gas pipe or a water pipe. The Vancouver Gas Company, incorporated in 1886, has a statutory right to open up the streets of a city for the purpose of placing its pipes in and under them. While wrong-doing is never to be assumed, and, therefore, the cutting of the hole in question should not, in the absence of any evidence warranting such a conclusion, be ascribed to the act of a wrong-doer, there is no sound basis on which a jury could say that it was cut by the municipal corporation or its servants and not by the gas company or its employees. It seems to me impossible

(1) 45 Can. S.C.R. 194.

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to say that a case was made for submission to a jury on the ground of misfeasance.

If then, in order to succeed, the plaintiff must make out such a case as would render the City of Vancouver liable although the hole had been cut by the gas company — and that, I think, is his situation — he must prove facts which, at least, *primâ facie* warrant an inference that the city neglected its duty to maintain the sidewalk in question in repair. The duty of repair is imposed by the statute in absolute terms. But, as is pointed out by Irving J.A., citing from Comyn's Digest, vol. 1, p. 405(*b*),

> An action upon the case does not lie where a man has not sufficient notice of his duty.

The duty to repair comes into existence only when a state of disrepair exists, and I find it very difficult, without holding the municipal corporation subject to the liability of an insurer, which the statute, in my opinion, was not intended to impose, *Mersey Docks Trustees* v. *Gibbs*(1), at pages 123-4, to reach the conclusion that, in the absence of proof of notice or of circumstances such that notice to the municipal corporation should be imputed(2), there has been neglect or breach of its duty to repair. There being no evidence of actual notice, the point for consideration seems to be whether such facts are disclosed as would warrant the trial judge in leaving it to a jury to say whether notice of the existence of the hole in question should be imputed to the defendants. From the fact that shortly afterwards the sidewalk was opened up for the purpose of making a connection with the pipe placed in the hole at which the plaintiff was injured,

(1) L.R. 1 H.L. 93. (2) L.R. 1 H.L., at pp. 121-2.

the reasonable inference would seem to be that the hole itself had been recently made rather than that it had existed for some time. From the evidence that "there had been earth and rough pieces of concrete thrown in there, tramped," it would also appear to be a reasonable inference that after the hole had been cut and the pipe placed in position, it had been filled up with this material to the surface, because otherwise it could scarcely have been "tramped." This would appear to have been a temporary filling, inasmuch as the street was shortly afterwards again opened up for the purpose of making the connection to which the plaintiff refers. It is a well-known fact that, when a hole has been cut and filled up in this manner, the filling may appear to be, when first put in position, perfectly firm and solid; and yet, unless it has been exceedingly well packed or tamped, action of water will soon cause a sinking of the material below the surface. The surface itself may remain intact for a time, but eventually the arch which it forms will give way and the surface itself cave in. That this may have happened, and in all probability did happen in the present case, seems to me to be a fair conclusion from the evidence before us. There is nothing to shew that the filling in was negligently done; still less that any municipal inspector looking at the hole after it had been filled in would or should know that the surface would collapse before the work of connection should be proceeded with. While, therefore, it is true that under the amended charter of the city the gas company could probably open up the streets only with the permission of the city engineer, so that the latter would have notice of any such opening to be made, and assuming that it would be his duty, or that of civic

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officials under him, to see that any opening so made was properly closed up, I find nothing in the evidence which would warrant a finding of neglect of that duty. It is entirely consistent with the evidence that the filling of the hole may have fallen in only immediately before the plaintiff was injured, or it may be that it gave way under the pressure of his foot step and that up to that moment there was nothing to indicate that the hole as filled in constituted a source of danger to pedestrians. Neither is it possible to say that the temporary filling in of such a hole (pending the connection within a few days of the pipe which it contained with the other works contemplated and which would necessitate the re-opening of the hole) with rough concrete and clay properly packed and tamped, would be a negligent or improper thing. The duty of the municipality to maintain its streets in repair must receive a reasonable construction. It does not subject the city to the liabilities of an insurer. The duty of the city engineer who has notice of an opening being made by the gas company must also be dealt with reasonably. It does not, in my opinion, require him to keep an inspector constantly on watch while such an opening is being made and filled in. Upon the evidence, it is a fair inference that this hole was filled in, as would be the duty of the gas company if it had cut the hole, and that the filling had been carried to the surface and had been "tramped." There is no evidence which would warrant an inference that upon a proper inspection an official of the City Engineer's Department would have discovered that the filling was insufficient and that the hole as kept constituted a

menace to pedestrians. *Sanitary Commissioners of Gibralter* v. *Orfila*(1), at pages 411, 413.

We were much pressed by counsel for the respondents with the argument that, inasmuch as it was peculiarly within the knowledge of the municipality whether the hole in the sidewalk had or had not been cut by its officials or contractors, and how long it had existed as a source of danger to pedestrians, upon the plaintiff shewing that he had been injured by stepping into the hole the burden was shifted to the defendant to prove facts and circumstances which would exonerate it from responsibility, and that, in default of its producing such evidence, it should be presumed that facts and circumstances existed which rendered it liable. This argument simply means that proof of the existence of a hole establishes a case of *primâ facie* liability without any proof of neglect of duty, or of facts from which an inference might fairly be drawn of neglect of duty on the part of the municipal corporation. I am unable to accede to that contention. This is not a case of *res ipsa loquitur*. Moreover, the plaintiff could readily have shewn the character of the pipe in question and have thus cleared up the issue as to misfeasance. He was, in my opinion, bound to do so. Assuming that, in the absence of such evidence, the case must be dealt with on the basis that the hole was not cut by the municipality, the plaintiff would probably have experienced no serious difficulty in adducing some evidence — very little would have sufficed in view of the situation of the hole — to shew that it had been in a dangerous condition long enough, if that were the fact, to warrant a jury

(1) 15 App. Cas. 400.

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imputing notice to the defendant. At all events *ei qui affirmat, non ei qui negat, incumbit probatio.* In the absence of any evidence of the existence of facts or circumstances warranting an inference of negligence on the part of the defendant, it should not be called upon to prove the negative, viz., the non-existence of such facts or circumstances.

For the foregoing reasons I am, with great respect for the views of the majority of the Court of Appeal of British Columbia and of those of my learned brothers who have reached the contrary conclusion, of the opinion that a case had not been made proper for submission to a jury and that the plaintiff's action should have been dismissed. I would allow this appeal with costs in this court and in the Court of Appeal and would dismiss the action with costs.

BRODEUR J.—I am of the opinion that this appeal should be dismissed and I concur with the opinion of Mr. Justice Idington.

Appeal dismissed with costs.

Solicitor for the appellant: *J. G. Hay.*

Solicitors for the respondent: *MacNeill, Bird, Macdonald & Bayfield.*

JOSEPH BENTLEY AND TOM WEAR (DEFENDANTS) ..... APPELLANTS;

AND

SAMUEL J. NASMITH (PLAINTIFF) .. RESPONDENT.

1912

*Feb. 26.
*March 21.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Broker—Sale of land—Principal and agent—Disclosing material information—Secret profit—Vendor and purchaser—Agent's right to sell or purchase—Specific performance.

A broker being informed by the owners that they would sell certain lands entered a description of the property in his list of lands for sale through his agency. The lands being still unsold about three months later, the broker, in consideration of a payment of $50, obtained an exclusive option from the owners for the sale or purchase by himself, within 30 days, of the lands at a price named, which was to include his commission in the event of his effecting a sale, but without disclosing information of which he was then possessed that there was a probability of the lands selling within a short time at an increased price. Within a few days after the date of the option he effected a sale, in his own name, of the lands for double the price named therein, notified the owners that he exercised his option to purchase and demanded a conveyance. In an action for specific performance, brought by the broker on refusal of such conveyance,

Held, per Fitzpatrick C.J.—That by the terms of the written agreement the broker became an agent for the sale of the lands with the option of purchasing them for himself; that he could not become purchaser until he had divested himself of his character as agent; that he was, as agent, bound to disclose to his principals the knowledge he had acquired respecting the improved prospects of a sale at enhanced value, and his exercise of the option to purchase did not relieve him of this obligation. He was, therefore, not entitled to a decree for specific performance.

Per Davies, Idington, Anglin and Brodeur JJ.—That the broker was an agent for the sale of the lands at the time he procured the

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option and, having failed in his duty to disclose to his principals all material information he had as to the probability of the lands selling at a higher price than that mentioned, specific performance of the agreement to sell to him should be refused. The judgment appealed from (16 B.C. Rep. 308) was reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming, on an equal division in opinion, the judgment of Clement J., at the trial, by which the plaintiff's action was maintained with costs.

The circumstances of the case are stated in the above head-note, and the questions raised on the appeal are discussed in the judgments now reported.

J. C. Bird, for the appellants.

E. A. Lucas, for the respondent.

THE CHIEF JUSTICE.—The facts are fully set out in the notes of the other judges. By the memorandum of 21st November, the appellants gave to the respondent "the exclusive right to purchase or sell for the term of one month" the property in question in these proceedings. This memorandum of itself undoubtedly established a very peculiar relation between the parties. In my opinion, Nasmith became thereunder an agent for sale and he also had an option to purchase. He could have sold the property as agent, or, finding himself unable to sell, he could have purchased it for himself. The dual relation should have been severed, however, before the option to purchase was exercised; otherwise, Nasmith continued to be an agent obliged, as such, to make full disclosure up to

(1) 16 B.C. Rep. 308.

the very moment that he exercised his option to purchase. The confusion in the legal relations between the parties resulting from such conditions is quite sufficient to shew how necessary it was to regularize his position towards the appellants. Not having done so, Nasmith was bound to them by the rule of law which regulates the relations of principal and agent as to disclosure, etc., and the exercise of his option to purchase did not relieve him of that obligation. In the peculiar circumstances of this case it would require but very slight evidence to justify the conclusion that the respondent was dealing as agent.

In answer to a question from me during the argument, Mr. Lucas admitted that the entry on the regular listing card made as the result of the first interview was just such as would have been made by Nasmith, he being a real-estate agent, if he had taken the property to sell as the agent of the appellants. In case of doubt it might fairly be assumed from the way the respondent treated the transaction at the time that he considered himself an agent for sale. That he did not, as he says, make any effort to sell the property cannot in any way effect the character of the relations established previously with the appellants. On the other hand, if he did not try to sell, what is the meaning of his reference to a prospective buyer; and why did he mutilate the listing card by taking off the owner's name ?

Finally, in the agreement of 25th November, there is quite sufficient to satisfy me that the relations of principal and agent still existed at that time between the parties and that the vendees might, on discovery of that agency have their recourse against the appellants on the ground that the sale was made

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under the terms and authority of the memorandum. *Bryant, Powis & Bryant* v. *La Banque du Peuple*(1), at page 180.

I would allow this appeal with costs.

DAVIES J.—This action was one brought to enforce specific performance of an agreement for the sale to plaintiffs by the defendants of certain lands.

The main questions debated on the argument in the appeal to this court were whether at the time the plaintiffs obtained the option for the purchase of the land they were the agents of the defendants for the sale of such land and bound to disclose to them before obtaining the option all material facts which had come to them or were within their knowledge respecting the selling value of such lands.

I have no difficulty on the facts in reaching the conclusion that at the time the plaintiff obtained the option for the purchase which he afterwards sought to have enforced he was the defendants' agent for the sale of the same land. It seems to me equally plain that being such agent and having become possessed of material information affecting the selling value of the lands it became his duty to disclose such information to his principals before attempting to purchase for himself. This disclosure he did not make. He deliberately concealed the facts within his knowledge; facts which largely affected the selling value of the land in his opinion and would in all probability have affected the judgment of the owners of the land in giving him the option.

Having reached these conclusions as to the agency

(1) (1893) A.C. 170.

of the plaintiff and his neglect to disclose material facts affecting the selling value of the land before obtaining an option to purchase for himself, it seems to me to follow as of course that a court of equity would not lend its aid to enforce at his instance such an agreement for the purchase of the land by himself obtained under such circumstances.

I would allow the appeal and dismiss the action with costs in all courts.

IDINGTON J.—The respondent, as a real estate agent, had in August agreed with appellants to list their property consisting of forty-six acres of land for sale at a price of $210 an acre. On the 19th November following he induced them to sign, in consideration of $50 then paid, an agreement giving him the exclusive right for thirty days to sell or purchase said lands at $200 an acre. This was done so late in the afternoon of that day that the agreement was dated as of the 21st, being the Monday following. On the 23rd or 24th of November he had the assurance to ask the first man inquiring $500 and then $400 an acre. On the 25th he sold to another at the latter price. He admits that he made no disclosure of anything he knew relative to the material circumstances which, if known to appellants, might have changed their minds and led to their refusing him this option.

He says, or rather tries to lead the court to believe, in the first place that he did not know anything material, and in the next place that what he did know was of the nature of suspicion, or mere rumours which were common property. He has not given anything in evidence to explain why, in two or three days, he had the assurance to demand $400 or $500 an acre

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from the first man he met likely to become a purchaser.

If he could have satisfied the court by reference to some sudden discovery after making the bargain, that would have removed the suspicion of unfair dealing, I have no doubt he would have given it.

The evening newspaper announcements may account for much, but I do not think the whole.

It is clear to my mind that if the appellants had known all respondent knew, or had reason to know to excite his expectation, he never would have secured the option.

It is also pretty clear that there was a something that induced the respondent suddenly to change his attitude of apathy taken relative to this property, from August, to that taken on the 19th of November as one of zealous anxiety.

He swears he did not know of the Canadian Pacific Railway developments. He may not actually have known, but I have not the slightest doubt he had good reason to suspect important developments. And especially so as he has failed to contradict or explain the evidence of Williams, who tells of the respondent saying some one had given a tip or hint. Indeed, he himself tells much that shews he had some reason to suspect things were moving, as it were.

The appellants were entitled to have these reasons that moved him disclosed to them. In saying so I have not overlooked the remark of Dart, "Vendors and Purchasers," at page 39 of the 5th edition, that an agent

> need not have pointed out a merely speculative advantage (such as the possibility of an unplanned though contemplated railroad running near the property) which might be reasonably supposed to be equally in the knowledge of both parties.

This is, in substance, a quotation from the judgment of Vice-Chancellor Wigram in the case of *Edwards* v. *Meyrick*(1), and is, therefore, as well as from its adoption by the author, entitled to great respect in every case involving similar conditions of fact.

This case has only a very slight sort of resemblance in its facts to that, but, nevertheless, the dictum has given me such concern as to lead me to seek for authorities wherein it may have been applied in cases exhibiting facts more closely resembling those here in question. I have failed to find any. It is, of course, desirable that the doctrine of fiduciary relationship binding an agent for sale should not be stretched to cover cases where disclosure has taken place and through honest oversight an incidental circumstance presumably known to both parties has been overlooked in the disclosure made.

In this case there was no attempt at disclosure or recognition of the duty requiring it and the respondent frankly says he would not have told appellants if they had asked him.

Indeed, the case, at the trial and throughout, has been treated as if the disclosure had not been made. But it seems to have been held that the mere listing of property with an agent for sale created no fiduciary relation.

With respect I cannot accept this latter view of the matter. The business of the respondent was to procure for those (listing property or in other words) entrusting him with the sale of property, purchasers thereof.

The naming of the rate of commission to be paid or

(2) 2 Hare 60.

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terms upon which it is to be paid has nothing to do with the legal question as to what will constitute the relationship of principal and agent between the parties.

The sole question in such cases must always be whether or not the alleged agent has by his language or conduct, or both, constituted himself the agent of a principal assenting thereto and has undertaken the duty flowing therefrom.

In *McPherson* v. *Watt*(1), the Lord Chancellor points out in effect that it mattered not whether Watt was a gratuitous adviser or paid adviser; the sole question being whether or not in fact he had become the adviser.

In the case before us I have no doubt the question of commission was as well understood by both parties as it was by the respondent when the entry was made by him on his listing card shewing what is admitted to have been *primâ facie* the usual rate.

There are some curious features in the case. Amongst others one is tempted to doubt whether or not the respondent did not in truth hesitate to take the position he now does.

The receipt given the sub-purchaser for the deposit got on the resale contains the following:—

> This receipt is given by the undersigned as agent and subject to the owner's confirmation.

The respondent himself signed his firm's name to this with a doubtful "pro S. J. Nasmith." What owner did he mean ? Or was it that the printed form merely said what he ought to have thought ?

When one looks at it thus and considers the facts

(1) 3 App. Cas. 254, at p. 263.

and that the respondent seems to have been far from clear in his own mind when speaking to appellants later on the point of whether or not he should set up a claim to the commission, some curious speculations flit across one's mind.

I think the appeal must be allowed with costs here and in the courts below and the action be dismissed with costs.

ANGLIN J.—The plaintiff, a real estate agent, sues for the specific performance of an agreement for the sale to him of certain lands of the defendants which he says resulted from his exercise or acceptance of an option to purchase such lands procured from the defendants on the 19th of November, 1910, in consideration of a cash payment of $50 which he then made to them. The document, under which the plaintiff claims, gave him for one month an exclusive agency to sell as well as an option to purchase the property in question at a stipulated price, $200 per acre, and upon terms specified. He effected a sale of it on the 25th November, he alleges on his own behalf, at $400 per acre.

In answer to the action, the defendants plead that the plaintiff did not in fact exercise his option to purchase and that the sale of the property at $400 per acre was effected by him on their behalf and as their agent. They also assert that in August, 1910, the plaintiff became their agent for the sale of the property in the ordinary way, that he was still such agent when he procured the option in November, and that, when seeking the option, he concealed from them certain material information which it was his duty to disclose. They maintain that the option which he ob-

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tained was thus vitiated and was voidable at their election.

It appears that the plaintiff sought the option to purchase in November because, as he himself says, he had reason to expect and did expect "a sharp rise in real estate values there." He had heard rumours of prospective industrial developments in the neighbourhood, the announcement of which he believed would precipitate a marked increase in the market price of this property. He knew that an adjacent property which had been in his hands for sale, had been "taken off the market for some good reason." These were circumstances which admittedly influenced his judgment as to the probable market value of the property in question. He must have known that they would be likely to influence the judgment of the defendants in deciding whether they should accede to his request for an option to purchase. "This excitement that was on," he says, "was the prime cause for my going there," *i.e.,* to the defendants, to secure the option.

Instead of imparting this information to the defendants (he says he would not have given it had they asked for it), the plaintiff apparently sought to mislead them. Although he had in view no purchaser other than himself or his partner, he talked to them as if he had a prospective purchaser and discussed the agricultural possibilities of the land. He practically admits that he did this in order "to throw the defendants off the track."

If, when he went to them on the 19th November, the plaintiff was the defendants' agent to procure offers for the purchase of the property in question, he was, in my opinion, bound to disclose to them all

material information which he had before taking from them for his own benefit an option to purchase it, and his deliberate concealment of such information — if not active misrepresentation of the situation — rendered the option which he secured voidable at their election. The materiality of that which he admits influenced his own judgment and action in the matter he cannot very well dispute.

But he insists that prior to the 19th November he was not the defendants' agent in any such sense as would impose upon him this duty of disclosure. The plaintiff first saw the defendants in August, 1910, with a view to purchasing another property from them. In the course of the negotiations about this other property, which came to naught, the defendants informed him that they owned the property now in question and wished to sell it. He admits that he told them that he handled "outside properties" and will not deny that he stated that his business was that of a real-estate broker. The defendant Wear says that he made this statement and that he then understood from him that he "sold on commission." The defendant Bentley also says that he knew the plaintiff was a real-estate agent. I have no doubt that this was the fact, and the evidence makes it abundantly clear to me not only that the character of the plaintiff's business was known to the defendants, but that, to the knowledge of all parties, it was in his character as a real-estate agent that the defendants offered to place with him the sale of their property and that he took the "listing" of it. His own story is that, when the defendants told him he might sell it if he could, he took a memorandum of the description of the land and of the price and terms of sale on the spot. When he

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returned to his office he immediately "listed" the property on a card in the following form:—

DIST. LOT.	BLOCK.	LOT.	STREET AND NO.	PRICE, INCLUDING 5 PER CENT COMMISSION.	TERMS.
Westerly Section Line	46 Acres of 7 Tp. Above Govt. 46 Acres	S ½ of 40 Dyke Cleared	S.E. ¼ of Gp. 2N. W.D. Soil A1	$210 Ditched all around	¼ cash Balance in 4½ years

Remarks: Give as full particulars as possible on the other side.
I HEREBY GIVE you the exclusive sale of the above property for .....

This, he admits, is precisely the course he always takes with properties placed in his hands as an agent for sale. He also says he thought later of offering the property under the authority thus given him to a prospective buyer.

Upon these facts I have no doubt that the plaintiff took the listing of the property in the ordinary course of his business as a real-estate agent, intending the defendants to understand, as they did, that he was assuming towards them the duties and obligations which such an agent undertakes when an owner of property places it in his hands to secure a purchaser. While such an agent has no implied authority to enter into binding contracts on his principal's behalf — while he may not be entitled to his commission, although he submits an offer in the terms stated by his employer, unless he procures the latter to accept it, it is his duty to exercise all reasonable diligence in procuring offers for the purchase of the property and

to submit them to his principal. He is in his principal's employment from the moment of his retainer to procure offers. The consideration for the promise of the contingent remuneration or commission, which is implied, if not expressed, in the placing of the property in his hands, or the listing of it with him, is his undertaking not that he will merely sit idle and bring to his principal such offers as may come his way, but that he will exert his skill and energies to procure such offers, and that he will in every respect conduct the business entrusted to him to the best advantage and in the best interests of his employer, giving to the latter the benefit of all information which he has or may obtain that might influence his judgment in regard to the price or terms at or upon which the property should be sold. These, in my opinion, were the obligations which the plaintiff assumed towards the defendants as a result of their August interview, and the defendants had the right to rely upon his discharging them. That whatever relationship was then constituted between the parties continued until the 19th of November the plaintiff himself admits. He says that nothing had occurred to change it. In fact by the very document which he then procured he continued his agency on somewhat different terms. It follows, I think, that without disregarding a duty of his employment as a real estate agent the plaintiff could not procure a binding contract for the purchase of his employers' property for his own benefit unless he first placed them in as good position as he himself occupied to form a sound judgment as to the present and prospective value of such property.

This is an action for specific performance. In order to succeed in obtaining that equitable relief the

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conduct of the plaintiff in bringing about the contract upon which he claims it must have been irreproachable from the point of view of a court of equity. The court will refuse this relief if it appears that there is in the circumstances surrounding the making of the contract anything which renders it not fair and honest to call for its execution. This is so in the case of unintentional unfairness. *A fortiori,* will this course be followed when the unfairness results from the plaintiff having intentionally failed to discharge a duty which he owed to the defendant. Even if the facts established should be deemed insufficient as a defence to a common law action for damages for breach by the defendants of their agreement to sell, or to support an action by them for rescission (questions upon which I refrain from expressing an opinion), they are, in my opinion, clearly sufficient to require the court, in the exercise of its ample discretion in regard to granting or withholding the relief of specific performance, to dismiss this action.

In the view which I have taken it is unnecessary to determine the question whether, if he had an enforceable option to purchase, the plaintiff exercised it in such a manner that he would be entitled to assert the rights of a purchaser from the defendants.

With respect, I would, for the foregoing reasons, allow this appeal with costs in this court and in the provincial Court of Appeal, and would dismiss the action with costs.

BRODEUR J.—The first question that we have to consider is whether the respondent was the agent of the appellants when they gave him an option on their property.

It appears by the evidence that a few months before the respondent, who is a real-estate agent, met the appellants and, as a result of that interview, the property in question was listed with him.

It was entered on a card which he was using in his office for the lands he had for sale and the price was entered on that card under the heading "Price, including 5 per cent. commission, $210." That sum represented the price of $200 asked for by the proprietors and the $10 were for the commission. It was impossible for me to come to any other conclusion than that the respondent was the agent of the appellants.

Once that relation established, it became the duty of the respondent to acquaint his principals with all the information he had as to the value of the land. An agent is bound to disclose to his mandator all the circumstances that might alter his views.

The vital principle of all agencies is good faith, for without loyalty the relation of principal and agent could not well exist.

The agent must make a full and fair disclosure of all the facts and circumstances within his knowledge in any way calculated to enable the principal to base his opinion.

In this case, Nasmith, when he approached the appellants to have an option on their property, should have disclosed the knowledge he had of a rise in the value of that land: and, not having done so, he will be responsible to the appellants for the sum obtained.

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *MacNeill, Bird, Macdonald & Bayfield.*

Solicitors for the respondent: *Lucas & Lucas.*

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*March 7, 8.
*March 21.

CARRIE SHEARER (DEFENDANT) ....APPELLANT;

AND

ANDREW S. HOGG (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Will—Universal legacy—Powers vested in legatee—Devise by legatee of residue undisposed of at her death—Substitution—Words and phrases—"Or not disposed of"—"In her possession."

S., by his will, gave all his property absolutely to his wife with a direction that their children should be suitably maintained and educated by her. The will then provided "that should my said wife die leaving any of my said property or rights, in her possession or not disposed of," upon her said decease the same should be divided "among our said children" in the manner specified.

Held, affirming the judgment of the Court of Review (Q.R. 40 S.C. 139, *sub nom. Shearer* v. *Forman*), that this provision did not empower the wife to dispose of the residue at the time of her death by will but had the effect of creating a substitution *de residuo* in favour of the children.

APPEAL from the Superior Court, sitting in review, at Montreal(1), affirming the judgment of Lafontaine J., in the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

The action was originally instituted by Addie M. Shearer, one of the children of the testator, against her sister, the present appellant, and John Forman, her husband. The original plaintiff died and the present respondent, by *reprise d'instance,* became plain-

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

(1) Q.R. 40 S.C. 139, *sub nom. Shearer* v. *Forman.*

tiff as the executor of the last will and testament. The action was dismissed in so far as it affected John Forman and was maintained in respect of the present appellant; no appeal having been taken in regard to the decision in favour of Forman, the judgment of the Court of Review merely affirmed the judgment of Mr. Justice Lafontaine against the appellant, Carrie Shearer. The clauses of the will of the late Andrew Shearer, in respect of which the dispute arises on the present appeal are quoted in the judgments now reported.

Leo H. Davidson K.C. for the appellant.

W. D. Lighthall K.C. for the respondent.

THE CHIEF JUSTICE.—The circumstances under which this will was made may help us materially to ascertain by interpretation of the language used what the intention of the testator was. Married under conditions which established community of property between himself and his wife, the testator wished evidently to provide for her and her four young daughters, two of whom were for some reason the object of his special solicitude. He had managed to accumulate a modest fortune barely sufficient, as he foresaw, to provide for the maintenance of those dependent on him in a very humble way. His estate at his death was valued at $7,000. Having confidence in his wife's prudence and capacity, which confidence has been fully justified, and to avoid, no doubt, the partition of the community, a costly and cumbersome proceeding, he gave her his estate burdened, however, with these obligations: 1st. That she should, during her lifetime,

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keep her children with her and provide for their education and maintenance according to their station in life; 2ndly. That such portion of the estate as might remain undisposed of or in her possession at her death should go to their four children in certain proportions which he fixes.

The words used in the will, and the interpretation of which has resulted in this litigation, are:

> And finally it is my desire, will and wish that should my said wife die leaving any of my said property or rights in her possession *or not disposed of*, the same should be divided among our said children as follows," etc.

The words which have created the embarrassment are, "or not disposed of." Are those words mere surplusage in the sense that they add nothing to those that precede, as for instance, the words "her heirs and assigns" in the disposing clause; or are they words of amplification conferring power upon the widow to dispose of the estate by will, as they would if they were construed without reference to the context?

Taken literally, I would be disposed to say that these words might be construed, in view of the context, to convey the right to dispose of the residue of the estate in her possession at death by will. In that way effect is given to each word; property which is the object of a testamentary disposition remains until death in the possession of the testator. "Le mort saisit le vif." It is also possible to say that these words are mere surplusage, that is, the testator meant that property in possession of his wife in the sense that it was not disposed of by her by deed *inter vivos* would go to their children. That being a possible construction should, in my opinion, prevail as being most consistent with the clear intention of the testator

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whose chief desire evidently was to provide for the support and maintenance of those dependent upon him as far as his modest estate would permit. To hold that the widow had an absolute power of disposition by will would be to defeat the clearly-expressed object of the testator. Nothing is more apparent than his solicitude for the care and maintenance of his young and helpless family, and if he gave his widow the power free from any limitation of making a will she might in the event of her death following close upon his dispose of the estate for the benefit of absolute strangers. Nothing could be further from the thought of the testator. Any possible construction of the terms used by him which would prevent the happening of such a contingency should be adopted.

I would dismiss this appeal and confirm the judgment below.

DAVIES J.—The controversy between the parties to this appeal depends for its solution entirely upon the construction given to the will of the late Andrew Shearer of Montreal.

The respondent claims that there was a substitution created by the will on the death of Mrs. Shearer and that he was the heir of one of the substitutes. The appellant's contention is that the will did not create a substitution, that the devise to the wife was absolute and that the power of disposition given to her of the property extended as well to a testamentary disposition as to one made in her lifetime.

The whole question is one of the testator's intention which is to be gathered not from any one phrase or sentence, but from the instrument read as a whole. The rules with respect to the construction of wills in

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the Province of Quebec are not different from those which prevail in all the other provinces of Canada. Articles 872 and 928 C.C. In all cases the intention of the testator, to be gathered from the whole instrument, is to govern.

By his will, executed in 1867, Andrew Shearer devised and bequeathed all the property, estates and rights, without exception, of which he should die possessed or entitled to unto his wife Elizabeth Crowe and her heirs and assigns for ever.

Following this absolute devise of his property are the two paragraphs in question which read as follows:

> And, it is further my will and wish, that my said beloved wife keep with her our daughters as long as any of them may wish to remain, and especially that our daughters Addie and Edith, have such education and upbringing as she will be able to afford them according to their station in life, and that inasmuch as our second daughter, Tina, is afflicted with sickness that she should be her mother's special care, during her said mother's lifetime with such necessaries as she may be able to provide her with.
>
> And finally, it is my desire, will and wish, that should my said wife die leaving any of my said property or rights in her possession or not disposed of that upon her said decease, the same should be divided among our said children as follows:—One-half thereof to our said daughter Tina, and the other half to our children, or those then living, in equal shares, one share to each of them, and their heirs and assigns forever.

I do not think any reasonable doubt can exist as to the testator's intention as expressed in and gathered from the entire will.

He first gives the property to his wife absolutely and then he impresses upon his gift a trust during her lifetime for the maintenance, support and education of his daughters. The power of the wife to dispose of the property or any part of it for the purposes specified in the will during her life was unquestionable. The will then provided that if at her death any

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of the property remained "in her possession or not disposed of" *upon her decease* the same should be divided among their children in the manner he then proceeds to specify.

The whole question before us resolves itself into this:—Do the words "should my wife die leaving any of my said property or rights *in her possession or not disposed of*" give the wife the power of testamentary disposition over the property; or is the disposition referred to one to be made by her during her life?

I think the latter expresses the true intention of the testator. There seemed to be much difficulty in giving a meaning to the words "in her possession" preceding those "or not disposed of." I am inclined to think they were inserted to cover the possible case of proceeds of property disposed of by the wife and which were at her death in her possession and held by her to be applied as the will prescribed for her own maintenance and that of her children. At any rate they are applicable to such a condition and to such process. The remainder of the property not sold would be embraced by the words "or not disposed of." General words giving a power of disposition unless controlled by their context may well be held to embrace testamentary disposition. I cannot think they do so as they stand in this will. Such a construction would seem to me to be opposed to the testator's entire plan as to the disposition of his property. His wife gets the absolute power of disposition over it during her life for her own and her children's maintenance and the latter's education, and all the property not, in the wife's judgment, disposed of by her in her lifetime, for the persons and purpose he specially indicates, is to be divided among his children in the pro-

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portions he specifies. To construe the words "or not disposed of" as giving the wife a testamentary power of disposition which might be used to give the property to strangers or, as in fact the widow attempted to use it, to give the undisposed of property to one child to the exclusion of the others would be to defeat the testator's intention and the plan and object he evidently had in mind when framing his will.

I conclude, therefore, that the respondent's construction of the will is the correct one and that it created a substitution, on the death of Mrs. Shearer, with respect to the then undisposed of property in favour of the testator's children.

I would dismiss the appeal.

IDINGTON J.—As I interpret the language of the will in question, it cannot be construed otherwise than as creating the substitution found therein by the courts below and, therefore, would dismiss the appeal with costs.

DUFF J.—It is conceded by counsel on both sides that if the words "desire, will and wish," in the fifth paragraph of the will, are properly construed as words of disposition and not of recommendation merely then the disposition effected by that paragraph is in law incompatible with the vesting in the widow of powers of disposition by will. I have no doubt that the words in question must be construed as words of disposition; and it follows, consequently, that the widow had no power of disposition by will and that a substitution *de residuo* was created.

ANGLIN J.—Notwithstanding the absolute terms in which the testator has couched the legacy to his

wife, observing the fundamental rule of construction which prescribes that testamentary intention should be gathered from the entire will (arts. 928 and 872 C.C.), this bequest must be held to be subject to such qualifications and restrictions as will give due effect to the provisions which follow it. By the first of these the widow's power of disposition of the property during her life is made subject to the rights of her daughters Addie, Edith and Tina to maintenance, care and education. It is the manifest intention of the testator that the property bequeathed to his wife shall be used by her for these purposes and for her own support. Actuated by the same wish he proceeds to state that it is his "desire, will and wish," not that his wife shall by her will make a designated disposition of so much of his property as shall at her death be left "in her possession or not disposed of," but that such property shall under the operation of his own will pass to his children in defined shares. While this is clearly intended as a dispositive provision, its effect is perhaps not so obvious.

The subject of the gift over to the children is such of the property bequeathed to her as the widow dies "possessed of" and such of it as she leaves "not disposed of." It is a little difficult, at first blush, to appreciate what the testator had in mind which might be property not disposed of and yet not in possession of his widow at her death. But, although at first inclined to read "or" as "and," since it is conceivable that some of the property though not disposed of might, nevertheless, be out of the widow's actual possession at the time of her death, I do not think we would be justified in substituting "and" for "or." It is not clear that it is necessary to do so in order to carry out the testator's intention.

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Anglin J.

What is the restriction imposed upon the widow's power of disposition ? On a literal reading of the will she is first denied the power to alienate any of the testator's property of which she dies possessed. This *primâ facie* excludes the power of disposition by will because, ordinarily, she would die possessed of property which she might thus dispose of. Confining the application of the words "or not disposed of" to such property (if any) as though not in her physical possession yet belonged to her at her death (*i.e.,* had not been alienated) as must be done to give to them any effect, when read in conjunction with the other words "in her possession," do they import a power of disposition by will ? I think not. Although, if they stood alone, the words "not disposed of" might well mean "not disposed of by act *inter vivos* or by will" (Pothier, Œuvres, vol. 8, "Des Substitutions," s. 4, No. 149), when taken in conjunction with the words "in her possession" and treating these latter words as not being mere surplusage, but as intended to impose some real restraint on the widow's power of alienation, I think the words "not disposed of" should be read as "not disposed of by act *inter vivos*" and, therefore, as not implying a right in the widow to make a disposition by will. On this question of construction, *Stevenson* v. *Glover*(1), referred to by Mr. Justice Lafontaine, is in point.

The words "not disposed of" are satisfied by a construction which restricts them to disposal by acts *inter vivos,* and that construction seems to me to best accord, not only with the words immediately preceding, but also with what appears to be the governing

(1) 14 L.J.C.P. 169.

intention of the testator, namely, that, while giving his wife the control, management and disposition of his entire estate during her life in order to provide for her own needs and for the education, maintenance and care of his children, he wishes by the dispositions of his own will to secure to the children what should remain of his estate upon his wife's decease.

In view of the form of the bequests to the wife (art. 944 C.C.), the powers of disposition given her (arts. 952, 975, 976 C.C.), and the dispositive provision by which the daughters take the property undisposed of or in the widow's possession at her death not from her, but directly from the testator (art. 962 C.C.), and having regard to article 928 C.C., I respectively concur in the conclusion of the learned judges of the Superior Court and Court of Review that we have here a case of substitution of residue. Its scope and extent I have indicated above.

The appeal fails and should be dismissed with costs.

BRODEUR J.—For the reasons given by the Chief Justice I am of the opinion that this appeal should be dismissed and the conclusions of the judgments of the Superior Court should be confirmed.

Appeal dismissed with costs.

Solicitors for the appellant: *Davidson & Ritchie.*
Solicitors for the respondent: *Lighthall & Harwood.*

1911
*Oct. 26, 27.
1912
*May 7.

LEON ERNEST OUIMET (PLAINTIFF) . APPELLANT;

AND

ADOLPHE BAZIN, HUSMER LANCTOT AND S. P. LEET, *ês qualité* (DEFENDANTS) ..... RESPONDENTS.

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC.
(MIS-EN-CAUSE.)

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

Constitutional law—Construction of statute—Quebec "Sunday Act"—7 Edw. VII. c. 42, amended by 9 Edw. VII. c. 51—Prohibition of theatrical performances—Local, municipal and police regulations—Criminal law—Legislative jurisdiction—Validation by federal legislation—"Lord's Day Act," R.S.C., 1906, *c.* 153.

In the "Act respecting the observance of Sunday," 7 Edw. VII. ch. 42 (Que.), as amended by 9 Edw. VII. ch. 51 (Que.), the provisions prohibiting theatrical performances on Sunday are not of the character of local, municipal or police regulations. On the proper construction of the legislation, treated as a whole, they purport to create offences against criminal law and, consequently, are not within the legislative competence of a provisional legislature under the "British North America Act, 1867." *The Attorney-General for Ontario* v. *The Hamilton Street Railway Co.* ([1903] A.C. 524) followed. The legislation in question derives no validity from the provisions of the "Lord's Day Act," R.S.C., 1906, ch. 27. Judgment appealed from (Q.R. 20 K.B. 416) reversed, Idington and Brodeur JJ. dissenting.

Per Idington J., dissenting.—The provisions of section 2 of the statute 7 Edw. VII., ch. 42 (Que.), are severable from one another as well as from the other provisions of the statute, and,

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

consequently, although other provisions may be *ultra vires*, the prohibition in respect of theatrical performances on Sunday is a police regulation which is within the competence of the provincial legislature.

Per Brodeur J., dissenting.—The legislation in question deals merely with local matters affecting police regulations and civil rights within the province and, consequently, is *intra vires* of the Legislature of Quebec.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming, but for different reasons, the judgment of Pagnuelo J., in the Superior Court for the District of Montreal.

Informations were laid in the Police Court for the City of Montreal against the appellant charging him with having carried on a business and given theatrical performances and representations, in the City of Montreal, on Sunday, on certain dates mentioned in the month of August, 1910, for profit and without necessity or urgency, in contravention of the Quebec statutes respecting the observance of Sunday, 7 Edw. VII. ch. 42, amended by 9 Edw. VII. ch. 51. In consequence, the appellant sued out a writ of prohibition to prohibit the police magistrates of the City of Montreal (the respondents), from taking cognizance of the complaints.

The appellant was proprietor of a theatre, in the City of Montreal, in which he exhibited "moving pictures" and which he kept open to the public on Sundays. The principal grounds invoked by him in support of the writ of prohibition were that the police magistrates had no jurisdiction to entertain the complaints in the informations and that the statutes under which he was charged with the offences were *ultra vires* of the Legislature of Quebec. The Attorney-

(1) Q.R. 20 K.B. 416.

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General for the Province of Quebec was made a party to the proceedings and, with the respondents, contested the action.

In the Superior Court, Mr. Justice Pagnuelo quashed the writ and his decision was affirmed by the judgment appealed from (1), but for different reasons. In the Court of King's Bench, Trenholme and Cross JJ. differed in opinion with the majority of the judges of that court (Jetté C.J. and Archambault and Carroll JJ.), but concurred in the result on the ground that the informations had been validly preferred in virtue of the provisions of the "Lord's Day Act," R.S.C. 1906, ch. 153.

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

Aimé Geoffrion K.C. and *Lacroix K.C.* for the appellant.

Lafleur K.C. and *Donat Brodeur K.C.* for the respondents.

THE CHIEF JUSTICE.—The object of this appeal is not to ascertain whether, on some technical ground, the information, which is the basis of these proceedings, can be sustained; but to test the constitutional validity of section 2 of the "Quebec Act," 7 Edw. VII. ch. 42, as amended by 9 Edw. VII. ch. 51. That section is in these words:—

> No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances, or excursions.

(1) Q.R. 20 K.B. 416.

The contention of the respondent is that it was competent to the Quebec Legislature to enact that section on the ground that it is in the nature of a municipal or police regulation of a purely local character. It is also argued that an act or default may be forbidden by statute in such a way that the person guilty may be liable to a pecuniary penalty which is recoverable as a debt by civil process by a private person, or, in some cases, only by an officer of the Crown. In which case such an act or default may be an offence against the statute, but is not a crime. Halsbury, vol. 9, p. 233, note.

I most regretfully have come to the conclusion that the section in question is not a local, municipal or police regulation, for the breach of which a pecuniary penalty is imposed, but legislation designed to promote public order, safety and morals.

The section purports to deal with a subject, "the observance of Sunday," which is not within the legislative jurisdiction of a provincial legislature and is already the subject of criminal legislation, as appears upon reference to the statute 29 Car. II. ch. 7, part of the criminal law of England declared to be in force by the "Quebec Act," 14 Geo. III. ch. 83.

It must be accepted as settled that "criminal law," in the widest and fullest sense, is reserved for the exclusive legislative authority of the Dominion Parliament, subject to an exception of the legislation which is necessary for the purpose of enforcing, whether by fine, penalty or imprisonment, any of the laws validly made under the "enumerative heads" of section 92 of the "British North America Act, 1867." In *Attorney-General for*

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Ontario v. *Hamilton Street Railway Co.*(1), their Lordships, it is quite true, gave no opinion with respect to the validity of the section of the Act they were considering (R.S.O. 1897, ch. 246) by which tramway companies were, subject to certain exceptions, prohibited from working their trains on Sunday; but they held the phrase "Criminal Law," in section 91 of the "British North America Act," free from ambiguity and that, construed by its plain and ordinary meaning, it would include every such law as purports to deal with public wrongs, that is to say with offences against society rather than against the private citizen. Apply this test to the section we are now considering, assuming a breach of the prohibition, what private right could possibly be affected and for what conceivable violation of the section would a private citizen have recourse ? In *Russell* v. *The Queen*(2), at page 838, their Lordships says:—

> Laws of this nature ("Canada Temperance Act") designed for the promotion of public order, safety and morals, and which subject those who contravene them to criminal procedure and punishment belong to the subject of public wrongs rather than to that of civil rights

Austin tells us, Jurisprudence, Lect. XXVII.:—

> In short, the distinction between private and public wrongs or civil injuries and crimes would seem to consist in this:—
>
> Where the wrong is a civil injury, the sanction is enforced at the discretion of the party whose right has been violated.
>
> Where the wrong is a crime, the sanction is enforced at the discretion of the Sovereign.

In what respect can it be said that working on Sunday, or attendance at theatrical performances or excursions on that day, the things that are forbidden, constitute a civil injury against a private individual

(1) [1903] A.C. 524. (2) 7 App. Cas. 829.

for which he has a remedy? The penalty, in case of breach, belongs to the Crown and can only be recovered under the summary conviction sections of the Criminal Code. It would appear also as if section 7 of the provincial Act was intended to prevent the enforcement of the penalty, except at the discretion of the Sovereign acting through the Attorney-General. It appears to me on the whole abundantly clear that the intention of the legislature was to forbid certain things which, in its opinion, are calculated to interfere with the proper observance of Sunday. In the *Hamilton Street Railway Case*(1) their Lordships hold, impliedly at least, that Christianity is part of the common law of the realm; that the observance of the Sabbath is a religious duty; and that a law which forbids any interference with that observance is, in its nature, criminal. See also *Pringle* v. *Town of Napanee*(2); *Cowan* v. *Milbourn*(3); *Vidal* v. *Girard's Executors*(4), at page 198.

It is impossible for me to believe that the legislature intended, by the enactment in question, to regulate civil rights. On the contrary, the evident object was to conserve public morality and to provide for the peace and order of the public on the Lord's Day. I am confirmed in this belief by the title of the Act which is described as "A law concerning the observance of Sunday"; and, as Sedgewick J., speaking for the majority of this court, said in *O'Connor* v.

(1) [1903] A.C. 524.
(2) 43 U.C.Q.B. 285.
(3) L.R. 2 Ex. 230.
(4) 43 U.S.R. 127.

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Nova Scotia Telephone Co.(1), at page 293; "We cannot with propriety shut our eyes to the words of the title." *Vide* also *Fielding* v. *Morley Corporation*(2), where it was held that

> the title of an Act of Parliament is to be read as part of the enactments.

The profanation of the Lord's Day was an indictable offence at common law; 2 Chitty's Criminal Law (2 ed.), p. 20; 13 Encyclopædia of the Laws of England, *vo.*, "Sunday." Blackstone classifies those laws under the criminal law (offences against religion, morals and public convenience) and says:—

> Profanation of the Lord's Day, vulgarly but improperly called Sabbath breaking, is another offence of the class now in question. 4 Stephens Com. Bk. VI. ch. 9.

In the enumeration of offences which may be tried summarily, Halsbury (vol. 9, No. 161), includes, at page 80, those arising out of breaches of the Sunday observance law (29 Car. II., ch. 7). See also *Rawlins* v. *Ellis*(3). In the report of the Commissioners on Criminal Law, vol. 2, at page 81, under the general heading of "Offences against religion," the Commissioners says:—

> Certain religious observances, such for instance as that of the Sabbath, may properly be conceived as exercising so important and beneficial an influence on moral conduct, that the wanton violation of them ought to be prevented by penal laws. The other general principle which we have above referred to as furnishing a legitimate foundation for all laws of the class we are now considering may also, to a certain extent, be applicable, namely, that with respect to institutions and observances which carry strongly with them the opinions and feelings of the community, and open defiance of them may justly be the subject of punishment.

(1) 22 Can. S.C.R. 276. (2) [1899] 1 Ch. 1.
(3) (1846) 16 M. & W. 172.

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In the absence of provincial enactments which make sections 889 to 1124 and 1125 of the Criminal Code applicable to prosecutions under the Quebec Laws — and we have not been referred to any — I would hesitate to hold with Mr. Justice Cross that the charge

although set out and made as for offences against the ineffective provincial Acts * * * should not fail merely because of its having been laid as a violation of a wrongly cited statute, if it were in other respects a charge of an offence known to the law and triable by a magistrate.

I have always understood the rule to be that a prosecutor could not ground the one charge in his information upon two Acts, passed one by Parliament and the other by a provincial legislature, which contain separate and distinct provisions, no more than a statutory offence could be blended in the same count with one at common law.

I would allow the appeal with costs.

DAVIES J.—This is an appeal from the judgment of the Court of King's Bench of the Province of Quebec quashing a writ of prohibition issued against the police magistrates of the City of Montreal prohibiting them from proceeding further in certain prosecutions against the appellant, Ouimet, for having had on the first and eighth days of August

for profit without necessity and urgency carried on a business and given theatrical representations on Sunday.

The complaint was made and the prosecutions instituted under the Quebec Acts 7 Edw. VII. ch. 42, and 9 Edw. VII. ch. 51. The former is intituled "An Act respecting the Observance of the Lord's Day."

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The principal sections are as follows:—

1. The laws of this legislature, whether general or special, respecting the observance of Sunday and in force on the twenty-eighth day of February, 1907, shall continue in force until amended, replaced or repealed: and every person shall be and remain entitled to do on Sunday any act not forbidden by the Acts of legislature, in force on the said date, or subject to the restrictions contained in this Act, to enjoy on Sunday all such liberties as are recognized by the customs of this province.

2. No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances, or excursions.

Sections 3 and 4 provide for punishment for offences against the Act by fine and imprisonment.

Sec. 5.—Nothing in the present Act shall repeal the Acts of this legislature now in force concerning the observance of Sunday, nor any by-laws passed thereunder, which laws and by-laws shall continue in full force and effect until amended, replaced or repealed according to law.

The amendment of 1909 increases the fines and imprisonment for subsequent offences.

The question raised for our consideration is as to the constitutionality of these Acts; that is, whether they were, as a whole, *ultra vires* of the Legislature of Quebec.

I was one of the judges of this court who, on a reference from the Governor-General in Council "In the matter of the jurisdiction of a province to legislate respecting abstention from labour on Sunday"(1), advised him, in answer to a question submitted to us whether the legislature of a province had authority to enact a statute in the terms of a draft bill annexed to the question

that we were unable to distinguish the draft bill then submitted for our opinion from the Act pronounced as *ultra vires* of the provincial

(1) 35 Can. S.C.R. 581.

legislature by the Judicial Committee in the reference made by the Government of Ontario to the Court of Appeal of that province in the matter of the Hamilton Street Railway Company reported in appeal to the Judicial Committee of the Privy Council(1)

The judges of this court who joined in giving that answer were of opinion that

the day commonly called Sunday or the Sabbath or the Lord's Day is recognized in all Christian countries as an existing institution and that legislation having for its object the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day is legislation properly falling within the views expressed by the Judicial Committee in the Hamilton Street Railway reference before referred to and is within the jurisdiction of the Dominion Parliament.

Turning for a moment to this decision of the Judicial Committee in which it was held that the Act there in question (R.S.O., 1897, ch. 246), intituled "An Act to Prevent the Profanation of the Lord's Day," treated as a whole, was beyond the competency of the Ontario Legislature to enact, it will be seen that this Act was originally enacted by the late Province of Upper Canada, before 1867, the legislature of which was competent for the purpose, but was consolidated and amended by extending and enlarging its provisions by the Act of the Province of Ontario passed in 1897. It was the validity or constitutionality of the consolidated Act that their Lordships were called upon to determine. Had the Legislature of Ontario the power to re-enact the original Act in its original form or to re-enact it enlarging its scope and extending its provisions prohibiting work on Sunday ? The answer of their Lordships, shortly, was that the legislature had no such power because the Act, treated as a whole, was beyond its competency to enact. The reasons for

(1) [1903] A.C. 524.

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their conclusion given by the Lord Chancellor are short and to the point. He says:—

> The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. Section 91, sub-section 27, of the "British North America Act, 1867," reserves for the exclusive legislative authority of the Parliament of Canada "the criminal law, except the constitution of courts of criminal jurisdiction." It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of Confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, "the constitution of courts of criminal jurisdiction," renders it more clear, if anything were necessary to render it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law in its widest sense, is reserved for the exclusive authority of the Dominion Parliament.

The pith of this judgment lies in the meaning they gave to section 91, sub-section 27, of the "British North America Act, 1867, reserving for the exclusive authority of the Parliament of Canada "the criminal law, except the constitution of courts of criminal jurisdiction" and in their judgment the words "criminal law," as used in section 91 of our "Constitutional Act," mean criminal law in its widest sense.

I have heard nothing to induce me to change the opinion in which I joined with my brother judges, in giving advice to the Governor-General in Council on the draft bill for prohibiting, on Sunday, the performance of work and labour, transaction of business, engaging in sport for gain, and keeping open places of entertainment. Nor am I able to discover any substantial distinction between the Act of the Legislature

of Quebec we are now considering and the draft bill upon which this court, in 1905, gave its opinion.

The object and purpose of each was to prohibit, on Sunday, the performance of work and labour, transaction of business or giving or taking part in theatrical performances, etc.

I do not mean to say that the Quebec legislation now in question and the draft bill with respect to which the opinion I have referred to was given cover the same ground. The prohibitions in one differ somewhat from those in the other and those in the draft bill are doubtless broader and more extensive than in the Quebec Act.

That, however, cannot affect the right to legislate on the subject-matter dealt with which is the same in both cases. I am of opinion that they are both beyond the competence of the provincial legislature as being within the exclusive right of the Parliament of Canada under sub-section 27 of section 91 of our "Constitutional Act"—"the criminal law except the constitution of courts of criminal jurisdiction."

I add this qualification, that the first and sixth sections of the Quebec Act now before us, 7 Edw. VII. ch. 42, may be said to permit certain things or acts to be done on Sunday prohibited by the federal Act of 1906 and, in so far as it does so permit, these sections may be *intra vires* the Quebec Legislature under the powers delegated and conceded to it by the Dominion legislation.

But it is contended that the Quebec Legislature derived, from the above federal Act, power to legislate on the subject of Sunday observance and that such federal legislation "validated" and gave life to provincial legislation which might otherwise be *ultra vires*.

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My construction of the federal Act is that it was an attempt to enact generally prohibitive legislation with regard to the proper observance of Sunday or the Lord's Day for the whole of Canada. But that, recognizing the different circumstances, habits, customs and religious beliefs which prevailed in the several provinces of the Dominion, Parliament determined to delegate to each provincial legislature the power to declare that any act or thing prohibited by the Dominion Act might be exempted from the operation of such act and permitted to be done by provincial legislation existing at the time the federal Act came into force or subsequently enacted.

As to the power of the Parliament of Canada so to delegate its powers I have no doubt whatever. Our statutes are full of legislation of a similar kind and, holding the Parliament of Canada to be a Sovereign Parliament within its powers as defined by our "Constitutional Act," I cannot doubt that, legislating within these powers, it can delegate to another person, body or authority the power to make a law as binding and effective as if embodied in one of its own statutes.

If I have properly construed the power of the Parliament of Canada to legislate exclusively on this subject, the observance of Sunday or the Lord's Day, and have also properly construed the federal Act of 1906 on that subject, the only question to be answered respecting the validity of the provincial legislation on the subject now before us is whether it is legislation permitting something to be done on Sunday which has been prohibited by the Dominion Act. If it is, such legislation is valid because power so to legislate is given by the federal Act. If, on the contrary, the provincial legislation is in itself prohibitive and not

permissive, and just so far as it is of that character, it is *ultra vires*.

Applying this rule to the second section of the Act now before us and under which the prosecutions were brought, and limiting my opinion to the one point desired by counsel to be determined, I conclude that the legislation of the province now in question is beyond the competence of the legislature and that, therefore, this appeal must be allowed and the judgment quashing the writ of prohibition vacated with costs.

IDINGTON J.—The appellant seeks to have respondents prohibited from proceeding with the trial of charges laid before the police magistrate of Montreal alleging an infringement of 7 Edw. VII. ch. 42, as amended by chapter 51 of 9 Edw. VII., passed by the Legislature of the Province of Quebec.

The second section of the latter Act is as follows:—

2. No person shall, on Sunday, for gain, except in cases of necessity or urgency, do or cause to be done any industrial work, or pursue any business or calling, or give or organize theatrical performances, or excursions where intoxicating liquors are sold, or take part in or be present at such theatrical performances, or excursions.

The question raised is as to the power of the legislature to so enact.

It is claimed this is criminal legislation within the meaning of section 91, sub-section 27, of the "British North America Act," which assigns the exclusive power of legislation on the subject of

the criminal law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters

to the Parliament of Canada.

There are two summonses in the appeal case presented; one of the 14th of August, and the other of

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the 21st of August. The former makes the charge without specifying the statute it infringes. The latter specifically assigns a contravention of the statutes above referred to. Singularly enough both allege as if a single offence what, to my mind, clearly covers two offences against the Act.

The above quoted statute clearly constitutes a distinctly independent offence, or perhaps two, in prohibiting the doing of "any industrial work or business" and by the following words other independent offences. Each is thus described and separated by the disjunctive "or."

But in the summons they are coupled together by the conjunctive "and," which is not the language of the Act.

The parties desire to have the constitutional question determined and raise no point regarding this objectionable misjoinder of offences which, in itself, is possibly amendable by the magistrate if objected to.

It is, therefore, not in that sense I refer to this minor matter, but to bring out in relief or so far as I can the real meaning of the statute as I read it.

If objection had been taken to this misjoinder and the magistrate had refused to amend and convicted and made his conviction follow the exact language of the summons, or of the statute, his conviction would have been bad in form and liable to be quashed for thus embracing two offences in one conviction, or bad from uncertainty arising from its alternative form which would, therefore, cover neither offence.

Tested thus we have in the same section a number of new offences created of which one is doing or causing "to be done any industrial work," and another is pursuing "any business or calling."

This latter is said to be, and I assume it to be a bad translation of the French version "un * * négoce."

That being assumed does not mend matters much for the present argument. It still leaves an enactment of a very wide comprehensive meaning and I venture to think almost, if not altogether as much so as the Ontario enactment, R.S.O. [1897] ch. 246, sec. 1, which was before the Judicial Committee of the Privy Council in the case of *The Attorney-General for Ontario* v. *The Hamilton Street Railway Co.*(1), and which reads as follows:—

1. It is not lawful for any merchant, tradesman, farmer, artificer, mechanic, workman, labourer or other person whatsoever on the Lord's Day, to sell or publicly shew forth, or expose, or offer for sale, or to purchase, any goods, chattels, or other personal property, or any real estate whatsoever, or to do or exercise any worldly labour, business or work, of his ordinary calling (conveying travellers or Her Majesty's mail, by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted).

The first question in said case submitted to the Court of Appeal for Ontario and brought by way of appeal therefrom under the consideration of the Judicial Committee was as follows:—

1. Had the Legislature of Ontario jurisdiction to enact chapter 246 of the Revised Statutes of Ontario, 1897, intituled "An Act to prevent the Profanation of the Lord's Day," and in particular sections 1, 7 and 8 thereof?

The Judicial Committee, speaking through the Lord Chancellor, disposed of it as follows:—

THE LORD CHANCELLOR.—Their Lordships are of opinion that the Act in question, Revised Statutes of Ontario, 1897, chapter 246, intituled "An Act to prevent the Profanation of the Lord's Day," treated as a whole, was beyond the competency of the Ontario Legislature to enact, and they are accordingly of opinion that the first question which was referred to the Court of Appeal for Ontario by

(1) [1903] A.C. 524.

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the Lieutenant-Governor, pursuant to chapter 84 of the Revised Statutes of Ontario, 1897, ought to be answered in the negative.

Then the court intimates the opinion so expressed rendered it unnecessary to answer the second question which rather looked to future legislation, and declined to answer further the remaining hypothetical questions submitted.

In order to estimate properly the effect of the expression "treated as a whole" in the above opinion we must look at the remaining sections of the said Ontario Act.

Section 2 deals with political meetings, tippling, brawling, etc.; section 3 with games and amusements; section 4 with hunting; section 5 with fishing; section 6 with bathing in exposed situations, and each of these things if done on Sunday is declared to be unlawful.

Sections 7 and 8 prohibit steamboat and railway excursions for hire, and the running of street cars on Sunday.

Condensing them thus each offence may not be accurately described, but I think they are sufficiently so to shew the nature of the Act when I add that there were penal clauses and prosecutions therefor provided in the Act.

The recovery of these penalties before a justice of the peace was provided for and he so far as the Act could was enabled thereby to direct a warrant to levy on the goods of the offender and in default of realizing the penalty and costs to imprison for a term not exceeding three months.

When we compare the sweepingly comprehensive language, first quoted, of the Quebec statute with this wherein lies the difference ?

There is a greater multiplicity of words in the

Ontario Act than in the other. But, when condensed, each reaches to almost every activity of mankind in their daily avocations. The specific things in the Ontario Act, not embraced in this comprehensive language used by the Quebec Act, are comparatively unimportant as a test relative to criminal legislation by which to distinguish the one Act from the other.

So comprehensive is the language in question here that it runs athwart the courses of business and transactions of men which they are only enabled to do by virtue of Dominion legislation. Counsel for respondent says that is not intended. But the Act discriminates not and covers the case of the banker and the railway manager or superintendent and all under him or them, as well as the case of the corner grocer or village blacksmith.

The Quebec farmer or professional man might work and possibly escape the operation of the Quebec Act whilst the Ontario Act leaves less chance of such escape from its drag-net.

But is that what can enable us to distinguish between them ? And so distinguish as to say the ruling does not bind us ? I confess I cannot see my way clear to do so.

The argument for a power of delegation from the Dominion Parliament may be good or bad. I need express no opinion for I fail to see the existence of any delegation in regard to this legislation now in question. Nor do I find anything by way of reference that can constitute its adoption by Parliament directly or indirectly. All I do find is that exceptions to be presumed by us here as quite proper exceptions are made in the "Lord's Day Act," R.S.C. ch. 153, by sections 5, 7 and 8, which cannot help here where that Act, by

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consent of the parties, is in its direct operative effect excluded from our consideration. Admittedly there exists no consent of the Attorney-General to this prosecution, which is needed to render the "Lord's Day Act," in such a case, operative in Quebec.

In section 16 of that Act there is said to be something to get round all this.

That section in its first part guards against being held to repeal provincial legislation then existing. It is said that this proper exception in order to prevent vexatious meddling is a something that creates. I cannot think so. Nor do I think the second part of the section, declaring that an offender against the Act who is on the facts violating "any other Act or law" may be prosecuted under either, helps.

It is to be observed that this obviously pre-supposes "the Act or law" to be a law and not a nullity.

Each act is intended by this section to be independent of any other.

In touching such a complex subject as this has become by the mass of legislation and judicial decision bearing upon it, this section is eminently proper for the purpose it was framed. That was to avoid friction and confusion.

I would not hold any man liable to prosecution on any provincial legislation resting solely upon this language of said section 16 to give it a vitality it did not carry in its own language when resting on the powers of the legislature of the province enacting it.

So far as these prosecutions rest on the comprehensive legislation in the first part of the section consisting of the two members thereof covering trade or business, and which I have dealt with, I think they should be prohibited.

But is there not presented in same section another offence of giving or organizing theatrical performances for gain which is something severable as the disjunctive "or" indicates, and entirely different on its face and gives rise to entirely different considerations from those applicable to the preceding parts I have just disposed of?

I do not know what conceivable cases of necessity or urgency can exist in relation to running a theatre on Sunday. I will assume that exception relates only to the cases falling under the part of the section with which I have dealt. But I cannot help remarking that the existence of this exception so looked at debars us from being able to make of the whole section only one enactment prohibiting work or business when so considered relative to giving on Sunday theatrical performances or excursions where intoxicating liquors are sold helps to sever these two prohibitions from the rest of the Act and permit of them being considered on their several legal merits.

Whether this severance is quite satisfactory or not, it is desirable, having regard to the main object of the parties, to treat the case as if it were clearly so.

I think the giving on Sunday of theatrical performances or excursions of the kind described may well be prohibited by provincial legislation. The prohibition of such a specific act as either might well find a precedent in the many cases recognizing the right of a province to make such mere police regulations as the social habits and conditions existing in that province may require.

It is said by counsel for appellant that these precedents rest upon the licensing power, but I do not

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think the principles observed in reaching the conclusion rested there in all of them.

I do not propose analyzing the cases in detail, but select as utterly free from this suggestion of dependence on the licensing power the case of *Reg.* v. *Wason* (1), and vol. 4, Cartwright's Cases on the "British North America Act," page 578, when the Court of Appeal for Ontario, then composed of Chief Justice Hagarty, Mr. Justice Burton, late Chief Justice of the same court, Mr. Justice Osler, and Mr. Justice Maclennan, later and till recently a member of this court, upheld legislation prohibiting the knowingly and wilfully selling to a cheese or butter manufactory milk diluted with water, or adulterated, or from which the cream had been taken, without notifying the owner or manager of the factory, and subjecting the offender to a penalty.

I had previously to the legislation thus enacted and passed upon, formed the opinion it was competent for a provincial legislature to pass it. I see no reasons to change the opinion I then formed.

The decision is, of course, not binding upon us, but the principles upon which that court proceeded seem to me sound and the relation of the subject to then existing federal legislation gives it a peculiar aptness to be considered in this case.

The reported argument of Mr. Blake in appeal as well as the reasons of the several judges in giving judgment are certainly instructive if not binding.

The case of *Hodge* v. *The Queen* (2) shews the regulation there in question dealt with a prohibition against playing billiards in a licensed hotel on Sunday.

(1) 17 Ont. App. R. 221.

(2) 9 App. Cas. 117.

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But though as suggested by appellant's counsel that arose out of the licensing power or regulation we are only carried back a step further for the licensing power itself was, by sub-section 9, of section 92, only for the raising of revenue.

Another and a broader reason lies at the foundation of this and all the other decisions upholding the power of regulation and prohibition of the liquor selling business.

The powers assigned by sections 8, 13 and 16, as well as sub-section 9, have in turn had to be relied upon.

The preventing of playing billiards in a licensed hotel on Sunday, does not seem very closely related to the licensing power. The decision in that regard rather shews that circumstances or conditions may arise which render it a proper thing for the consideration by a local legislature and foundation for doing something to eradicate an evil which is not likely to be dealt with by Parliament.

I should pause before saying it was powerless to do so for I can conceive a legislature of a province being confronted with conditions which it alone would be likely to deal with and which the ordinary scope of the criminal law would not reach.

A great deal of our municipal legislation is and must as our cities grow be still more of this character.

True this is not a municipal regulation, but suppose the legislature chose to assign the power to city municipalities to make such regulation respecting theatrical exhibitions as that here in question, can it be said it would then be legislating *ultra vires ?*

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We, at least, in *City of Montreal* v. *Beauvais*(1), have gone quite as far in upholding a by-law enabled by the legislature for closing shops after certain hours. That was for a closing of shops and rested upon the powers given by the sub-sections to which I have referred, and this is for a closing of a house of another kind for a whole day. I may add that leave to appeal from our decision in that case was refused by the Judicial Committee.

Each was, no doubt, intended to promote by such police regulations the health and moral well-being of the people.

Neither is necessarily within the criminal law.

The remarks of Lord Davey in *City of Toronto* v. *Virgo*(2), at page 93, point in the direction of what I am trying to reach in that regard.

And this now in question being of the character I have referred to as being within the power of the legislature I do not think it should be held null because of the constitutionally evil company it is found in.

The latter circumstance, of course, makes its maintenance more difficult. And though I am unable to see how any of the Act can rest directly upon the federal legislation pointed to, it is clear that the circumstance of Parliament desiring to maintain local legislation of such a character is not an argument against the maintenance of its validity.

In the view I have taken it is almost needless to add it is not a well-drawn Act, or at least not as effective as one might now be made if the draughtsmen were set to work with the present state of the federal

(1) 42 Can. S.C.R. 211. (2) [1896] A.C. 88.

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legislation. Or the licensing power and its consequent power of regulation might be resorted to.

What can be done thus indirectly, I submit, may be upheld when done directly.

I think the prohibition should not extend to a charge properly confined to the prohibition of any theatrical representation on Sunday for gain. It seems severable from the *ultra vires* part of the Act.

The appeal should, therefore, be allowed in part and that being a divided success should carry no costs.

DUFF J.—The Quebec statute which is impeached on this appeal professes to create offences which, in my opinion, if validly created would be offences against the criminal law within the meaning of section 91, sub-section 27, of the "British North America Act." The enactment appears to me, in effect, to treat the acts prohibited as constituting a profanation of the Christian institution of the Lord's Day and to declare them punishable as such. Such an enactment we are, in my opinion, bound to hold, on the authority of *The Attorney-General* v. *Hamilton Street Railway Co.*(1), to be an enactment dealing with the subject of the criminal law.

It is perhaps needless to say that it does not follow from this that the whole subject of the regulation of the conduct of people on the first day of the week is exclusively committed to the Dominion Parliament. It is not at all necessary in this case to express any opinion upon the question, and I wish to reserve the question in the fullest degree of how far regulations enacted by a provincial legislature affecting the con-

(1) [1903] A.C. 524.

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duct of people on Sunday, but enacted solely with a view to promote some object having no relation to the religious character of the day would constitute an invasion of the jurisdiction reserved to the Dominion Parliament. But it may be noted that since the decision of the Judicial Committe in *Hodge* v. *The Queen* (1), it has never been doubted that the Sunday-closing provisions in force in most of the provinces affecting what is commonly called the "liquor trade" were entirely within the competence of the provinces to enact; and it is, of course, undisputed that for the purpose of making such enactments effective when within their competence the legislatures may exercise all the powers conferred by sub-section 15 of section 92 of the "British North America Act."

It is impossible, I think, consistently with the view above expressed, to hold that the statute in question can derive any efficacy from the "Lord's Day Act," ch. 153, R.S.C. 1906. This latter enactment appears to be framed upon the theory that the provinces may pass laws governing the conduct of people on Sunday; and by the express provisions of the Act such laws, if in force when the Act became law, are not to be affected by it. That is a very different thing from saying that in this Act the Dominion Parliament has manifested an intention to give the force of law to legislation passed by a provincial legislature professing to do what a province under its own powers of legislation cannot do, viz., to create an offence against the criminal law within the meaning of the enactment of the "British North America Act" already referred to. We should, I think, be going beyond what is justified

(1) 9 App. Cas. 117.

by the guarded language of the Dominion statute if we were to construe it as giving validity to such legislation.

ANGLIN J.—The question to be determined on this appeal is the constitutionality of the prohibitive provisions of the Quebec statute, 7 Edw. VII. ch. 42, as amended by the statute 9 Edw. VII. ch. 51.

The validity of this legislation is supported by the respondents on two distinct grounds: (*a*) that it is within the legislative jurisdiction conferred upon the provinces of the "British North America Act"; (*b*) that, if otherwise unconstitutional, it has been validated by certain provisions of the federal "Lord's Day Act" — chapter 27 of the Dominion Revised Statutes of 1906.

(*a*) I am unable to find any real distinction between the Quebec legislation now under consideration and that of the Province of Ontario held to be *ultra vires* by the Judicial Committee in the *Hamilton Street Railway Case*(1).

The history of the Quebec legislation is, no doubt, different from that of the Ontario Act. The pre-confederation legislation of Quebec (Con. Stat. L.C., 1860, ch. 23) was much narrower in its scope than the ante-confederation statute in force in Ontario (Con. Stat. U.C., 1859, ch. 104). But, whatever might be said of an Act of a provincial legislature similar to the earlier Lower Canada legislation, the Quebec statute now before us, because indistinguishable in substance and principle from the Ontario legislation condemned by the Privy Council, must be held by us

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to be *ultra vires* as an invasion of the domain of criminal law assigned by the "British North America Act" to the legislative jurisdiction of the Parliament of Canada.

Although enacted by a provincial legislature not empowered to deal with criminal law, the Ontario legislation was, in the view of the Privy Council, so distinctly criminal in its character that it could not be upheld as an exercise of provincial jurisdiction under any of the powers conferred by section 92 of the "British North America Act," notwithstanding the cogency of the presumption that a legislature always means to act within its jurisdiction. I do not regard the decision of the Judicial Committee as depending on the fact that the Upper Canada "Lord's Day Act" (Con. Stat. U.C., 1859, ch. 104) had been originally enacted by a legislature clothed with authority to pass criminal laws. Neither can I accede to an argument which involves the view that legislation held to be criminal in one province of Canada may be regarded as something different in another province, or that the phrase "the criminal law" used in section 91, sub-section 27, of the Imperial "British North America Act" may have a meaning different from that which would be attached to it in other legislation of the Imperial Parliament. Lord Chancellor Halsbury says that it is "the criminal law in its widest sense that is reserved" to the Dominion Parliament.

In the criminal law of England, in 1867, was embraced the "Sunday Observance Act," 29 Car. II., ch. 7, and other restrictive legislation. 13 Encyc. Laws of Eng., p. 707. Indeed, a person who kept open shop on Sunday would appear to have been indictable at

common law as

> a common Sabbath-breaker and prophaner of the Lord's Day commonly called Sunday. 2 Chitty's Criminal Law (2 ed.), p. 20.

Legislation of a prohibitive character, to infractions of which punitive sanctions are attached, passed for the purpose of preventing profanation of the Sabbath would, therefore, appear to be within the purview of sub-section 27 of section 91, of the Imperial "British North America Act," conferring on the Dominion Parliament exclusive jurisdiction to legislate in respect to "the criminal law."

I abstain, however, from attempting to enunciate a criterion for the determination of the broader question — when a prohibitive enactment, carrying penal sanctions for its infraction, should be regarded as so for partaking of the nature of criminal law that it is within the exclusive legislative power of the Federal Parliament. I rest my opinion in the present case chiefly upon the judgment of the Judicial Committee already adverted to.

It was suggested at bar that the Quebec statute might be defended as legislation merely affecting civil rights, or as legislation in the nature of a local or municipal police regulation, with sanctions, authorized by clause 15 of section 92 of the "British North America Act," appropriate to ensure obedience to its prohibitions. But the very first section indicates unmistakably that the purpose of the legislation is to make what the legislature deemed suitable provision "respecting the observance of Sunday" in the province. To carry out this purpose we find in the second section a prohibition couched in wide and sweeping terms. Section 6 further confirms this view of the character of the statute, making it still more ap-

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parent that to prevent profanation of the Sabbath is its object. It is such legislation that their Lordships of the Judicial Committee, as I understand their judgment, have held to be criminal law and as such beyond the competency of a provincial legislature.

I do not refer to the fact that the informations in this case each charge more than one offence further than to say that any objection on that ground was waived. Counsel for both parties asked our decision upon the validity of section 2 of the Quebec statute, as a whole, and of the subsequent sections providing sanctions for infractions of section 2. I do not attempt to distinguish between the several matters and things forbidden by section 2. Forming part of an Act of which the purpose was to prevent profanation of the Sunday each of the prohibitions must, I think, under the decision in the *Hamilton Street Railway Case*(1), be regarded as criminal legislation.

(*b*) The Dominion "Lord's Day Act" excepts from the operation of its prohibitive clauses everything which is, by provincial legislation, past or future, declared to be lawful. While reserving to, or conferring upon, provincial legislatures the power to make exceptions from the operation of the Dominion statute — and thus in effect *pro tanto* to amend it — and recognizing and maintaining in force, if not validating, provincial legislation already passed declaring certain acts to be lawful on Sunday (provisions made, no doubt, to enable local bodies to deal with the peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy), there is not a word in the federal statute

(1) [1903] A.C. 524.

confirming or authorizing anything in the nature of provincial prohibitive legislation past or future. On the contrary section 14 declares that

> nothing in this Act shall be construed to * * * in any way affect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when the Act comes into force.

The provincial legislation in so far as it is prohibitive must, therefore, depend for its force and efficacy upon the powers of the legislature which enacted it. In so far as it provides for the exception of acts and things which would otherwise fall under the prohibitions of sections 2, 5 and 6 of the federal Act (sections 5, 7 and 8, R.S.C. 1906, ch. 153), Parliament has made that Act inoperative. But beyond these saving exceptions the Dominion statute does not "in any way affect" provincial legislation.

In this view it is unnecessary to consider the question debated at bar as to the power of the Dominion Parliament to delegate its legislative functions to a provincial legislature.

The latter part of section 1 of the Quebec statute may be within the saving provisions of the federal Act; but the prohibitive clauses of the Quebec statute are, I think, *ultra vires* of a provincial legislature.

The appeal should, in my opinion, be allowed.

BRODEUR J. (dissident).—Nous avons à décider si l'acte de la législature de Québec sur l'observance du dimanche, qui est le chapître 42 des statuts 7 Edouard VII. est constitutionnel.

La présente cause avait trait d'abord à le fermeture des théâtres le dimanche; mais un consentement, qui est au dossier, démontre qu'il s'agit d'un *"test case"*

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et que d'un commun accord on soumet à la décision des tribunaux la légalité de tout le statut lui-même. Voici les propres terms de ce consentment:—

Brodeur J.

Les parties en cette cause consentent à limiter leur argumentation et leurs prétentions à la seule question de savoir si la loi sur l'observance du dimanche passée par la législature de Québec en vertu du statut 7 Edouard VII., ch. 42 de 1907 est constitutionnelle, *ultra vires* ou *intra vires*, les moyens de prohibition ne devant pas être discutés, le tout pour éviter des frais et des pertes de temps.

La même entente est convenue pour les autres causes de Sharpe, Richardson et Applegath.

Pour bien comprendre la raison d'être de cette législation il est important, je crois, de connaître les circonstances qui y ont donné lieu.

La province d'Ontario avait dans ses statuts une loi dominicale basée sur le statut de Charles II. Elle était intitulée "An Act to prevent the profanation of the Lord's Day." Passée sous l'Union du Haut et du Bas Canada elle avait été reproduite dans les statuts refondus d'Ontario et plus tard on jugéa à propos d'en étendre les dispositions en prohibitant la circulation des tramways le dimanche. Les tribunaux furent saisis de la question et le Conseil Privé, dans la cause de *Attorney-General for Ontario* v. *Hamilton Street Railway Co.*(1), décida en substance que cette législation provinciale était de sa nature criminelle et était dans son ensemble (as a whole) inconstitutionnelle. On a alors demandé au parlement fédéral de légiférer sur la matière. Le gouvernement crut, avant d'adopter une législation générale, devoir en référer à cette cour et soumit à cette fin certaines questions auxquelles des réponses furent données.

Il était bien évident par la nature des réponses que le parlement fédéral ne pouvait se soustraire à l'obli-

(1) [1903] A.C. 524.

gation d'agir. Mais il lui restait a décider quelle forme il allait donner a sa législation. Il pouvait bien procéder sous les dispositions de l'Acte de l'Amérique Britannique du Nord (sous-sec. 27 de l'article 91), à déclarer criminelle toute œuvre servile ou tout acte de commerce fait le dimanche et son autorité n'aurait pas pu être contestée. Mais il se trouvait en présence de lois existant depuis des siècles dans certaines provinces; il avait à faire face à des coutumes séculaires qui par leur caractère contribuaient à la sanctification du dimanche ou au développement de la religiosité de la population, ou qui avaient été nécessitées par des établissements par trop dispersés. Je pourrais citer, entr'autres coutumes, les pèlerinages qui ont lieu le dimanche depuis un temps immémorial dans la Province de Québec.

Il en est de même de cette coutume pour le paysan d'apporter à l'église les prémisses de ses produits et de les faire vendre à enchères publiques après le service divin pour en consacrer le produit au soutien des œuvres religieuses.

Une loi qui aurait été adoptée par le Parlement fédéral et qui aurait déclaré criminelle toute excursion le dimanche ou qui aurait prohibé la vente de denrées ce jour-là aurait naturellement frappé ces coutumes si recommendables.

En présence de ces difficultés, le Parlement n'a pas procédé à amender le code criminel mais il a passé une loi qui par son titre, "Acte concernant l'observance du dimanche," et par ses dispositions en général doit être classée parmi celles adoptées pour la paix, l'ordre et le bon gouvernement du pays sous les dispositions du premier paragraphe de la section 91 qui se lit comme suit:—

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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.

Cette loi du dimanche adoptée par le Parlement fédéral est le ch. 153 des status refondus du Canada, 1906.

On trouve que le Parlement, bien loin de vouloir empiéter sur les droits des provinces les a, au contraire, formellement reconnus en déclarant dans les sections 5, 7, 8 et 16 que ses dispositions n'auaient d'effet que si les provinces n'ont pas de loi couvrant le cas.

La législation dominicale frappe les droits civils qui, comme on le sait, sont du ressort des provinces et il n'y a pas lieu alors de s'étonner de voir le Parlement fédéral respecter l'autonomie des Provinces sous ce rapport.

Nous avons dans nos lois et dans notre jurisprudence la question de la tempérance qui peut nous servir de guide dans l'interprétation de la loi fédérale et de la loi provinciale du dimanche. Le Parlement fédéral a, comme on le sait, le "Canada Temperance Act" qui pourvoit à la prohibition des liqueurs dans certains districts. Cette loi a été attaquée et le Conseil Privé, en 1882, dans la cause de *Russell* v. *The Queen*(1), a décidé que le Parlement fédéral, en vertu de ses pouvoirs de faire des lois pour la paix et le bon ordre du Canada, pouvait passer cet acte.

C'est une loi tendant à restreindre l'abus des liqueurs enivrantes.

Les provinces également avaient légiféré sur la matière et avaient ordonné, par exemple, la fermeture

(1) 7 App. Cas. 829.

des débits de liqueurs le dimanche ou pendant certaines heures les jours de semaine. Ces lois provinciales ont été également attaquées comme inconstitutionnelles et le Conseil Privé à différentes reprises en a maintenu la validité. *Hodge* v. *The Queen*(1) ; *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(2) ; *Attorney-General of Manitoba* v. *Manitoba Licence Holders Association*(3) ; *Poulin* v. *Corporation of Québec*(4) ; *Huson* v. *Township of South Nowich*(5).

Dans la seconde de ces causes, Leurs Seigneuries disent, à la p. 365:—

> In section 92, No. 16 appears to them (their Lordships) to have the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada so far as supplementary of the enumerated subjects fulfils in section 91.

Dans la cause de *Russell* v. *The Queen*(6), le Conseil Privé avait également déclaré que dans ses attributions de légiférer pour la paix et le bon ordre le Parlement fédéral avait le droit de passer une loi prohibitant l'usage des liqueurs. Les provinces ont également le pouvoir d'exercer la même autorité.

Si les provinces peuvent fermer les buvettes le dimanche, je ne pourrais pas m'expliquer pourquoi dans l'exercice de leurs pouvoirs de faire des lois de police elles n'auraient pas le droit de fermer les théâtres le dimanche.

La législation provinciale en question dans cette cause-ci n'a fait, après tout, qu'une réglementation de police. Cette prohibition des représentations théâtrales le dimanche d'ailleurs n'arrive qu'incidem-

(1) (1883) 9 App. Cas. 117.
(2) (1896) A.C. 348.
(3) [1902] A.C. 73.
(4) 9 Can. S.C.R. 185.
(5) 24 Can. S.C.R. 145.
(6) 7 App. Cas. 829.

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ment dans le statut. Ce dernier a pour but principal de revêtir de l'autorité de la loi les us et coutumes de la province de Québec. Voici la section 1ère de ce statut:—

> Les lois de cette législature, soit générales, soit spéciales, relatives à l'observance du dimanche en vigueur le 28 de février, 1907, continueront à être en vigueur jusqu'à ce qu'elles soient modifiées, remplacées ou abrogées; et il est et continue d'être permis à toute personne de faire le dimanche tout acte qui n'est pas prohibé par loi de cette législature en vigueur à la dite date, ou d'user le dimanche de toutes les libertés que lui reconnaissent les usages de cette province sous les restrictions contenues en la présente loi.

Elle énonce parmi ces restrictions les œuvres serviles inutiles, les représentations théâtrales et les excursions où l'on débite des liqueurs en édictant l'article 2 que se lit comme suit:—

> Sect. 2.—Il est défendu le dimanche dans un but de lucre, sauf néanmoins le cas de nécessité ou d'urgence, d'exécuter ou de faire exécuter aucune œuvre industrielle, ainsi que d'exercer aucun négoce ou métier, ou de donner ou d'organiser des représentations théâtrales ou des excursions accompagnées de vente de liqueurs enivrantes ou de prendre part ou d'assister à ces représentations théâtrales ou à ces excursions.

On ne saurait prétendre que ces dernièrers dispositions devraient rendre toute la loi nulle et inconstitutionelle; et, comme je l'ai dit au commencement, nous sommes appelés à nous prononcer sur la validité de toute l'acte lui-même, vu le consentement signé par les parties au procès.

Nous devons donc rechercher quelle est l'idée dominante de cette loi. Pour moi, je la trouve dans la section 1ère; et la dernière section n'a été édictée que dans le but d'empêcher les propriétaires de théâtres, les organisateurs d'excursions et les commerçants ou industriels d'invoquer des usages qui auraient pu exister et qui seraient devenus légalisés par la première section.

D'ailleurs, en supposant que ces prohibitions seraient seules, je dis qu'on devrait les considérer comme règlements de police tombant sous la juridiction provinciale.

Le travail le dimanche a toujours été considéré dans Québec, dès les premiers temps de la colonie, comme devant être réglementé par les autorités policières. Comme on le sait, l'Intendant sous la domination française avait le droit de faire des règlements de police. La législation criminelle, au contraire, appartenait au Conseil Souverain ou au Conseil Supérieur. Or suivant cette distribution des pouvoirs législatifs, l'intendant Raudot prohibait le 25 mai, 1709, toute œuvre servile les dimanches et les jours de fête. Nous pouvons trouver le texte de cette ordonnance, ainsi que de certaines autres qu'il a faites pour empêcher qu'on fasse du bruit près des églises aux pages 421 et 426 des "Ordonnances des Gouverneurs et des Intendants sur la voirie et *la police*" compliées en 1856, 3ème vol.

Le parlement fédéral, par sa loi de 1906, n'a pas voulu faire une législation criminelle. S'il avait voulu lui donner ce caractère, il ne l'aurait pas appelé simplement "An Act respecting the Lord's Day"; mais, adoptant les termes du statut d'Ontario qui venait d'être examiné par le Conseil Privé, il l'aurait intitulé "An Act to prevent the profanation of the Lord's Day." Il aurait amendé son Code criminel. Il y avait déjà dans ce code la partie 22 qui traite des offenses contre la religion.

Mais dans la loi il n'est nullement question du Code criminel.

Une action qui est signalée criminelle par le législateur doit frapper tous les citoyens d'un même pays.

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Il paraîtrait étrange qu'un acte pourrait être un crime dans un certain endroit du pays et ne le serait pas ailleurs. Ce serait cependant la portée du statut fédéral que nous examinons. En effet, dans les sections 5, 7, 8 et 16 on y défend certaines choses pourvu qu'une loi provinciale n'aît été passée à ce sujet.

Ainsi dans une province un travail quelconque par l'opération de la loi fédérale y serait défendu, tandis que par l'effet d'une loi provinciale il serait permis dans une autre province.

Si nous consultons la section 6 du statut fédéral au sujet des télégraphistes, nous voyons également que ce statut ne saurait être une législation criminelle vu que cette législation a en vue la création d'un jour de repos.

Il est bien évident pour moi que ce statut fédéral ne doit pas être considéré comme un statut criminel, mais comme une loi concernant la paix et le bon ordre du pays.

Alors toute législation provinciale qui n'est pas incompatible avec les dispositions de ce statut est valide parce qu'elle a trait à des droits civils, à des matières d'intérêt local et que sa règlementation du sujet participe des lois de police sous les dispositions des sous-sections 13 et 16 de l'article 92 de l'acte de l'Amérique Britannique du Nord.

L'appellant a invoqué en sa faveur l'opinion donnée par la cour suprême sur la référence qui a été faite par le Gouverneur-en-Conseil.

La législation qui a été adoptée subséquemment par le Parlement fédéral et par la législature provinciale de Québec démontre, comme je viens de le dire, que ni dans un Parlement ni dans l'autre on a

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voulu légiférer criminellement. On paraît au contraire s'être entendu, et le Parlement fédéral et les provinces, pour éviter l'écueil qui avait été signalé par la cour suprême.

Pour toutes ces raisons je serais d'avis de renvoyer l'appel avec dépens.

Appeal allowed with costs.

Solicitor for the appellant: *J. O. Lacroix.*

Solicitor for the respondents: *Douat Brodeur.*

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*March 28.
*May 7.

THE STECHER LITHOGRAPHIC COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THE ONTARIO SEED COMPANY AND ADAM UFFELMANN (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assignments and preferences—Chattel mortgage—Hindering and delaying creditors—Assignment of book debts—Surety.

The Ontario Seed Co. owed a bank some $8,000 for which J. was surety by bond and indorsement of notes for all but $500. The bank also held as further security an assignment of the company's book debts. The company gave to A., a brother of J., a chattel mortgage of all its personal property and agreed to assign to him the book debts. A. then gave to the company an amount sufficient to pay the bank's claim, J. having supplied him with funds for the purpose, and the company gave its own cheque to the bank with a direction to assign the book debts to A., which was done.

Held, that the evidence justified the finding at the trial that the chattel mortgage was given for the benefit of J., who was aware at the time it was given that the company was insolvent, and that it was void under the provisions of the "Assignments and Preferences Act" and should be set aside.

After the assignment of the book debts to A. the company was allowed to go on collecting them.

Held, that such assignment was valid, but that the assignee could not retain the value of what had been collected out of the proceeds of the property covered by the chattel mortgage.

Judgment of the Court of Appeal (24 Ont. L.R. 503) reversed and that of the Divisional Court (22 Ont. L.R. 577) restored.

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

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

On 12th August, 1909, the Ontario Seed Company, Limited, a company incorporated under the Ontario "Companies Act," executed a chattel mortgage covering all its goods and chattels in favour of the respondent as security for an advance alleged to have been made by the respondent to the company of the amount of $8,300. This chattel mortgage also assigned to the respondent all the book debts of the Ontario Seed Company, a partnership formerly carried on by Christian H. Kustermann and Otto Herold. All the assets of the Ontario Seed Company were taken over and all its liabilities assumed by the Ontario Seed Company, which was its successor. The Ontario Seed Company, Limited, on 13th August, 1909, was indebted to the Merchants Bank of Canada in the sum of $8,254.52, for which the Merchants Bank held as security a bond for $5,000, executed by one Jacob Uffelman, a brother of the respondent, and an assignment of the book debts of the Ontario Seed Company, the partnership concern. On 13th August, 1909, the respondent issued a cheque in favour of the Ontario Seed Company, Limited, for $8,300, representing the amount of the chattel mortgage. This cheque was deposited in the Merchants Bank of Canada to the credit of the Ontario Seed Company, Limited. The Ontario Seed Company, Limited, on 13th August, 1909, issued a cheque in favour of the Merchants Bank of Canada for $8,254.52, thus paying off all its indebtedness to the bank, relieving Jacob Uffelmann from his

(1) 24 Ont. L.R. 503. (2) 22 Ont. L.R. 577.

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liability on his bond to the bank and releasing the claim of the bank to the book debts that it also held as security for the indebtedness of the company. On the 12th of August, 1909, the Ontario Seed Company and the Ontario Seed Company, Limited, executed a direction to the Merchants Bank of Canada, requesting the bank to assign the book debts held by it to the respondent. This direction states that the transfer of the book debts is to be made to the respondent, on payment by him to the bank of $8,254.52. The transaction as appears by the documentary evidence, shews that the respondent made no payment to the bank; that the bank was paid by cheque of the company. In pursuance of such direction the bank on the 7th day of September, 1909, executed an assignment of the book debts in favour of the respondent.

The appellant is a creditor of the Ontario Seed Company, Limited, and brought this action on behalf of all creditors of the Ontario Seed Company, Limited, for a declaration that the said chattel mortgage is fraudulent and void as against the creditors of the Ontario Seed Company, Limited.

The trial judge declared the chattel mortgage void to the extent of the difference between the actual value of the book debts of the Ontario Seed Company on the 13th of August, 1909, and the sum of $8,300.

The Divisional Court made an order declaring the chattel mortgage to be void in its entirety. The Court of Appeal for Ontario restored the judgment of the trial judge.

The appellant, who is the plaintiff in the action, now appeals and asks to have the chattel mortgage set aside in its entirety.

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Secord K.C. for the appellants. The chattel mortgage is clearly void under the Statute of Elizabeth and it cannot be void in part and valid in part. *Commercial Bank* v. *Wilson*(1); *Mader* v. *McKinnon*(2); *Totten* v. *Douglas*(3).

The mortgage was *particeps criminis* in procuring the mortgage and cannot obtain relief in equity. Kerr on Frauds, 4 ed., pp. 365 *et seq.; Cameron* v. *Perrin* (4).

Sir George Gibbons K.C. and *Sims* for the respondents. There was a *bonâ fide* advance by the mortgagee which prevents the mortgage being held void under the "Assignments and Preferences Act." *Mulcahy* v. *Archibald*(5); *Middleton* v. *Pollock*(6).

Even if the advance was made with intent to give a preference it was still *bonâ fide*. *Ex parte Games* (7).

THE CHIEF JUSTICE (oral).—This appeal should be allowed with costs.

IDINGTON J.—I recognize to the full extent that, as has been so often been said, a preferential assignment is not by reason of its preferential character obnoxious to the Statute of Elizabeth, said to be declaratory of the common law, against schemes for defeating, hindering or delaying creditors. I must also recognize as possible that a scheme may be formed

(1) 3 E. & A. 257.
(2) 21 Can. S.C.R. 645, at p. 652.
(3) 18 Gr. 341, at p. 359.
(4) 14 Ont. App. R. 565.
(5) 28 Can. S.C.R. 523.
(6) 2 Ch. D. 104.
(7) 12 Ch. D. 314.

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having in it the elements which may render it obnoxious to both that law and the provision of R.S.O. 1897, ch. 147 (now ch. 64, Ont. Stat., 1910), aimed at preferential assignments.

In this case I think the chief purpose of the parties to the chattel mortgage in question was clearly to prefer the claim of the surety and relieve him from the situation in which he had as such become involved. There is evidence, however, of its being only part of a wider scheme which involved at least the hindering and delaying of the creditors.

All the courts below have found the chattel mortgage in question was the result of both designs to defeat, hinder or delay, and to prefer one creditor of an insolvent over another. I cannot say they are wrong in taking that view of the facts. But even if I could and I find that the sole purpose of the parties was the alleged preference and nothing else, how would that help the respondent, Adam Uffelmann?

When the immediate object of an agreement is unlawful the agreement is void. Therefore, the object and, if you will, the sole object of the chattel mortgage having been to withdraw certain assets of the insolvent debtor from the reach of other creditors in order to enable the surety to pay the debt he was surety for, and thus prefer one creditor over others, surely the entire object was unlawful.

Primâ facie the whole is tainted with illegality for such is the presumption the statute has declared and created against such transactions when concluded within sixty days prior to attack thereon.

I am, therefore, with all due respect, unable to understand how the learned trial judge and the Court of Appeal have been able to draw a line where the

parties did not, if we have any regard to their language in expressing in this mortgage their intentions, and thereby sever the legal from the illegal.

I concede it was quite possible to have produced whether lawfully or not such an agreement as the learned trial judge finds the parties had intended relative to their purpose. It was not, however, in the minds of the parties to create a security of which the parts and purpose could be severed in the way the judgment appealed from implies; and without doing violence to the language of the instrument and the manifest purpose of the parties thereto, we cannot find anything therein to justify such a severance or drawing of such a line between the legal and illegal as is attempted below.

Nor do we find anything in the language of section 10 (now section 13) of the statute upon which this action is founded to warrant the giving only such conditional relief as given.

That section, sub-section 1, is as follows:—

13. (1) In the case of a gift, conveyance, assignment or transfer of any property, real or personal, which is invalid against creditors, if the person to whom the gift, conveyance, assignment or transfer was made shall have sold or disposed of, realized or collected the property or any part thereof, the money or other proceeds may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, transfer, delivery or payment was made, and such right to seize and recover shall belong, not only to an assignee for the general benefit of the creditors of the debtor, but where there is no such assignment, to all creditors of the debtor.

I quote this just to point out that it does not countenance any such thing as has been done, and next to shew its limitations in relation to another point I am about to refer to in connection with the book debts.

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I submit that the language, "assignment or transfer of any property * * * which in law is invalid," lends no countenance to what has been done.

Are there, however, two or more agreements or assignments in this chattel mortgage? I think there are, for we have the assignment of the stock in trade and then a distinctly separate assignment by way of additional security of all book debts, etc., due the old company, and we have also another relative to the unpaid capital. It is conceivable in many ways that an instrument might well contain in this way a series of assignments of which some might be legal and others illegal, but in the language used relative to the stock in trade part of the mortgage, there is no room left for any such severance or suggestion as made, of the good from the bad. To do so on the lines laid down is, I respectfully submit, to construct a theory of what the parties might fairly have so designed as to bring them within one or more of the saving clauses of the statute; and constitute thereby a bargain they never dreamed of.

I incline to think the vicious purpose tainted each of the whole of these assignments in this instrument. But as to the collaterals, held by the bank, and called book debts, I think they were on his payment to the bank the property, or at all events the potential property of Jacob Uffelmann, for whom the respondent was acting and on behalf of whom he was entitled to receive said securities by virtue of his (Jacob's) right as a surety paying off the creditor holding same.

The same day as the mortgage was given, the company gave a direction to the bank to transfer these book debts to respondent Adam Uffelmann, but as he clearly was but the substitute of Jacob, no violence is

done to the actual intention or even the language used in attributing what was done to an assertion of Jacob's rights as the surety who had in fact raised money and in a needlessly roundabout way, paid off the bank.

His right need not be rested upon the clauses in the mortgage and cannot be injured by any clause therein referring to the same subject.

When these securities were transferred thus, they formed an asset distinctly severed from the rest of the estate, and if Jacob took no care to collect them, but let the company do so, he lost his security to that extent and has no one but himself to blame.

Indeed, he may truly blame the illegal purpose of hindering and delaying the creditors for the year that was needed to enable them to pay, as evidently was the intention of those who concocted the circular issued four days later over Jacob's own hand as secretary of the company.

If he permitted the collection and appropriation thereof by the company pursuant to such a scheme, how can any equity rest thereon to make good his consequent loss out of other property to which he was not at all entitled as against the other creditors to resort ? If he permitted it through sheer neglect, how again can he resort for indemnity to a mortgage that the statute presumes, under the circumstances, void ?

Again let us look at the above quoted sub-section of section 10, read it closely and we see that the right of appellant is bounded by and is limited to an account of the proceeds of that which would have been exigible had it "remained in the possession or control of the debtor," etc.

On the one hand the respondent has no right to

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claim any part of that which he has taken possession of by virtue of an instrument presumed to be illegal and void. And on the other, the appellant has no right to claim an account of those securities which clearly, under the circumstances, never could have become exigible to answer the claims of other creditors.

As to the argument rested on sub-section 5 of section 3, relative

> to the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not thereby lessened in value to the other creditors

where is the evidence of any such substitution in good faith or bad faith ?

There never existed a foundation on the facts for alleging substitution of one or part of one for another.

The mortgage treated in express words the one as being in addition to the other.

And when we depart from it to the other basis of right to the book debts as security, the two subjects as security are entirely independent of each other, and the book debts free from any such pretension.

No one ever thought of any substitution in regard to either or any part thereof.

And as clearly as can be the debtor's estate has been, by what has taken place relative to book debts, lessened in value, if affect be given the judgment appealed from, to the other creditors.

I repeatedly pressed counsel to see if the proceeds could be traced to anything specific which now formed part of the estate, but was told it could not be done.

Now, as I take this saving clause, if the money had been found invested in some specific thing that has remained to answer for the condition I have quoted relative to lessening of the estate "in value to the

other creditors," principles of equity would require, as well as the statute, relief to be given to that extent.

Or if some privileged claim over the whole estate, the payment of which would enhance the value of the whole estate to the creditors, had been paid off thereby, the same should be done in regard thereto.

As it is, there is nothing either in shape of agreement or actual results to lay a foundation on which to apply such principles.

The appeal should be allowed with costs and the Divisional Court judgment be restored.

DUFF J.—I agree that this appeal should be allowed with costs.

ANGLIN J.—A study of the evidence has satisfied me that it fully supports the findings of the learned trial judge that the impeached chattel mortgage, nominally given to Adam Uffelmann, was in fact the security of Jacob Uffelmann; and that it was given and taken with knowledge of the mortgagors' insolvency and with the intent and purpose that it should serve to "hinder" and "delay," though, perhaps, not to "defeat" or "prejudice," the creditors of the mortgagors, other than the bank and Jacob Uffelmann. Unless, therefore, it comes within some one of the saving exceptions of sub-section 1 and sub-section 5 of section 3, of the R.S.O. 1897, ch. 147, I am convinced that, as against such creditors, it is void under sub-section 1 of section 2 of that statute.

Jacob Uffelmann, as surety to the bank for the mortgagors, was already their creditor for all of the $8,300 which the mortgage purports to secure, except about $500. The evidence makes it reasonably clear

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that the real object of the parties was not to secure this $500, but to secure Jacob Uffelmann in respect of his existing liability of upwards of $7,700 as surety, which he was by payment converting into a direct claim against the company. The additional $500 he had to assume in order to clear off the bank's claim and to obtain an assignment of the $6,000 worth of book debts held by it as collateral. The last of the exceptions made by sub-section 1 and the last under sub-section 5 of section 3, therefore, do not apply to the transaction.

The other exceptions under sub-section 1 and the first exception of sub-section 5 clearly have no application.

The bank is not a party to this action. The payment to it is not now in question. The second exception under sub-section 5 does not apply to the case as between the plaintiffs and the chattel mortgagee.

I shall presently give my reasons for thinking that the respondent has not brought himself within the only remaining exception made by sub-section 5, namely,

> the substitution in good faith of one security for another security for the same debt.

I am, therefore, of the opinion that the validity of the impeached instrument is not saved by anything in sub-section 1 or sub-section 5 of section 3.

I agree, however, with Meredith, J.A., that, although

> the plaintiffs are entitled to have the transaction in question set aside * * * it does not follow from that that Jacob Uffelman is also to lose the rights which he had against the company at the time of the carrying into effect of the impeached transaction.

I also agree that the plaintiffs have no right "beyond the removal of the fraudulent security out of

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their way." In his factum counsel for the appellants expressly disclaims any intention to attack in this action the assignment by the bank to the defendant Adam Uffelmann of the book debts held by it as collateral. As surety for the debtors, Jacob Uffelmann was entitled on paying the guaranteed debt to be subrogated to the rights of the creditor. I agree with the learned trial judge that

> it was part of the transaction that the bank should transfer to Adam Uffelman the book accounts which they held under assignment from the company and which they subsequently assigned to him.

In taking this assignment, Jacob Uffelmann did nothing fraudulent. He merely exercised a clear equitable right. It is not material to this part of the case that he took it in the name of his brother Adam.

But I am, with respect, unable to concur in the conclusion of the learned trial judge and of the Court of Appeal, as expressed by Meredith, J.A., that, in the result, the defendant Uffelmann is entitled to retain, on account of his claim against the insolvent company, out of the proceeds of the property covered by the chattel mortgage, a sum equal to the value, at the time they were assigned to him, of the book debts formerly held by the bank as collateral. The statute provides that nothing contained in it shall affect

> the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not thereby lessened in value to the other creditors.

But there is no evidence in the record that a substitution of chattel property for book debts as security was ever agreed upon or intended. Moreover, the finding of intent to hinder and delay creditors in the giving and taking of the chattel mortgage is incompatible with that good faith which would be essential to its

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validity had a substitution been contemplated. What the parties had in view was not the substitution of a new security for the same debt; it was rather to obtain security upon the chattel property in addition to the book debts, so that all would be out of the reach of other creditors, and also to secure the whole claim of $8,300 instead of the $6,000 already secured by the book debts. The debtor's estate was lessened in value to the other creditors.

The right of the defendant Uffelmann must, in my opinion, be restricted to such of the book debts transferred to him by the bank as still remain outstanding. His title to these is distinctly severable from the claim which he asserts to the proceeds of the chattel property. It in nowise rests or depends upon the impeached chattel mortgage transaction. But for such of the book debts as he has allowed the debtor to collect, or to discharge by a set-off of contra-accounts, he cannot be allowed to have indemnity out of the proceeds of the chattels, to which his only claim is under an instrument found to be fraudulent. To give him the benefit of security upon this property, without any agreement or understanding that it was to be substituted for the released book debts and notwithstanding the finding of *mala fides,* would be to give efficacy to a transaction which the legislature has declared to be invalid.

I am, for these reasons, of the opinion that this appeal must be allowed and the cross-appeal dismissed, both with costs. The appellant is also entitled to his costs in the Court of Appeal. The judgment of the Divisional Court should be restored.

There may be some hardship in this result. Jacob Uffelmann appears to have been persuaded by Kus-

termann to lend himself to his schemes. He undoubtedly advanced substantial sums of money. He may even have thought that in taking the chattel mortgage in question he was giving the Seed Company a chance to retrieve itself and was thus, while temporarily helping it to stave off its other creditors, taking a step which would ultimately benefit them. He nevertheless contravened the statute when he took as security for his own claim a conveyance of his debtors' property with intent to hinder and delay other creditors; and that he knew he was entering into a transaction of very doubtful legality is manifest from the efforts he made to conceal the fact that the chattel mortgage was really taken for his benefit.

BRODEUR J.—It has been found by the trial judge that the chattel mortgage in question was made with intent to defeat, hinder and delay creditors and that view has been confirmed by the Divisional Court and the Court of Appeal.

It is perhaps unfortunate for Uffelmann that he might lose as a result of this judgment the greater part of the value of the book debts that had been transferred to the bank as a security for the debt for which he was also responsible. But instead of paying purely and simply that debt and becoming thereby possessed of the security he tried through the respondent, his brother, to make a fraudulent transaction and take a chattel mortgage which the company in view of its insolvent situation could not legally grant and have a larger security that would cover the whole indebtedness of the company to him.

I am of opinion that the chattel mortgage to Adam Uffelmann is illegal and should be set aside.

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As to the book debts I concur in the views expressed by Mr. Justice Idington and Mr. Justice Anglin.

The appeal is allowed and the cross-appeal dismissed.

Appeal allowed with costs.

Solicitor for the appellants: *M. A. Secord.*

Solicitors for the respondents: *Millar & Sims.*

ALFRED B. CUSHING AND ARTHUR T. CUSHING (DEFENDANTS) ..... } APPELLANTS;

AND

RICHARD H. KNIGHT (PLAINTIFF) .. RESPONDENT.

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*May 8.
*June 4.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Vendor and purchaser—Sale of mortgaged lands—Agreement—Condition precedent—Cash payment—Default—Objection to title—Repudiation—Specific performance.

An agreement for the sale of land provided that the purchase-money was to be paid by instalments "$10,000 cash on the signing of this agreement, the receipt of which is hereby acknowledged," the remaining instalments to be paid in one, two and four years, with interest from the date of the agreement, and there was a proviso making time of the essence of the contract and, on default in performance of conditions and payment of instalments, for the cancellation of the agreement by the vendors on giving written notice to the purchaser. The land in question formed part of a larger area and there was an undischarged mortgage upon the whole property of which both parties had knowledge at the time of the agreement. The cash payment was not made, the purchaser refusing to pay this amount until the mortgage was severed and apportioned so that the land mentioned in the agreement should bear only a determinate share thereof, and the agreement amended to this effect. The vendors then withdrew from the agreement by a letter addressed to the purchaser's solicitor. In an action against the vendors for specific performance,

Held, per Davies and Anglin JJ.—The execution of the agreement constituting the relationship of vendors and purchaser was the consideration for the cash payment then to be made and, in default of such payment, the obligation to sell and convey the lands with a good title did not become binding upon the vendors.

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

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Per Duff and Brodeur JJ.—Payment of the ten thousand dollars in cash was a condition precedent to the constitution of any obligation by the vendors to sell or convey the lands and, consequently, to shew good title.

Per Idington J.—In the circumstances the purchaser's refusal to make the cash payment was a repudiation of the agreement which deprived him of the right to a decree for specific performance.

Judgment appealed from (1 D.L.R. 331, 1 West. W.R. 563) reversed.

APPEAL from the judgment of the Supreme Court of Alberta(1), by which the judgment of Simmons J., in favour of the defendants, was reversed, Harvey J. dissenting, and the action of the plaintiff was maintained with costs.

The circumstances of the case are stated in the above head-note.

Ewart K.C. and *C. F. Adams* for the appellants.

Wallace Nesbitt K.C., C. C. McCaul K.C. and *J. E. Wallbridge* for the respondent.

THE CHIEF JUSTICE.—This appeal is allowed with costs in this court and in the Supreme Court of Alberta, *in banco*, and the action is dismissed with costs.

DAVIES J. concurred in the opinion of Anglin J.

IDINGTON J.—These parties executed an agreement for the sale and purchase of half of two lots in Edmonton for the sum of $33,750, of which the sum of $10,000 was to be paid, by the express terms of said agreement, "on the signing of this agreement, the receipt of

(1) 1 D.L.R. 331, 1 West. W.R. 563.

which is hereby acknowledged." This provision for payment proceeded to provide also that $10,750 should be paid in a year, $8,000 in two years and $5,000 in four years. A mortgage existed for $15,000 and interest at seven per cent. per annum in favour of a third party and covering the whole of said lots, but did not fall due till a few months after the last of said payments of purchase-money.

The respondent refused to pay the $10,000 payable on the execution of the agreement he had signed unless specific provision was made therein for the early severance of the mortgage so that each half would bear a determinate share in case it became desirable for him later on to have paid off what was to be borne by the half he was buying.

He had signed with full knowledge of the existence of this mortgage and as a man of education and ordinary sense must have been alive to these possible complications before he signed the agreement; especially so as that had been preceded by a payment of $100 and a receipt therefor given him setting forth above terms of payment upon which the completed agreement was to be framed.

I pass by a mass of evidence in regard to an alleged verbal understanding providing for this outstanding mortgage as at best only confusing the questions to be solved. It is admitted as fact that respondent knew of this mortgage when he signed the agreement.

The plain language of the agreement required payment of $10,000 cotemporaneously with the execution of the document. And when respondent refused to comply, with such express language binding him, he gave appellants the right to treat such explicit refusal as an abandonment or at all events repudiation of the

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agreement entitling them to rescind. They rescinded accordingly after having given four days to respondent to consider his position.

The latter chose, at the end of four days, to insist on their amending the agreement before paying over the $10,000. How could he more clearly repudiate that agreement? His hope of getting a new agreement to suit him is no answer.

The demand made, if complied with, might have turned out an impossibility for appellants to have fulfilled.

If the agreement had not by its terms impliedly excluded, as the judgment appealed from maintains, in acceding to respondent's claims all right to interest in this $10,000 it might have been urged with greater fairness that it was only to be considered as an instalment to be postponed till title passed.

Moreover, by paying the $10,000 at the time of signing the respondent risked nothing. The balance of the purchase-money after such payment exceeded by over $7,000 the total mortgage. The respondent had a right under the agreement to proceed, after paying the $10,000 deposit, to insist on the title being made out before going further, and, before next payment, being made good on due protection being given him against the complications he professes to have dreaded.

And in case of his electing the right given in the agreement to pay up the entire purchase-money he could have forced the appellant to redeem the mortgage no matter how unexpectedly onerous that might have proved to appellants. Of course the collateral verbal agreement might have modified this. I am

passing no opinion upon that, but upon the agreement which is sued upon and must be construed as it reads.

This agreement was the outcome which the parties to the previous receipt anticipated.

If the agreement could be treated as not executed at all then there was nothing but that receipt to be considered; imperfect by reason of the mutual intention that it should be followed by and be only the foundation for such agreement.

And if such a receipt so given is to alone constitute the foundation for this action there seem to be many difficulties in respondent's way.

The Statute of Frauds, the verbal understanding and what seems, in light thereof, very like equivocal conduct on part of respondent in claiming something unprovided for therein as a *sine qua non* of his proceeding to close up the transaction, furnish, I incline to think, impassable barriers to his resting an action of specific performance on the receipt alone.

He knew about the mortgage before writing his solicitor and when he instructed him to look at the title and if that found right to hand over the cheque, he ought at least to have told him that he knew of this mortgage and perhaps have told him his understanding as to that.

As I read his letter it shews he thought the agreement completely executed and ready for the investigation of title and if that satisfactory then to hand over the cheque.

He has seen fit to sue upon it and surely he cannot be heard to say now it was not executed. If so, then all else merged therein save possibly the collateral verbal agreement if evidence can warrant it being held such.

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In my view his action fails and this appeal should be allowed with costs.

Duff J.

DUFF J.—I think the appeal should succeed on the ground that the cash payment of ten thousand dollars not having been made the appellants' obligation to sell (and, consequently, their obligation to shew a good title) did not become absolute.

From the first the parties contemplated the execution of a formal contract of purchase. The evidence of the agent is precise that, according to his understanding with the respondent, the sum mentioned was to be payable upon the execution of that contract; and it is clear enough that the appellant Alfred B. Cushing, who acted for his brother as well as for himself, always had the same view of the arrangement.

The fact that such a formal agreement was contemplated is, as Lord Cranworth said in *Ridgway* v. *Wharton*(1), strong evidence that the parties did not intend finally to bind themselves until that agreement should be completely constituted and there is a great deal to be said for the view that, according to the evidence, read as a whole, the legal position of the parties up to the time of the execution of the agreement of the 12th September was that the appellants had made an offer of sale in terms of the receipt which they had precluded themselves from revoking until a reasonable time had elapsed to enable the parties to prepare and execute a formal instrument. It is, however, not necessary to consider what the legal position of the parties might have been if the document of the 12th of September had never been executed. That

(1) 6 H.L. Cas. 238.

instrument was prepared in accordance with the original intention of both parties and with the object of setting forth the terms of their agreement in final and binding form. It was executed by the appellants first and afterwards by the respondent; upon it the respondent sues; and it evinces, in my judgment, in the clearest way the intention of both parties that a condition precedent to the constitution of any obligation to sell on the part of the appellants was the payment of ten thousand dollars down. The parties do not, it is true, in formal terms provide that the payment of that sum is to be a condition; but the intention that it should be so is manifested by the frame of the agreement as a whole, the stipulations of which pre-suppose that this payment has already been made and shew unmistakeably that it is upon the basis of this assumed state of facts that the parties are contracting.

In this view it is, perhaps, unnecessary to notice the point made upon the last paragraph of the agreement. This paragraph applies, of course, only to default in respect of payments to be made in future.

I cannot understand, I may add, the contention that the respondents after refusing to comply with this condition, can (after the time fixed for payment has long passed and the property has greatly increased in value) fasten a contract to sell upon the appellants by offering now to make the cash payment stipulated for. With great respect, to give effect to that contention would seem to be constituting a fresh contract.

ANGLIN J.—In my opinion, on a proper interpretation of the contract for the specific performance of

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Anglin J.

which the plaintiff sues, the consideration for the payment by him of the sum of $10,000 "cash on the signing of this agreement" was the execution of the agreement itself — the constitution of the relationship of vendors and purchaser between the parties — the promise or undertaking of the vendors to sell and convey. The plaintiff was not entitled to require the vendors to shew their title to the land in question before payment of this sum of money: the agreement specially provides otherwise.

If the parol evidence may be looked at for this purpose (which, I think, more than doubtful), it seems to me to make it reasonably clear that it was well understood that the $15,000 mortgage (the existence of which, as a single charge on the land in question and other property for the whole amount secured, the plaintiff relies on as a justification for his refusal to pay the $10,000 until this incumbrance had been removed or had been so apportioned that the land which he was purchasing would stand as security to the mortgagee for only $5,000) would remain unchanged until the transaction should be closed by the purchaser paying the entire purchase money, either at the time stipulated, or in advance under the provision for that purpose.

The property in question was of a speculative character to the knowledge of both parties. Time was of the essence of the agreement. The defendants' notice giving the plaintiff four days within which to pay the $10,000, with cancellation as an alternative, was, in the circumstances, reasonable, and on his default they were entitled to treat the agreement as cancelled unless they had bound themselves not to do so. I find nothing which so binds them.

The express provision in the agreement for rescission by notice in the event of default in payments refers, in my opinion, not to the $10,000 cash payment, but to the subsequent payments which the purchaser covenanted to make. That provision the defendants do not invoke and it does not affect whatever rights accrued to them on the plaintiff's refusal to pay the $10,000. As already stated, his default, in my opinion, gave them the right to withdraw and cancel. That right they have exercised — I think legally and efficaciously.

I would, for these reasons, allow this appeal with costs in this court and in the court *en banc,* and would restore the judgment of the learned trial judge.

BRODEUR J.—I agree with the views expressed by Mr. Justice Duff. This appeal should be allowed with costs in this court and in the court *en banc,* and I would restore the judgment of the trial judge.

Appeal allowed with costs.

Solicitors for the appellants: *Ewing & Harvie.*
Solicitor for the respondent: *J. E. Wallbridge.*

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*May 10.
*June 4.

F. J. X. COX, J. BROCKEST, D. McLEAN AND D. E. FINCH (PLAINTIFFS) ..... APPELLANTS;

AND

THE CANADIAN BANK OF COMMERCE (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Banking—Promissory note—Special indorsement—Condition—Pledge—Collateral security—Holder in due course—Payment and satisfaction—Liability on current account.

The bank having refused further loans to a trading company until its current liability to the bank was reduced, a note by the company in favour of its directors was specially indorsed to the bank by them and handed to the company's manager, who had charge of its financial affairs, with instructions to have the note discounted, but without authority to pledge it. Without informing the bank of his restricted power to deal with this note, the manager deposited it with the bank as collateral security for the company's current liability and, in consideration of the deposit, obtained fresh advances from the bank by discounts of the company's trade paper. At maturity of the note the trade paper had been retired and an overdraft on the company's account had been covered, but the general indebtedness of the company for former loans still subsisted. In a suit by the directors for the return of the note the bank counterclaimed for the amount thereof.

Held, affirming the judgment appealed from (21 Man. R. 1), that, so far as the bank was aware, the company's manager had ostensible authority to pledge the note as collateral security for the general indebtedness of the company on its current account, that re-payment of the fresh advances by retirement of the trade paper so discounted was not satisfaction of the debt for which the note was pledged, and that the bank was entitled to enforce payment of the note as holder in due course for valuable

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

consideration within the meaning of the "Bills of Exchange Act," and to recover thereon the amount of the company's general indebtedness remaining unsatisfied.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), reversing the judgment of Mathers C.J., at the trial, in favour of the plaintiffs, dismissing the plaintiffs' action with costs and maintaining the defendant's counterclaim.

The plaintiffs were directors of the Finch Company, Limited, which was a trading company carrying on business in the City of Winnipeg and was a customer of the bank at its branch there. In the circumstances stated in the head-note, they brought the action to have an order against the bank directing it to return the promissory note in question to them and for a declaration that the bank was not entitled to enforce payment thereof. The bank counterclaimed for the recovery of the amount of the note from the plaintiffs as indorsers.

At the trial His Lordship Chief Justice Mathers rendered judgment declaring that the plaintiffs were not liable to the bank as indorsers, ordering that the note should be returned to the plaintiffs, and dismissing the bank's counterclaim with costs. This judgment was reversed by the judgment now appealed from.

J. B. Coyne for the appellants.

R. M. Dennistoun K.C. for the respondent.

THE CHIEF JUSTICE and DAVIES J. agreed that the appeal should be dismissed with costs.

(1) 21 Man. R. 1.

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Idington J.

IDINGTON J.—Finch, one of the appellants, was the managing director of a mercantile corporation, and the others were fellow-directors thereof. Respondent was their banker.

By resolutions of the board the manager or a director appointed, with the accountant of the company, were authorized amongst other things "to borrow money from" respondent

> on behalf of the company either by overdrawing the account of the company with the said bank or otherwise * * * and to negotiate with, deposit with, or transfer to the said bank (but for credit of the company's account only) all or any bills of exchange, promissory notes, cheques, etc., etc., * * * also to arrange, settle, balance and certify all books and accounts between the company and the bank,

I may incidentally remark that the ingenious suggestion that these powers, though given by the company do not cover the case of the personal authority to use these indorsers' signatures for another than the specific purpose they gave them for, hardly comes with a good grace from the very men who framed and passed these resolutions intending the bank to rely on them.

A copy of this series of resolutions was on file with the bank for its guidance as to the limit of authority of these officials, who, in turn, signed a general letter of hypothecation which, of course, could not enlarge the powers given by these resolutions, but was an authority within them as ample as possible thereunder to enable the bank to hold securities given

> as a general and continuing collateral security for payment of the present and future indebtedness and liability of the undersigned (*i.e.*, the company), and any ultimate unpaid balance thereof, etc.

Such were the relations between the corporate bodies when the company, in the end of August, 1907, owed the bank and was so pressed by it that the latter desired the personal guarantee of the company's direc-

tors for the payment of the latter's indebtedness when called for.

This was refused. Then the notes or acceptances of shareholders for unpaid calls on their stock was suggested. Many drafts were made on them, but few, if any, accepted before matters became so urgent that at a meeting of the board the appellants agreed to indorse the note of the company for two thousand dollars if the latter would assign them the sum so due for unpaid calls to indemnify them against such indorsements, and the board accordingly passed a by-law to carry this out.

It is clear that the purpose was that such note should, when so indorsed, be discounted by respondent.

It is equally clear that the bank-agent thereafter refused to discount it, but offered Finch, duly authorized as above, to deal with securities he had in his hands for purposes of his company in such a way as would enable him best to finance the company, to accept it as collateral for the company's account as a means of strengthening it. He says Finch assented thereto, and the banker accepted it as collateral.

Primâ facie the result of so dealing with the note in question would be to render it a security to which the bank could look for payment of any ultimate balance due by the company. And in default of any restriction as to such general application there is no answer to the bank's claim to hold it and enforce its payment.

It was, so soon as in possession of the bank, placed in the register of collaterals held against this account.

The company's accountant understood from Finch it was used as collateral.

The ledger-keeper, who was also acting account-

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ant in the bank, and the person to ask for its return, if returnable, never heard during its currency of any claim to have it returned, though meeting Finch almost daily.

The manager in effect swears it was properly so treated in accordance with his suggestion and the assent of Finch thereto and that the business done thereafter between the company and the bank proceeded on the faith thereof.

Finch denies his assent thereto, but in that is discredited by the learned trial judge.

The learned trial judge, however, not resting upon any express agreement restricting its application to overdrafts and discounts of trade notes, but, by a process of reasoning which I cannot accept, indeed hardly follow, as to the consideration for its deposit having been the granting overdrafts and discounting such trade notes, saw his way to finding such a restricted application of it as a collateral.

These might, as he suggests, be valuable considerations given by the bank and entitling it to hold the security. But, unfortunately for the appellants and the reasoning I refer to, there was no such consideration expressly agreed on as the consideration, much less as being the entire consideration.

The manager in his way of illustrating his meaning does, in a loose sort of way, in one place, refer to such subjects as being motives of action.

But, with respect, I think no banker or competent business man would be likely to attach a restriction as claimed to what he says transpired relative to and as governing the purpose of giving this collateral.

The consideration clearly was the undertaking to carry the account as a whole, and the deposit was

made a general collateral to the whole as a basis of credit for such dealings.

Now, was there anything in the way of notice to the bank of the terms upon which the appellants indorsed ?

The learned trial judge expressly finds the bank took it in good faith and without notice thereof.

The only vestige of foundation for believing otherwise was the learned trial judge's own finding that the bank-agent asked or induced Finch to believe that if he got a note so indorsed for two thousand dollars it would be discounted.

A step further in the same direction, making it clear that the bank-agent had expressly agreed to such a thing, and as Finch says, had followed it up by accepting the note as if discounting it, but later repudiating that under instructions from head-office, would possibly have made an arguable case implying knowledge in the bank that the note was got and produced pursuant to such an express agreement for its discount.

Such is not found to be the fact. What is found to be the fact falls far short thereof. In either case it is only by a train of reasoning that knowledge of what the indorsers intended to be done with their indorsement could be imputed to the bank.

Short of such express knowledge or notice, or facts upon which either could be fairly imputed to the bank, it seems to me there could not be rested any such contention as set up here.

The distinction between the indorsing for purposes of discount and collateral security is at best rather fine and, perhaps, not worth much except in exceptional circumstances. If the appellant had made as

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suggested, but not proven, a case that the securities furnished the indorsers had been abandoned as result of what the bank did, something more tangible would have had to be dealt with.

I think the appeal must be dismissed with costs.

DUFF J.—Finch had no authority in fact to deal with the note as he did. Had he ostensible authority? I think he had. I think his possession, in the circumstances, would naturally, in the view of the bank-manager, imply authority to use it on behalf of the company for the purpose of improving the status of the company's account with the bank in order to procure the advances then urgently needed. *Ex facie,* the transaction (as between the directors and the company), was simply an indorsement by the directors of the company's note for the company's accommodation. I cannot see anything in it importing any limitation as to the terms under which the bank was to hold the paper. The natural inference of third parties would be, I think, that such arrangements were left to the discretion of the company as represented by the manager.

The only other point is whether there was any restriction upon the classes of advances in respect of which the note was pledged. The learned trial judge held it was to be applied only to secure the overdrafts and certain other specified advances. There is some difficulty in taking that view on the evidence as it stands; and, while I should desire to give the greatest possible weight to the finding of the trial judge, I am disposed to think the better view is that which prevailed in the Court of Appeal. I do not, of course, in the least accede to the contention that the trial judge,

because he rejected the evidence of Finch on this point, was bound to accept, in its entirety, that of the bank manager; a variety of circumstances open to the observation of a trial judge, but excluded from that of a court of appeal might very properly determine his judgment in the rejection of one part while accepting another part of the testimony of a witness. I think, however, that the learned judge has fallen into some error in not giving sufficient weight to the course of business and to the probability that if there was a departure from it there would have been some record of that either in the bank or by Finch himself. Finch's remark to his accountant seems to give support to the view that the note was to be pledged as collateral security for the indebtedness of the company generally. On the whole I am not satisfied that on this point the Court of Appeal was wrong.

ANGLIN J.—The defendant Finch, in my opinion, held the note in question and took it to the defendant bank not as the agent or emissary of the indorsers, but as the president and accredited business representative of the Finch Company, Limited, with ostensible authority to use it as he might deem best in the interests of that company. Of whatever actual limitation there may have been upon his authority the bank had no notice. The trial judge has so found.

The learned judge says that

> Finch deposited it (the note) as collateral security on the bank's promise that such a deposit would ease up the account and that advances would be allowed as an overdraft and upon trade paper.

The company had the benefit of this consideration. Again the learned judge says

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it (the note) was pledged as collateral security only for the company's account.

The evidence warrants these findings and they have been confirmed by the Court of Appeal. A perusal of Finch's evidence has satisfied me that his statements to the contrary are wholly unworthy of belief.

Because, when the note in question in this case matured, the advances allowed on overdraft had been repaid and the trade paper discounted had been taken up (one note of $529, however, appears to be still outstanding), the learned trial judge concluded that all the liability of the defendants had ceased, although the Finch company still owed the bank some $1,900 on the general account to which the note indorsed by them had been pledged as collateral. With great respect, it would seem to me that the learned judge confused the consideration for which the note was given to the bank by Finch with the indebtedness for which it was pledged as security.

I agree with the majority of the judges of the Court of Appeal that the plaintiffs have failed to establish any ground for relief from their liability as indorsers and would dismiss this appeal with costs.

BRODEUR J. agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Coyne & Hamilton.*

Solicitors for the respondent: *Machray, Sharpe & Dennistoun.*

G. M. ANNABLE (DEFENDANT) ..... APPELLANT; 1912

AND

JAMES H. COVENTRY (PLAINTIFF) .. RESPONDENT.

*May 13.
*June 4.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Title to land—"Land Titles Act," R.S. Sask., 1909, *c.* 41—*Fraud—Cancellation of certificate of title—Appeal—Findings of fact—Review by appellate court.*

The appellant obtained a transfer of lands which had been executed by the registered owner to him through some mistake or inadvertence, and, although he was aware that these lands had been previously transferred by the beneficial owner to the respondent, he registered the transfer and thereby secured a certificate of title therefor in his own name as the owner.

Held, affirming the judgment appealed from (1 West. W.R. 148), that the certificate of title issued to the appellant should be cancelled, under the provisions of the "Land Titles Act' (R.S. Sask., 1909, ch. 41), as having been fraudulently obtained.

Per Anglin J.—Where error in the findings of the trial judge can be demonstrated wholly by argument it is the duty of an appellate court to review questions of fact even where those findings have been against fraud, and upon oral testimony. *Coghlan* v. *Cumberland* ([1898] 1 Ch. 704); *The "Gairloch"* ([1899] 2 Ir. R. 1); and *Khoo Sit Hoh* v. *Lim Thean Tong* ([1912] A.C. 323), followed.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), which varied the judgment of Newlands J., at the trial, and maintained the plaintiff's action with costs, but for reasons different from those given by the trial judge.

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

(1) 1 West. W.R. 148.

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

G. E. Taylor for the appellant.
W. B. Willoughby for the respondent.

THE CHIEF JUSTICE agreed that the appeal should be dismissed with costs.

DAVIES J.—I am not able to reach the charitable conclusion of the trial judge that there was no fraud on the part of Annable in taking from the vault of the solicitor Grayson and from that solicitor's clerk in his master's absence the transfer of the south-west quarter of section 36, township 15, range 24 west of the second meridian, and in causing the same to be registered and a certificate of title taken out to himself.

The learned trial judge, however, finds that under the circumstances the onus of proof lay upon him to prove that he paid value for the land and that he failed to discharge that onus.

I have gone carefully through the evidence and, while I fully agree in the finding that Annable did not prove that he gave any value for the land, I think also that he must have known when he obtained from the vault of the solicitor, Grayson, the transfer found by the latter's clerk in a private bundle of his employers from Kitty Ann White to Annable of this quarter section that it had been executed in mistake for the north-west quarter section of the same section which he had actually purchased from William J. White.

He must have known of the mistake when he registered the transfer and took out the certificate of title in his own name.

The positive evidence of William J. White that he never sold this south-west quarter section to Annable, but did sell him the north-west quarter section; the failure of Annable to remember how much he paid for this south-west quarter section, which he alleged he bought, or the amount of any of the instalments he paid, or when he paid any of them; the absence of any receipt, agreement or scrap of writing evidencing a sale to Annable by White or a payment of any part of the purchase-money to White; the absence of any entry in any book shewing any such payment, together with other facts proved, convince me that White never did sell and Annable never did buy this south-west quarter section.

William J. White was the beneficial owner of the land, it having been willed to him by his father. In April, 1902, he sold and transferred the quarter section to the respondent, Coventry, and was paid by him the purchase-price. Coventry went into possession at or immediately after his purchase and has remained in possession, farming the land and otherwise dealing with it as owner ever since, without any claim ever having been made by Annable that the land was his until after he found the assignment in Grayson's vault to himself and registered it in 1909.

Kitty White was the executrix of the will of her late husband, Charles B. White. The latter's son, William J. White, was the beneficial owner and devisee under his father's will. The consideration stated in the transfer found in the vault from Kitty White, executrix, to Annable was one dollar.

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Davies J.

Whatever may have been the belief or intention of Annable when he induced Grayson's clerk to give him this transfer we do not know, but, looking at all the facts proved, I fully agree with Chief Justice Wetmore that with full knowledge of the facts that W. J. White had sold this quarter section to Coventry, the respondent, and that he was the owner of the land the appellant fraudulently caused the transfer to himself from Kitty White to be registered and so obtained the certificate of title.

I think we are fully justified in reversing the inference of the absence of fraud drawn from the facts by the trial judge.

I would dismiss the appeal with costs.

IDINGTON J.—The father of William J. White homesteaded the south-west quarter of section 36, township 15, range 24, west of the second meridian and in the Province of Saskatchewan and had the right of pre-emption to the north-west quarter of said section.

He died on the 7th of March, 1891, at his original home in Ontario, after having by his will devised said lands to his son. By the same will he devised to his wife his homestead in Ontario and bequeathed to her his chattels there, during widowhood, and appointed her his executrix of the said will, which she proved.

William J. White lived on and completed the homestead duties in respect of said south-west quarter section and got a certificate recommending him to the grant thereof.

As there were no unpaid debts she was, in effect, a bare trustee for her son William J. White. He, being the actual beneficial owner of the said half-section,

resided on and farmed the said south-west quarter section for some years, if not till he sold it for a valuable consideration to the respondent, and, on the 26th of April, 1902, made an assignment to him pursuant to said sale. Unfortunately this could not by law be registered until the Crown patent issued, and even then was not tendered for registration, or the need for a transfer from the executrix would have been discovered and, no doubt, got.

In conformity with the "Land Titles Act" she was, on the 11th of May, 1903, granted said lands as personal representative, and this was registered on the 31st of March, 1904.

But it seems undisputed that respondent, who resided near it, had ever since his said purchase possessed and cultivated the land till these proceedings and, meantime, had made an abortive sale of it.

William J. White had, as appears from the abstract of registrations, previously mortgaged the property to local bankers for a small sum. And on the said 29th of April, 1902, that was discharged. A small seed-wheat-loan bond, as I take it, was made by William J. White in favour of the Minister of the Interior on the 12th of June, 1903. I see no explanation of why he should have signed for that after his sale to the respondent. As he stood in the Department of the Interior certified, as stated, for the patent, I infer he was merely carrying out his agreement of the previous year. Curiously enough the patent to his mother as personal representative and this bond bear the same number on the abstract. However, as no point is made of the execution of this bond save the unimportant one to shew that William J. White was not correct in saying he had left and never come back

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to Moose Jaw after January, 1903, it does not concern us much.

The appellant says he bought the north-west or pre-emption quarter-section and this south-west quarter-section from William J. White as one entire purchase, for the same consideration covering both. This single transaction becomes, as will presently appear, in carrying it out, if the story is true, strangely and in an unaccountable manner divided into two.

The said north-west quarter section was transferred to him by William J. White for the alleged consideration of $800 by a transfer, dated the 10th of March, 1903, drawn by one Fish, a local conveyancer.

There is produced and proved an assignment of this north-west quarter of said section from Kitty Ann White to William J. White, dated 14th September, 1904, for the consideration of one dollar.

Seeing the patent only got registered in the previous month of March this transaction just now referred to clearly is attributable to the completion of the title William J. White had bargained with the appellant to give him and pursuant to which he had made said transfer of the 10th of March, 1903, referred to.

The appellant had lived in Moose Jaw twenty-eight years before the trial and had been rancher, real estate agent and real estate speculator, and knew the district where the south-west quarter section now in question is situate, about twenty miles from Moose Jaw. On the 18th of March, 1909, he registered a transfer from Kitty Ann White, described as widow and personal representative of her late husband, purporting to transfer to him said south-west quarter section for the consideration of one dollar, and bearing date the

20th of July, 1903, and got, thereupon, a certificate of title which he contends is conclusive against the world.

At the foot of this certificate is noted, by the assistant deputy-registrar, the fact that the title of the owner is subject to the above-mentioned bond to the Minister of the Interior.

The attesting witness to said transfer was on said date serving as a clerk in the office of a solicitor where the respondent's above-mentioned transfer from White had been drawn, executed and still remained awaiting registration, which could not take place till registration of the patent. He made at the time the usual affidavit of execution from which it appears that this assignment was executed at Moose Jaw on the day it bears date. This witness was called but can give no information beyond verifying the fact of his being attesting witness and that the document seemed to have been written by a typewriting machine he had operated, but whether on this occasion he or some one else used it he could not say.

The solicitor's mind is equally a blank on the subject, save that he knew this south-west quarter section had been previously to that date conveyed by William J. White to the respondent and that he must have overlooked the misdescription.

It had remained in the solicitor's office, I imagine, evidently untouched, for nearly six years after this appellant had got Fysh to draw the transfer from William J. White to him of the north-west quarter section, and four or five years after he had carried it to the solicitor to get the said transfer by Mrs. White, of September following, to complete the business.

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The appellant, on the 25th of February, 1909, having sold the north-west quarter section to Wilson and Schrader, they retained said solicitor to pass the title. He (the appellant) accompanied the solicitor's clerk, who had then waited on him for his title papers, to the solicitor's office to search for them. Whilst engaged in such search the appellant, for the first time, saw the above-mentioned assignment of the south-west quarter section from Kitty Ann White to him and induced the clerk thoughtlessly to give it up to him. He took it away without asking the solicitor and registered it as already stated on the 18th of March, 1909.

If he had, as was his duty, asked the solicitor he never would have got it, for the solicitor tells us he knew Coventry, the respondent, had bought the south-west quarter section from William J. White.

Though he says he had bought both quarter sections at the time from William J. White as parts of the same transaction for one and the same consideration he cannot tell what that was. He pretends White owed him something, which the latter denies. He says the son directed the balance, which he cannot name except what had to be paid to the Government for the north-west quarter, to be paid to his mother, and it was paid accordingly by monthly instalments, but of which he can name no amount nor specify any of the times of payment.

She was dead before he ventured, without asking the solicitor, and hence improperly, to take possession of the document he founds his title upon, and was thereby led to invent this story he now tells. He cannot remember that he ever told any one till then that he owned or had bought the south-west quarter. It is shewn Mrs. White was well acquainted and on friendly

terms with Coventry, who on coming to town usually made a friendly call on her. She had bought a house in Moose Jaw after coming to town to live, and lived in it there with her son. There is not a shadow of foundation for supposing she was likely to be a party to a fraud on respondent, as she must have been if knowingly signing a transfer thereof to another and in monthly receipt of instalments on account of the price thereof.

The solicitor out of whose office the assignment was improperly taken acted for respondent and had, as he supposed, passed the title by procuring the discharge of the mortgage to the local bankers, but never saw the will and, I infer, waited the issue of the patent for which William J. White had a certificate apparently entitling him thereto. I infer that, as the transfer could not be registered before patent, whoever got it, the solicitor awaiting it lost sight of the transaction and the registration of the assignment to respondent was thus overlooked. The solicitor, I may repeat, has no doubt of the fact that respondent was the purchaser of the south-west quarter section and entitled to it.

And although the appellant swears the transaction between him and White was a single one embracing the purchase of a half section, he has utterly failed to suggest how or for what reason the assignments he got from William J. White, and his mother, and which he knew of all along, and had ultimately registered, one or both contained only the conveyance of a quarter section instead of the half section he was entitled to if his story is true. He listed the north-west quarter for sale, but refrained from listing the south-west quarter. He never paid taxes

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on the latter. He does not venture to say he omitted to do so as to the north-west quarter. He, I think, must have known in many ways that respondent was in possession of and claiming the south-west quarter section as the vendee of William J. White. The latter swears he had told him so. I see no reason to discredit him. Appellant undoubtedly knew it was a homestead quarter section, with such improvements as that implies, yet never concerned himself to know anything of the utility of these improvements with a view to benefiting therefrom as entitled on his story.

He seems to admit driving past it, yet never noticed or troubled to notice their state or other state of his acquisition which he never had seen except in this way.

He told respondent he had bought the north-west quarter from William J. White, but never set up any claim to the south-west quarter. The respondent also swears to the appellant telling him of having sold his quarter and having previously wanted one Smiley to put respondent's quarter along with his and sell both as a half section.

The appellant denies remembering. His explanation admits that he knew respondent had a quarter of that section, but imagined it was another. For a real estate speculator conversant with the district all this seems lame. And his story as to the alleged payments without receipts or other corroboration of any kind seems to me untrustworthy. The alleged loss of account books might, one would have supposed, be capable of corroboration, especially for one having a bookkeeper. It would have been interesting to have had the bookkeeper produce and verify the earliest cash-book and other books still on hand.

And when we find the bookkeeper writing a letter clearly disclosing knowledge of the respondent's claim and that man not called one is apt to become suspicious.

The question of notice may, in itself, be covered by the "Land Titles Act," but that does not dispense with its use as a valuable part of the evidence in a case of fraud. He swears he was to pay $800 to the Government for the north-west quarter. It is admitted the Government price actually was only $400 and, with interest, which from the date of the homesteading would be about $260, could not be the sum he names. There would be thus left a small balance. White swears he was to have got a hundred dollars, but never got it.

When we find $800 put in the assignment as the consideration, and that both almost agree, the one positive and the other suggesting that the bargain was made on the street, and it was found later that Mrs. White had to sign a transfer, I see nothing improbable in the surmise that I am tempted to make of something being said now forgotten by White relative to paying this balance to her.

It is not the version of either, yet they were speaking so long after the transaction was closed they may have forgotten such details. I need not dwell on, and do not rest on this surmise. If it comes to a question of veracity between them I have no hesitation in accepting White's statement as against that of appellant. The former coincides with honest dealing and a straight method of business. The latter is the converse and implies by its methods most improbable things.

No one has accepted the latter's story. Nor do I

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see how any one accustomed to such work can peruse his evidence and trust it.

The claims he sets up must rest on a bargain with William J. White, and the assignment put forward as executed by his mother must be taken if anything, as a mere mode of carrying that out.

When I come to the conclusion, as I do unhesitatingly, that there never was a bargain with him that embraced this south-west quarter, then his act of inducing a clerk, without authority and behind his master's back, to deliver over such a document under all the circumstances I have related and of having it taken to the registry and put on record there, constitutes such a gross fraud that there should, I respectfully submit, never have been any hesitation in so declaring.

If White ever thought of selling and defeating respondent's rights he clearly must have contemplated fraud, and it would require but little evidence to make the appellant a party who had participated therein with him under section 65 of the Act. If a personal representative, shewn to be such, on the face of the certificate and registry, as here, should for his or her own purposes, intending to apply the purchase money to his or her own use, so receive it for such purpose to the knowledge of the purchaser, how can he not be held participating or colluding ?

If White's story be accepted, how could the payments to the trustee be properly made ?

Clear as noonday, either White or appellant intended deliberately to cheat somebody out of their rights in the south-west quarter, for I am quite sure that the late Mrs. White never so intended. And there is nothing but appellant's word for it that White

did. As between the two I have no doubt in concluding it was appellant who committed fraud, and all that has followed, placing him in the light of either knave or fool, as his own story does, is result thereof.

We have no explanation of how the transfer of the north-west quarter from White to appellant got from Fysh's office to that of the solicitor, or for what purpose. Possibly the appellant might have helped by searches most men would have made in an effort to discover this and other details of a story involving their honour, especially knowing or having means of knowing William J. White's version given in Moose Jaw six weeks before the trial. No one else seems to know the how or why of this and many other strange things his story suggests.

I think, however, a careful consideration of the evidence as he chooses to leave it as it stands almost demonstrates that the instrument he used was simply the product of a typewriter's mistake of "south-west" for "north-west," and its destruction was quite overlooked when about a year and three months later the late Mrs. White rectified the error by executing a new transfer.

Having reached such conclusions I need not enter at length, if at all, upon the questions raised by the learned trial judge's view of the Act, and the possibility of his judgment being maintained on the ground and in the way he dealt with the case. I do not dissent therefrom but express no definite opinion in that regard.

I may call attention to the following section of the "Land Titles Act":—

> Section 4.—Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of

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actual fraud or over contracts for the sale or other disposition of land for which a certificate of title has been granted.

This does not seem to me so clearly limited to the construction contended for by appellant's counsel as he seemed to urge. To restrict it to the cases of fraud only would eliminate part of the section. To apply that part of the section "or over contracts for the sale or other disposition of land" to such contracts as made after every certificate of title would be needless. Such a jurisdiction is nowhere in the Act taken away, and must, unless expressly taken away, be presumed to continue.

If, on the proper construction, it is applicable to a case such as this, for example, where the contract has not been fulfilled and yet the certificate of title which the parties might intend to become effective when once due fulfilment of contract for sale had taken place, had been improvidently issued, then the form of relief the learned trial judge gave might be appropriate so long as no right of third parties had intervened. There are many considerations relative thereto suggested by other sections of the Act.

The question was argued somewhat, but I have formed, I repeat, no final opinion in regard thereto.

The question is raised of the land not having been brought under the Act by registration of the Crown grant at the time when these competing transfers were made, but I doubt the point being well taken if nothing else had co-operated therewith. I need not form an opinion on it.

DUFF J. agreed that the appeal should be dismissed with costs.

ANGLIN J.—We are asked to reverse the finding of

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the Supreme Court of Saskatchewan, sitting en banc, that the defendant in taking and having registered a transfer from Mrs. K. A. White to himself of a quarter section of homestead land committed a fraud, and to restore that of Newlands J., that he merely made an innocent mistake, and that, in giving his testimony at the trial that he had bought and paid for this quarter section, he was also honestly mistaken—the fact being as found by the learned trial judge, that he had given no consideration for the transfer in question, but had bought an adjacent quarter section which had been conveyed to him and subsequently sold by him.

I agree with Wetmore C.J., who says:—

> Looking at the general character of Annable's testimony and his conduct * * * and the testimony of William J. White, I cannot bring my mind to look upon his action with the same degree of charity that the trial judge did.

I concur in the view of the evidence taken by Brown J. and in his conclusion that

> when the appellant got the transfer of this land from Mr. Grayson's office he had no right whatever to it, and he must have taken it and had it registered knowing that he had no right to it and in fraud of the plaintiff.

It is within the province of an appellate court and it is its duty,

> even where, as in this case, the appeal turns upon a question of fact * * * to re-hear the case * * * not shrinking from overruling it if, on full consideration, the court comes to the conclusion that the judgment is wrong. *Coghlan* v. *Cumberland* (1); *The "Gairloch"* (2).

This rule was acted upon by the Judicial Committee in the recent case of *Gordon* v. *Horne* (3), (29th July, 1910).

(1) (1898) 1 Ch. 704. (2) (1899) 2 Ir. R. 1.
(3) 43 Can. S.C.R. ix.; 42 Can. S.C.R. 240.

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It is, in my opinion, not possible to say that the full court erred in taking a view of the evidence different from that of the learned trial judge and in affirming his judgment on the ground of fraud which he had failed to find. His error was susceptible of demonstration wholly by argument. *Khoo Sit Hoh* v. *Lim Thean Tong*(1).

In dismissing the appeal, however, I do not wish to be understood as dissenting from the view of the law expressed by Newlands J. I find it unnecessary to consider that aspect of the case.

BRODEUR J. agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Chisholm & Regan.*
Solicitors for respondent: *Willoughby, Craig & McWilliams.*

(1) (1912) A.C. 323, at p. 325.

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JAMES MORGAN AND OTHERS (PLAINTIFFS) ..... APPELLANTS; *May 15. *June 14.

AND

THE AVENUE REALTY COMPANY (DEFENDANTS) ..... RESPONDENTS.

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

Servitude—Obligation of mitoyenneté—Exercise of party-rights—Contribution towards party-wall—Arts. 510 et seq. C.C.

The defendants erected their building against the plaintiffs' wall so that it served them in the way of exterior protection for the side of the new building; they connected the metal roof-flashing with the wall by nails, etc., but constructed the new works in such a manner as to avoid depending upon the plaintiffs' wall for support and without piercing recesses in it to receive joists, etc.

Held, reversing the judgment appealed from (Q.R. 20 K.B. 524), Fitzpatrick C.J. dissenting, that the defendants had exercised party-rights in the plaintiffs' wall and utilized it as an external wall for their building, and that they were, consequently, obliged to treat it as a common wall and to pay half the value of the portion thereof so utilized by them.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment, at the trial, in the Superior Court, District of Montreal, and dismissing the plaintiffs' action with costs.

The material circumstances are stated in the judgments now reported.

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

(1) Q.R. 20 K.B. 524.

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The Chief Justice.

T. P. Butler K.C. and *Lafleur K.C.* for the appellants.

T. Brosseau K.C. for the respondents.

THE CHIEF JUSTICE (dissenting).—I agree entirely with the judgment of the court of appeal.

IDINGTON J.—The question raised here is whether or not the respondents have so used the wall erected by appellants as entitles the latter to call upon them for payment of half the costs of construction.

The line between these adjacent properties has never been finally determined and seems so doubtful that their respective surveyors employed to try and determine it, found the appellants' wall in part might be upon the ground of the respondents and recommended making a party-wall of it.

But the respondents instead of agreeing to that conceived the idea that they might so construct their building as to avoid perceptibly pressing upon or enjoying support from this wall yet enjoy every other benefit that an external or end wall could give it and be free from being called on to contribute to the cost of its erection.

Respondents' architect ingeniously contrived, by means of an iron structure rested on the front and rear walls or foundations and on pillars in the basement at a distance of a few feet from the wall in question, to avoid putting any beams into the wall as in old days was the common method of support to carry the upper part of a building.

The iron beams reached up to the edge of the wall in question and, so as to enable respondents to say it did not touch the wall, a sheet of paper was put between the end of each of these beams and the wall.

It was thought this was not enough, but a pretence of an end wall was made by building one of eight inches consisting of terra-cotta brick which, I suppose, could be a furring to receive the plastering on the inside.

Covered over the roof by usual material the job looked well done and all the protection of any party-wall was got without the expense of paying for half of it.

There were weak spots in the scheme. In the cellar the wall in question was white-washed by respondents, no doubt for purposes of light and cleanliness. The terra-cotta brick only began with the ground floor and was carried on the iron frame structure I have referred to. And when it became necessary to make the roof complete the respondents used metal flashing, which they found necessary to tie to the appellants' wall by nails driven into that. The respondents, therefore, had all the benefits (save the usual extent of support) a party-wall ever gives by sheltering the occupants of its building from the inclemencies of the weather.

The terra-cotta unless covered by metal or cement was worthless as an external wall. This was not so covered.

The question is raised whether or not this use of a party-wall is a usage of it that entitles the appellants to compensation.

It is said that so long as the party-wall is not used for support of the building put up against it the appellants have no right to complain.

It is by no means clear that the respondents' structure does not derive very substantial support from the stone wall in question. If the foundations of respond-

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ents are, as few are, absolutely solid, and can never settle and their structure has been built absolutely plumb, the structure undoubtedly can never rest for support on the party-wall. But if, as shewn, it rests on a blue clay, liable to give way and produce a settlement, then assuredly the party-wall of stone may become not only a great support and stay, but also a perpetual safe-guard that the settlement will, on that side, be kept nearly plumb. I hardly think the sheet of paper, now most likely ground to powder by the pressure, will help much.

It seems asking rather too much, indeed, to require a good deal of assurance, to obtain such an assurance against the possibilities of the consequences of such settling tendencies and yet to say that this party-wall is of no use to respondents and hence that it does not use it.

But there is more than that; they made, as bound by law, an application to the civic authorities for a permit to build and, in that, represented their proposed building to be of four stories in height and the thickness of its external party-wall as follows:—

> Thickness of external walls, 1st, *20*, 2nd, *16*, 4th, *16*, 5th * * 6th * * 7th * * 8th * * 9th * * 10th * *. Thickness of party-walls, 1st, *24*, 2nd *20*, 3rd, *16*, 4th * * 5th * * 6th * * 7th * * 8th * * 9th * * 10th * * . Are the party walls solid or vaulted: *solid*. External walls * * .

Either it was intended to use this wall now in question or it was not.

Certainly if it was intended to use this appellants' wall as a shield against prosecution the respondents ought not to be heard to say they did not use it.

And if it was not intended to use it, but to rely on the terra-cotta structure as an external wall, then that was something like fraud upon the authorities. I

prefer believing respondents' application and intention were honest. Indeed, I hardly think they should be allowed to say otherwise.

The inspector says:—

Q.—In other words, they used Morgan's wall as their outside wall, is that the case ?

A.—Well, I do not know if I can answer that way. But what I know is that there was a wall there, and they came to my office to ask me if I would accept a terra-cotta wall hanging on steel joists and beams, I told them it was unnecessary as there was a strong wall there. They said that they did not want to use this strong wall, but wanted a terra-cotta wall independent of Morgan's wall, I said if Morgan's wall was not there you would have to build according to your application, because it would not answer the purpose of the by-law.

Q.—You could not have a terra-cotta wall without anything outside ?

A.—No, you cannot have an exterior wall built of terra-cotta, only eight inches.

Q.—That would not have been a wall ?

A.—No, not an external party-wall.

Q.—As a matter of fact there was no wall built by them at all that would be allowed as an exterior wall ?

A.—No, there was none.

Even without more than using the wall to nail the roof to and finish the protection against the weather which this wall in question gave respondents, I incline to think they made that use of the wall that requires they should pay for it.

The mere accidental shelter a wall gives, say to a tent, though beneficial as sheltering from the wind, can give no right of compensation. But this design shews a great deal more. It is a use of a wall for all the purposes for which an external or party-wall is needed and the very effort put forth to avoid, by the design adopted, giving compensation, shews a desire to use the wall in the common acceptation of the term.

It is not the mere support involved and usually re-

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ferred to that determines the limit of the law in this regard. The law gives the right to use such a wall and implies the corresponding obligation to pay for it. It saves wasting money, and those thus saved (as the respondents were), must pay for the use they have made of the privileges the law gives.

Modern ingenuity and skill may enable a dispensation of the use of the old devices as to support, but does not avoid the application of the principle the law always carried in it and which, when applied here, seems to me to bind the respondents to pay for the benefits they enjoy thereunder. Without this wall they would have had to build another, such as specified, by itself for external walls.

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

DUFF J.—The evidence is sufficient to establish the conclusion that the appellants' wall serves the purpose of an exterior wall in the protection of the respondents' building. The respondents' architect admits as much: and the municipal inspector makes it clear that it was because of the juxtaposition of the appellants' building that the respondents were allowed to proceed with the erection of their building without constructing an exterior wall on the south side. It is really not disputed that the respondents have intentionally and deliberately availed themselves of the appellants' wall for all the purposes of an exterior wall except support; and there can be little doubt that they constructed the building in the full expectation that, when it had settled into its permanent position, it should receive support also from the appellants'

wall. The respondents have, no doubt, struggled hard to avoid the burden while enjoying the benefit but, I think, they have not succeeded. I agree with reasons given by Mr. Justice Trenholme and by the trial judge.

ANGLIN J.—Although the evidence is probably insufficient to establish that it was the intention of the defendant company that their building should receive lateral support on its southern side from the north wall of the plaintiffs' building, or that it in fact receives such support, the use made by the defendants of the plaintiffs' wall, in my opinion, constituted it a party-wall. By an ingenious method of construction the defendants have, perhaps sufficiently, provided for the support of the eight-inch terra-cotta structure, which they call the south wall of their building, without its receiving actual support from the plaintiffs' north wall. But the latter wall is none the less made use of by the defendants in many respects as an external wall of their building.

But for its contiguity the by-laws of the City of Montreal, if enforced as we must assume they would have been, would have prevented the erection of the defendants' building having for its south wall merely an eight-inch terra-cotta structure. The evidence indicates that the civic authorities permitted the building to be constructed as it was solely because it was represented to them that the plaintiffs' north wall would be used as a party-wall. The defendants have in fact no other south wall of any kind in their basement. They have whitened the face of the plaintiffs' wall which serves as the south side of their cellar rooms. They have actually connected the top of

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their terra-cotta structure with the north wall of the plaintiffs' building by the use of metal flashing. Without the covering afforded by the plaintiffs' wall, the defendants' terra-cotta structure would not at all have answered the purpose of an external wall. It is in fact the plaintiffs' wall which, partially at least, serves that purpose. In these circumstances I am satisfied that the defendants have taken such possession and have made such use of the plaintiffs' wall that they should not be allowed to escape liability to pay one-half the cost of so much of it as they have thus taken advantage of.

In an attempt to evade this liability — noteworthy for its cunning rather than for its honesty — they have, no doubt, not made the full use of the plaintiffs' wall which they might have made of it as a party-wall. But they have made and are making a use of it which they cannot honestly enjoy without assuming the obligations incident to its existence as a party-wall. It is gratifying to me that the law, as I understand it, does not require us to reach a conclusion not consonant with common honesty, which would be the result of upholding the respondents' contention.

For these reasons and those stated in the opinions of the learned trial judge and of Mr. Justice Trenholme, who dissented in the Court of King's Bench, I would respectfully allow this appeal with costs in this court and in the Court of King's Bench and would restore the judgment of the trial judge.

BRODEUR J.—La question est de savoir si l'intimée fait usage du mur érigé par l'appelant dans la ligne de séparation entre leurs propriétés, et si elle est tenue de lui en payer la moitié de la valeur.

Il est bien évident que, d'après les règlements municipaux, la bâtisse de l'intimée serait illégalement construite si elle n'utilisait pas le mur en question.

Les autorités municipales, quand elles ont accordé le permis de bâtir, ont compris que ce mur serait utilisé et l'intimée s'est exemptée par là même d'en construire un tel que requis par les ordonnances de la Cité de Montréal. Mais quand elle fut mise en demeure par l'appelant de payer la moitié de la valeur de ce mur, elle a répondu qu'elle n'en avait pas besoin.

Les ingénieux procédés auxquels l'intimée a eu recours violent les principes élémentaires de la justice et de l'équité et il ne peut lui être permis de s'enrichir ainsi aux dépens d'autrui.

Elle a mis dans les étages supérieurs de sa bâtisse un mur en brique poreuse (terra-cotta) qui, comme il est en preuve, ne peut servir que dans l'intérieur et ne pourrait jamais être utilisé comme mur extérieur à moins d'être recouvert de métal ou d'une couche de ciment.

Dans le soubassement elle n'a pas jugé à propos de continuer son mur de brique poreuse et le mur du demandeur, appelant, fait la division des deux propriétés.

L'intimée avait laissé entre son mur de terra-cotta et le mur du demandeur un espace à peine suffisant pour y mettre une feuille de papier. Comme le terrain est peu solide à cet endroit il est arrivé ce qui devait inevitablement se produire: les deux bâtisses se sont rejointes et elles se trouvent l'une sur l'autre.

L'intimée, cependant, n'aurait pas pu se contenter d'en rester là car la pluie se serait inévitablement introduite entre les deux murs et aurait desagrégé sa brique poreuse et rendu sa maison inhabitable. Alors

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elle a réuni la partie supérieure de sa brique poreuse au mur du demandeur par une bande de métal qu'elle y a clouée solidement.

Elle a donc fait acte de propriétaire sur ce mur en y introduisant ces clous et cette bande de métal.

La loi déclare que les murs sont présumés mitoyens (art. 510 C.C.).

Il me paraît bien evident que si, plus tard, les tribunaux avaient à se prononcer sur la nature du mur en question qu'ils le considèreraient comme mitoyen. L'usage que l'intimée en fait dans le soubassement, la bande de métal qui y a été introduite et clouée dans le haut feraient considerer le mur érigé par le demandeur comme étant le mur mitoyen servant aux deux maisons, vu que le mur en brique poreuse qui s'y trouverait ne pourrait pas plus être considéré comme le mur extérieur de la maison de l'intimée que les enduits faits par le demandeur-appelant, de son côté.

L'intimée pouvait bien acquérir la mitoyenneté après entente avec l'appelant. C'est une faculté que la loi lui accorde (art. 518 C.C.). Mais si, au lieu de procéder de cette manière, elle s'est servie du mur construit exclusivement par son voisin, il est clair qu'en pareil cas ce dernier pouvait la poursuivre en dommages-intérêts et pouvait demander la destruction même de la besogne mal plantée, pour me servir de l'expression de Fuzier-Hermann, Répertoire, *vo.* "Mitoyenneté," No. 222.

Mais ne pouvait-il pas également, s'il le préférait, considérer l'intimée comme ayant tacitement manifesté la volonté d'acquérir la mitoyenneté et réclamer d'elle le paiement de la moitié de la valeur de son mur? La jurisprudence et la doctrine n'ont pas craint d'aller jusque là. (Fuzier-Herman, *vo.* "Mitoyenneté," No. 223.)

Le propriétaire voisin peut donc devenir acquéreur d'un mur mitoyen soit èn donnant formellement son intention, soit en faisant des actes qui constituent de sa part la volonté de se servir du mur.

Les auteurs appellent ce dernier cas "l'usurpation de la mitoyenneté:" et la personne qui y a recours engage aussi bien sa responsabilité que si elle avait formellement réclamé la cession forcée du mur.

La voie de fait est équivalente au contrat même de cession. Dijon, 21 janv., 1880, Recueil, arrêts de Dijon 1880, 151.

Quand y a-t-il usurpation d'un mur ? C'est là une question de fait dont le tribunal de première instance devrait être le juge souverain, surtout si, comme dans le cas actuel, la preuve est quelque peu contradictoire.

Le savant juge qui a entendu la cause en cour supérieure a trouvé que l'intimée se servait du mur du demandeur, appelant. Il n'est pas nécessaire pour qu'un mur soit mitoyen qu'on y introduise des poutres: mais on peut en faire usage et, en consequence, engager sa responsabilité quand, en ayant recours à des moyens plus ingénieux qu'honnêtes, le propriétaire d'un lot voisin d'un mur en retire tous les avantages qu'il peut procurer et qu'il se dispense, à raison de çela, d'en construire un lui-même.

La jurisprudence Canadienne ne nous donne qu'une cause où cette question se soit soulevée: c'est celle de *Boyer* v. *Marson* (1), où il a été décidé que le défendeur qui avait bâti près de la maison de la demanderesse sans faire de mur, mais qui avait rempli de mortier les interstices entre le toit et le mur voisin a été obligé le payer la moitié du mur. Il y avait en plus le fait

(1) Q.R. 15 S.C. 449.

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que les locataires du défendeur avaient posé de la tapisserie sur le mur. La situation était passablement identique à cette cause-ci. En effet la partie supérieure avait été remplie de mortier, tandis que dans notre cas une bande de métal a été clouée dans le mur du demandeur.

Le mur avait été tapissé. Dans notre cas, la partie du mur dans le soubassement a été blanchie à la chaux.

L'intimée a cité devant cette cour deux décisions qui ont été rendues devant les tribunaux français et qui sont rapportées dans Dalloz 1859-1-277; Sirey, 1898-1-503.

La première de ces décisions est à l'effet que les constructions n'avaient été élevées qu'à proximité du mur du voisin et qu'elles n'y *pénétraient pas et ne s'y appuyaient pas* et qu'il n'y avait pas lieu de maintenir l'action possessoire qui avait été instituée par ce voisin, vu que les constructions ne constituaient pas un trouble à sa possession.

La deuxième de ces décisions a été rendue sous les dispositions de l'article 656 du Code Napoléon qui diffère sensiblement de notre article correspondant (art. 513 C.C.). Ce jugement porte d'ailleurs non pas sur l'obligation du propriétaire voisin de contribuer au mur dont il s'est servi par usurpation, mais sur le droit que le propriétaire possède de renoncer à la mitoyenneté ou de l'abandonner.

Ce n'est donc pas le cas tel que posé dans la cause actuelle que ces décisions des tribunaux français décident.

D'ailleurs les deux articles, ainsi qu'on le voit, ne sont pas du tout rédigés de la même manière. Voici,

en effet, l'article 656 du Code Napoléon ainsi que l'article 513 de notre code:—

Art. 656 C.N.	Art. 513 C.C.
Cependant tout co-propriétaire d'un mur mitoyen peut se dispenser de contribuer aux réparations et reconstructions en abandonnant le droit de mitoyenneté, *pourvu que le mur mitoyen ne soutienne pas un bâtiment qui lui appartient.*	Cependant tout co-propriétaire d'un mur mitoyen peut se dispenser de contribuer aux réparations et reconstructions en abandonnant le droit de mitoyenneté et *en renonçant à faire usage de ce mur.*

Ces jugements reconnaissent le droit au propriétaire voisin d'abandonner la mitoyenneté lorsque le mur ne *soutient pas sa maison.* Dans notre code, au contraire, il est dit que la faculté d'abandonner ne peut pas s'exercer si le voisin *fait usage* du mur.

On ensigne également en France que le propriétaire voisin engage sa responsibilité *s'il fait usage* du mur, même lorsqu'il le fait pas servir a supporter ses bâtiments. Fournel, "Traité du Voisinage," *vo.* "Mur," vol. 2, page 316, et au mot "Adossement," Demolombe, "Servitude," vol. 1, no. 421; Dalloz, 1870, 2, 217.

J'ai souligné les parties des deux articles qui diffèrent. Je reconnais que la différence n'est pas très considérable: mais elle démontre que notre loi engage plus facilement la responsabilité du co-propriétaire que la loi française. Sous le Code Napoléon le droit d'abandon ne peut s'exercer que dans le cas où le mur ne supporte pas la bâtisse voisine: tandis que sous l'autorité de notre code la simple utilisation du mur empêche l'exercice de cette faculté.

Pour ces raisons j'en suis venu à la conclusion que l'action du demandeur doit être maintenue et que la défenderesse, intimée, doit lui payer la moité du mur en question.

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Brodeur J.

L'appel doit être maintenu avec dépens tant de cette cour que de la cour d'appel et le jugement de la cour supérieure doit être confirmé.

Appeal allowed with costs.

Solicitor for the appellants: *T. P. Butler.*

Solicitors for the respondents: *Brosseau, Brosseau, Tansey & Augers.*

LA COMPAGNIE PONTBRIAND v. LA COMPAGNIE DE NAVIGATION CHATEAUGUAY ET BEAUHARNOIS.

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*March 6, 7.
*May 7.

Practice and procedure—Expertise—Appointment of single expert—Pleadings—Submission of irrelevant questions—Arts. 392-409 C.P.Q.

APPEAL from the judgment of the Superior Court, sitting in review, at the City of Montreal, affirming in part the judgment of Mr. Justice Bruneau in the Superior Court for the District of Richelieu.

The action was for breach of a contract for alterations and repairs to a ship, and the pleadings involved a counterclaim and an incidental demand. At the close of the evidence the respondents (plaintiffs) made a motion for the appointment of experts to examine the ship in order to ascertain what works were necessary to put it in condition for navigation, and the cost of such works. The motion for the proposed *expertise* was granted forthwith, notwithstanding objections raised on behalf of the appellants, and, without the consent of the parties as to the appointment and choice of an expert or experts, nor allowing an opportunity for recusation, the trial judge *sua sponte,* named one expert for the purpose of ascertaining the matters mentioned. The appellants took exception to the judge's order. The single expert, named, made some investigations, but did not hear evidence of witnesses, and made a report recommending that certain

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

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alterations should be made to the ship at a cost of about $5,800. The trial judge received this report, and, without any further proceedings, maintained the respondents' action in respect of several items of damages claimed by the principal demand and, in addition, for the sum of $5,800 mentioned in the report of the expert. From the total amount, so found, the trial judge deducted the amount claimed by the appellants' cross-demand, and condemned them to pay the remainder to the respondents. On an appeal to the Court of Review, this judgment was affirmed as to the principal demand and the cross-demand, and, as to the incidental demand the Superior Court judgment was reversed and the said demand was dismissed.

The appellants, on their appeal to the Supreme Court of Canada, contended that, on the evidence, the principal demand should have been dismissed and the cross-demand maintained, and complained that the appointment of the expert had been irregularly made, without compliance with the requirements of articles 392 *et seq.* of the Code of Civil Procedure and, further, that the trial judge had no authority, on the pleadings, to submit the questions referred to a single expert and that the report should have been disregarded as the expert had not based it upon evidence regularly adduced before him.

After hearing the arguments of counsel the court reserved judgment, and on a subsequent day the appeal was allowed with costs in the Supreme Court of Canada and in the Court of Review, costs in the Superior Court to abide the issue of a partial new trial; it was ordered that the cause should be remitted to the Superior Court to be re-inscribed for

hearing on the roll at the stage it had reached when the motion for *expertise* was made; and it was declared that the appointment of the expert was irregularly made and the questions submitted to him by the trial judge were not relevant in the existing state of the pleadings.

Appeal allowed with costs.

T. Chase Casgrain K.C. and *George E. Mathieu* for the appellants.

Aimé Geoffrion K.C. for the respondents.

1912

*May 21.
*Oct. 7.

JOHN R. SHAW (PLAINTIFF) ..... APPELLANT;

AND

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Life insurance—Endowment policy—Surrender—Cash value—Action for rescission—Representation by agent—Inducement to insure.

The life of S. was insured by a twenty year endowment policy which provided that at the end of the term he could exercise one of three options including that of surrender of the policy on receipt of a sum to be ascertained in a specified manner. About ten months before the policy expired he wrote to the company asking for the amount payable on surrender which was promptly furnished, and, more than a year later, he brought action for a larger cash payment and in the alternative for rescission of the contract for insurance and return of the premium paid with interest alleging that when he applied for the insurance he was informed by the agent of the company that the cash value of the policies surrendered would be the larger amount claimed. The trial judge directed rescission and return of the premiums as prayed. This judgment was reversed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal (23 Ont. L.R. 559) that as S. did not swear nor the evidence he adduced establish that he was induced to enter into the contract by the representations of the agent as to the sum payable on surrender, and it might fairly be inferred that had he been given the true figures he would still have taken the policy, his action must fail.

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

The material facts are stated in the above headnote.

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

(1) 23 Ont. L.R. 559.

Hellmuth K.C. for the appellant. The misrepresentation of the agent entitled plaintiff to rescind. *Smith* v. *Chadwick*(1) shews that the difference in the amount of surrender value was a material inducement to plaintiff to accept the policy. See also *Smith* v. *Kay*(2), at page 759; *Gordon* v. *Street*(3).

Nesbitt K.C. and *Arnoldi K.C.* for the respondents. The alleged misrepresentation was inconsistent with the terms of the policy and evidence of it inadmissible. *Horncastle* v. *Equitable Life Assurance Society*(4).

The contract having been executed it could only be rescinded for fraud.

THE CHIEF JUSTICE.—This action was brought originally to enforce the contracts of insurance evidenced by the two policies; but at the trial, by an amendment, resiliation of the contracts and return of the payments for premiums was asked for. There is no allegation of fraud; the ground or cause of resiliation relied upon is the alleged representation made by the special agent of the company with respect to the surrender value of the policy at the expiration of the 20 year period, when the insured had, besides the protection of the policy in case of death in the interval, three options open to him:—

(*a*) The right to require paid up policy at end of term.

(*b*) The right to surrender at end of term of twenty years.

(*c*) The right to continue the policy as insurance with annuity after twenty years.

(1) 20 Ch. D. 27, at p. 44.
(2) 7 H.L. Cas. 750.
(3) [1899] 2 Q.B. 641.
(4) 22 Times L.R. 735.

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The Chief Justice.

He chose to exercise his right to surrender. The surrender clause is in these terms:—

> This policy may be surrendered to the company at the end of the said first period of twenty years and the full reserve computed by the American Table of Mortality and four per cent. interest and the surplus as defined above will be paid therefor in cash.

This clause does not attempt to fix the surrender value or the amount of the reserve; but postpones the ascertaining of those amounts till the end of the first period of 20 years; it is, in effect, a promise to pay 20 years after the date of the policy, an amount to be ascertained then by a fixed method and on a fixed basis. The misrepresentation alleged consists in a statement made by the agent of the company at the time the policy was taken out to the effect that, calculated according to the terms of the surrender clause, the insured would be entitled to a money payment of $1,013, whereas it is now ascertained that the clause and the other provisions of the policy give the insured a lesser sum of $678.82.

The question is: Does the calculation made, at the time the policy issued, at the request of the insured, by the agent, although admitted now to have been made in error, render the policy voidable?

I hold not. There is nothing in the evidence to satisfy me, and the plaintiff has not said so when examined as a witness, that he was induced to enter into the contract by the error made by the agent in his calculation of the surrender value of the policy at the end of the term of twenty years. On the contrary, I think the fair inference, on all the evidence, is that, if the true surrender value had then been ascertained and given to the insured, he would still have taken the policy. This is not a case of fraud practised by or on behalf of the company, but an error in calculation

made with respect to the benefit to be derived by the insured, assuming the contract to be carried out honestly and in the best of good faith. The company is careful not only to fix the basis upon which the benefit is to be obtained, but also to stipulate against the binding effect of any promise made by the agent such as is now relied upon. The policy has this provision:—

NOTICE TO THE HOLDER OF THIS POLICY.—No agent has power on behalf of the company to make or modify this or any Contract of Insurance, to extend the time for paying the premium, *to bind the company by making any promises*, or by receiving any representation or information not contained in the Application for this Policy.

I cannot see how, even assuming it to have been satisfactorily proved, which it is not, that the calculation made by the agent was a promissory representation to the insured, the company can be bound, in view of all the provisions of the policy.

I would dismiss the appeal with costs.

DAVIES J. concurred with Anglin J.

IDINGTON J.—The appellant made an application to respondent on the 27th September, 1889, for $2,000 insurance on his life upon the 20 Payment Life Ret. Prem. Plan 20 Year Distribution; gave his promissory note at one month for the first premium of thirty-three dollars and paid that and nineteen succeeding premiums. He got, two months later, as requested, two policies each for $1,000. He brought thereon this action on the 22nd February, 1910, to recover the sum of $2,026, and by his declaration of the 2nd April, 1910, alleged the issue of said policies, and further, that the agent of the respondent had induced him to apply for said policies

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on the distinct representation and assurance that the reserve on each of the said policies computed by the American Table of Mortality and four per cent. interest was a fixed sum, and that said sum on the expiration of the twenty years during which the premiums were payable would amount to $527 on each of the said policies.

And further:—

8. The said agent as a further inducement represented to the plaintiff that the surplus on each of the said policies at the expiration of twenty years from the date of issue of the said policies would amount to the sum of $486 on each of the said policies.

He alleged also that relying upon the truth of said representations he had paid the premiums for the full period of twenty years which had expired on the second of November, 1909.

At the trial on the 18th May, 1910, he was allowed to amend this declaration by adding a prayer for rescission of the said contracts and a repayment of the premiums so paid and interest from dates of payment.

The learned trial judge gave this latter form of relief, and allowed the recovery of $1,354.64, but was reversed by the Court of Appeal for Ontario.

Appellant's contention was that the agent had represented that upon the expiry of the twenty years he would be entitled, as one of four options given, to receive on each policy the sum of $527 out of a reserve fund and $486 out of a surplus fund.

The policies each expressly provided as follows:—

SURRENDER.—This policy may be surrendered to the company at the end of the first period of twenty years, and the full reserve computed by the American Table of Mortality, and four per cent. interest, and the surplus as defined above, will be paid therefor in cash.

The alleged representations as to the amount to be expected out of the surplus fund could not be enforced because any verbal representation such as alleged could not legally vary the written policy, and could not in any case be held to have been misrepresenta-

tions of fact upon which fraud could be assigned and recovery thereon be based. This claim, therefore, was disallowed by the learned trial judge and no further contention has been made as to it.

The questions raised are thus reduced to the sole question of whether or not there was such a fraudulent representation by the agent as to entitle the appellant to claim rescission of the contract and a return of the premiums paid with interest.

The case is peculiar in this that the alleged representations were oral and the appellant does not pretend he can remember and give literally all that was said to him by the agent or agents twenty years ago, but depends on a memorandum in writing made later and speaks by that.

There were two agents concerned in the application. One Belfry first came to canvass appellant, saw him several times at his office and on the street, and later one McNeil representing himself as a special agent came, and then both interviewd him. This resulted, as stated above, in his signing an application, being examined, and giving his note.

On the 6th November following he seems to have written McNeil for some explanation.

We have no copy of this letter and, properly speaking, no secondary evidence of its contents. He produced and proved a letter in reply from McNeil dated the 11th November, 1889, which refers to this letter of the 6th. The greater part of this reply consists of an explanation of delays, and assuring him that the policy had been issued and gone to Mr. Belfry, to whom he had wired to deliver the policy if that had not already been done. The reply then continues as follows:—

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You seem to be in doubt as to the kind of a policy you applied for. In order to make it clear to you I send a slip to shew your plan.

You will observe that the cash value in 20 years is composed of two elements, *i.e.*, the reserve and the surplus.

For particulars see plan.

This plan was a sheet of printed paper in which evidently there had been filled in a number of the masses of figures it contains. A good deal has been said as to its being a thing given the agents to use and as to its want of heading indicating its non-authoritative issue, but in the view I take this is of little consequence.

The appellant says he got this in the same envelope as the letter and that he read it and being satisfied with it placed it for safe keeping with the policies.

He does not pretend to remember more than that he is sure it bore out the representations made him verbally. His evidence is as follows in his examination:—

I do not pretend now to say that I remember them, but they said there would be a cash surrender value, or an annuity, or other benefits of the policy, that is from memory. I signed an application for $2,000. * * * I was satisfied when I received this slip of paper, because it sets forth the representations made to me verbally by McNeil and Belfry, and I attached it to my policy, kept it with the policy, and have had it for twenty years. At the expiry of that time I expected the representations made in that paper to be made good. Instead of that I have been deceived. * * *

Q. You can't recollect what was said to you before you received that letter?

A. No, I do not pretend to recollect the conversation. * * *

Q. And are you prepared to swear here now what the figures were they gave you?

A. Yes.

I may observe that the letter of McNeil by no means clearly indicates that the exact amounts involved were what had concerned appellant. On the

contrary it is information regarding the nature of the plan of insurance and not the accuracy of any figures involved that would seem to have been desired.

The learned trial judge believed him and no attempt is made to discredit him. I assume, therefore, he is a truthful witness and the inferences I draw must not be taken as indicating the contrary.

But I must bear in mind that the charge now made is one of fraud, and the nature of the alleged fraud, and ask myself if I can properly say such a charge so founded on that sort of recollection of a conversation, indeed of many conversations, made twenty years ago, is sustained.

It seems to me, as Mr. Justice Magee has observed in the Court of Appeal, that it was quite possible that the item of reserve payable might have been correctly stated by McNeil or Belfry in their conversations, and that when the appellant saw the amount in question stated therein even slightly better than Belfry or McNeil had stated, he put it away as he says satisfied. I do not take it he is swearing to an identification of each line, letter and figure as the exact verification of what he could recall.

Therein are set forth the figures for each year of twenty years that would be payable at death, and the figures for each result according to the four options he was entitled to select from in case of surviving the twenty years.

To be quite sure that all or any one of these numerous figures were identical with what he had been told in the conversations that had taken place six weeks or more before, is a feat of memory that would be unusual.

Indeed, the most any man can say in such a case is

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just what the appellant does say and that is liable to the honest mistake Mr. Justice Magee suggests as possible, and I think in this case, quite probable.

It is hardly likely that an insurance agent intending to defraud would have selected an item which was based on tables of mortality accessible to any one choosing to inquire and make the requisite calculation his policy on its face rested on.

The risk of doing it with a gentleman of education and especially of the legal profession liable to have the subject brought to his mind at any moment, and of a young man likely to be canvassed again by others for additional insurance, seems altogether too great to permit of one readily assuming there was fraud involved in the evident mistake.

It evidently was a mistake, I think. In this appellant's own case we have furnished an apt illustration of how mistakes will occur.

He seems, in January, 1909, to have anticipated the falling due of these policies. He wrote on the 28th of that month to respondents in Toronto a letter of inquiry setting forth in blank the several options. The figures were filled in on this letter at the Toronto office; is the note made in the case and is confirmed by appellant's evidence, I think, as a fact. And a letter is written on the 1st February, 1909, from that office repeating same information. In reply to this, appellant on the fifth of the same month writes as follows:

Dear Sir:

Re Policies Nos. 378136 and 378138.

When I took out these policies with your company over 20 years ago I was supplied with a guarantee shewing what the result would be to me if I survived the period. The following are the figures. In view of the figures submitted in yours on the 1st inst. would be glad to know before I take whatever action I deem advisable, whether the options submitted in yours of the 1st inst. are final.

Figures submitted and guaranteed when insurance was effected.
20 year Investment Policy $1,000, age 27, rate, $33 per $1,000.

1. Surrender Policy for Cash, Reserve.....$527.00
   Surplus..... 486.00
   ——— $1,013.00
2. Paid up Policy for $1,825.00.
3. Paid up Policy for $1,000.00 and Cash $486.00.
4. Annuity for Life, $81.50.

Yours truly,
J. R. SHAW.

Now it so happens that the very memorandum on which he relies in writing this letter, and in this case, makes it plain that as to the surrender policy for cash the reserve item was guaranteed, but the surplus item was only estimated and based on past experience. I am quite sure no one would be justified in suggesting fraud in this mistaken representation by appellant of what he was guaranteed. But this is more than mere illustration, it is an apt test of the appellant's powers of accurate observation as well as recollection. I do not think it would be safe, resting entirely thereon as we must, to maintain this appeal.

I may observe that the sum of $93 is but a fractional part of the entire obligation the respondents by this form of policy undertook with and towards the appellant. His life was insured for twenty years, and then after the respondent had carried that, he had the option of selecting and calling upon it for further benefits. It is not a correct appreciation of the bargain and benefits to be had thereunder to compare the $93 with what he was entitled to on the basis of one of two items of a single option to be made after he had meantime enjoyed twenty years insurance of $1,000 and various sums increasing yearly up to $1,627. And when he selected this first option of surrender to say it was the proportion of that sum of $93 to a total of

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$434, is surely delusive. To appreciate accurately the materiality of this $93 in its relation to the whole contract we ought at least to know what it would have cost to carry such an insurance on such a life for twenty years.

This question only becomes material when we come to consider the question of whether or not the appellant was in fact induced by this mistake to do anything; and if found a fraudulent mistake to enable, or see if it would enable, the court to indemnify him without robbing the respondent of the value of the contract so far as executed.

He does not venture to swear that he was induced thereby to enter into this contract. Nor do I wish to lay down as law that in a case of fraud it is always necessary to swear to the inducement. It may be inferred from the nature of the transaction and the substantial materiality of what has been misrepresented when regard is had to the entire contract and the relative value of the part or thing so misrepresented bears to the whole transaction.

Can any one safely infer, in this case at this distance of time and on such defective evidence of the material facts which should be known, as a fact that, if the appellant had seen in this memorandum the true figures $434, instead of $535, he would have withdrawn from the contract.

I cannot so infer. To do so would imply on his part an accuracy of observation and of calculation and taste for making same, he evidently had not, or he would have seen and tested the tables of mortality for himself, or in this case have seen to it that he had duly estimated the value of twenty years insurance and deducted that service value from the sum he al-

ternatively claimed in the event of rescission. Assuming, as I do not, that under such circumstances he was entitled to rescission, I need not discuss or pass an opinion either on that or the question of whether or not his true remedy was not an action on the warranty that misrepresentation generally carries in it.

Whatever rescission means it does not mean that he rescinding is entitled to retain any, much less large, part of what he bargained for, and to get back all he paid with interest as awarded appellant at trial hereof.

Another thing I cannot understand is how the appellant, who came to realize on the 5th of February, 1909, this mistake, and to sue on the policies a year later, could be permitted to rescind his contract in May, 1910.

If it was a fraud that had, as now is of necessity urged, been committed upon him, he was bound, if electing to rescind on such ground, to have repudiated the contract at once on its discovery, and rescind, or claim rescission then. He should not, and in law I submit could not, take full advantage of being insured for the rest of that year and then later on attempt repudiation.

Every hour of this he was putting respondent, who could not rescind, at a disadvantage. He was not entitled to have attempted such a thing. I tried on the argument to get his counsel to explain how the last paragraph of the statement of claim was at all consistent with this requirement of the law. I am yet without a satisfactory reply.

I assume counsel must have read the judgment of Mr. Justice Meredith who deals with this from the

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pleading point of view, and had found that the least said the better.

I am unable to understand how the real question of proper repudiation was not raised and argued out on facts so patent as here. Fortunately the other grounds I rest on suffice.

It is usual to claim rescission by the writ in cases of fraud if it be the purpose to repudiate the contract.

This appeal should be dismissed with costs.

DUFF J.—I concur in the result.

ANGLIN J.—After a careful study of the evidence, oral and documentary, I find myself unable to say that it has been satisfactorily established that the appellant was induced upwards of twenty years ago by a material misrepresentation to enter into the contract of insurance of which he now claims rescission on that ground. My brother Idington has indicated reasons why the appellant's evidence is insufficient to sustain his claim and to justify a reversal of the judgment of the Court of Appeal. Apart from the difficulty created by his failure to bring action promptly on discovering the alleged misrepresentation and his omission to pledge his oath that that misrepresentation actually induced him to enter into the contract (which I regard as most important), for lack of satisfactory evidence of the misrepresentation itself, which, in the circumstances of this case, would require to be even more than usually clear and convincing, this action fails.

The appeal should be dismissed with costs.

BRODEUR J. agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Kilmer, McAndrew & Irving.*

Solicitors for the respondents: *Arnoldi & Grierson.*

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*May 10.

JOHNSTON v. DESAULNIERS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Gift—Infant—Money received—Pleading—Evidence—Presumption—Proceeds of prostitution—Conversion—Lien.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Cameron J., at the trial, and maintaining the plaintiff's action with costs.

The plaintiff (respondent), an infant, and the appellant lived together in adultery and, during the time they were so living together as husband and wife, she handed various sums of money, obtained by prostitution, to the appellant, who used part of it in purchasing a hotel property. In an action against the respondent for money received for the use of the plaintiff the defence was simply a denial of the allegation in the statement of claim. At the trial, Cameron J. dismissed the action, being of opinion that the evidence shewed that the plaintiff had given the money to the defendant to deal with as he pleased. By the judgment appealed from, this decision was reversed, the court below holding that, in the circumstances, there could be no presumption of gift, and, as the plea simply denied the debt, the plaintiff was entitled to recover the sum claimed by her and to a charge or lien on the defendant's interest in the hotel property for the amount of her claim and costs.

On the appeal to the Supreme Court of Canada, the

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

(1) 20 Man. R. 64.

court heard counsel for the appellant and, without calling upon counsel for the respondent, dismissed the appeal with costs.

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Appeal dismissed with costs.

Cohen for the appellant.

Blackwood for the respondent.

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*May 4, 6.
*June 15.

MACLEOD v. THE SAWYER & MASSEY CO.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Vendor and purchaser—Sale of land—Condition—Approval of assignments—Equitable estate or interest—Priority between transferees—Principal and agent—Fraudulent and criminal practices—Notice of previous transfer—Implied knowledge of principal.

APPEAL from the judgment of the Supreme Court of Saskatchewan, *in banco*(1), reversing the judgment of Wetmore C.J., at the trial, and maintaining the respondents' (plaintiffs') action with costs.

One Bennett purchased lands from the Canadian Pacific Railway Co., on deferred payments, and received a contract from the company agreeing to convey the lands to him, on completion of the payments, with a proviso that no assignment of his interest should be effectual unless approved by the company. B. transferred the land in fee to the Sawyer & Massey Co., which applied to the railway company for the approval of the transfer, and the approval was refused on account of the conveyance not being of B.'s equitable interest only. J. D. McLeod, having knowledge of the transaction between B. and the S. & M. Co., subsequently procured an assignment of the same lands from B. to M. J. M., in proper form and, by fraudulent artifices and criminal acts, secured the approval thereto of the railway company. An action by the S. & M. Co. against all the other parties to set aside the conveyance to M. J. M. was dis-

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

(1) 2 Sask. L.R. 516, *sub nom. Sawyer & Massey Co. v. Bennett.*

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missed at the trial, by Chief Justice Wetmore. By the judgment appealed from the Supreme Court of Saskatchewan reversed this decision, Lamont J. dissenting, and held that the clause in the agreement requiring the approval of the railway company affected only the position between the vendor and the purchaser, B., that the assignments by B., without such approval, created equitable estates or interests in the land in his assignees, which would result equally from a conveyance in fee; consequently, that the equities, as between the S. & M. Co. and M. J. M., being equal the approval of the railway company gave M. J. M. the better equitable estate. However, all the circumstances being taken into consideration, the approval fraudulently obtained could not give M. J. M. any better position in equity than if it had never been obtained; therefore, the S. & M. Co.'s equitable estate being first in point of time should prevail, and they had the right to question the means by which such approval was obtained and to shew that it was improperly obtained.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment and, on a subsequent day, dismissed the appeal with costs, Duff and Anglin JJ. dissenting.

Appeal dismissed with costs.

Chrysler K.C. and *W. B. Willoughby* for the appellant.

Norman MacKenzie for the respondents.

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*Nov. 9, 10.

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*Feb. 21.

THE DOMINION BRIDGE CO. v. JODOIN.

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

Negligence—Injury to workman—Liability of employer—Common fault.

APPEAL from a decision of the Court of Review at Montreal(1), maintaining the verdict at the trial in favor of the plaintiff (respondent).

The plaintiff, Jodoin, alleged in his action against the appellant company for damages, that he was employed by them as a skilled labourer in the erection of a building in Montreal. In the course of such employment he was ordered to finish some rivets at an elevation of at least fifty feet from the ground. There was no scaffolding directly under the riveting and he asked the foreman in charge if he would move and re-erect the one in use or place a plank across two beams near the work to be done and was ordered to use the plank. In doing so the plank slipped and he was thrown to the ground sustaining severe injuries. The defence was that the plaintiff had voluntarily and recklessly exposed himself to unnecessary danger.

The plaintiff produced evidence affirming the above statement of the facts. The foreman denied that he was asked whether or not the plaintiff should move the scaffolding, but did not say that he ordered it to be moved or forbade the plaintiff using the plank.

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

(1) Q.R. 39 S.C. 103.

1910

DOMINION BRIDGE CO. v. JODOIN.

The jury found that there was common fault and assessed the total damages to plaintiff at $4,500, which was reduced to $2,200, for which the plaintiff had judgment.

On appeal to the Supreme Court of Canada the judgment of the Court of Review maintaining the verdict was affirmed by a majority of the court.

Appeal dismissed with costs.

Lafleur K.C. and *H. U. P. Aylmer* for the appellants.

Atwater K.C. and *Duclos K.C.* for the respondent.

1911

*Oct. 19.
*Nov. 6.

LANGLEY v. ROWLANDS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Principal and agent—Sale of land—Commission.

APPEAL from a decision of the Court of Appeal for British Columbia(1), affirming the verdict for the plaintiff (respondent).

The plaintiff took an option on land of the defendant with the idea of promoting a syndicate to purchase it. Having failed in this he was allowed by the defendant to endeavour to sell the land for $100,000 and a commission of $5,000 more. He introduced a possible purchaser to the defendant, telling the former that the price was $105,000, and asking the latter to protect him at that price. The person so introduced stayed on defendant's premises for some days, and having decided to purchase asked defendant the price and was told it was $100,000, which he paid. The plaintiff brought action for his commission of $5,000 and obtained a verdict at the trial which was maintained by the Court of Appeal.

An appeal by the defendant to the Supreme Court of Canada was dismissed.

Appeal dismissed with costs.

J. Travers Lewis K.C. for the appellant.

Nesbitt K.C. and *C. C. Robinson* for the respondent.

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

(1) 16 B.C. Rep. 72.

IN RE HENDERSON AND THE TOWNSHIP OF WEST NISSOURI.

1911

*Nov. 17.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Leave to appeal—Municipal by-law—High-School district—Public importance.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment of a Divisional Court(2), which maintained a judge's order maintaining a by-law for a rate for a school-house in West Nissouri.

In 1888, the Middlesex County Council passed a by-law constituting East Middlesex a high school district, but nothing was done under it. In 1910, a by-law was passed establishing a continuation school in the township of West Nissouri, which was part of the high school district of East Middlesex, under the provisions of the present "High School Act," 9 Edw. VII. ch. 91, sec. 4, which provides that when a high school district has existed in fact for three months it shall "continue to exist" and be deemed a high school district under the latter Act, whether regularly formed originally or not.

On motion to quash the by-law passed in 1910, all the courts below held that the high school district of West Nissouri never "existed in fact" within the meaning of this Act when the by-law of 1910 was passed and the by-law for the rate was valid.

On motion to the Supreme Court of Canada for

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

(1) 24 Ont. L.R. 517. (2) 23 Ont. L.R. 21.

1911

IN RE HENDERSON AND THE TOWNSHIP OF WEST NISSOURI.

leave to appeal from the judgment of the Court of Appeal the leave was refused, their Lordships considering that the case raised no question of great public importance and that there was no other ground on which it could be granted.

Leave to appeal refused.

G. F. Henderson K.C. for the motion.

Chrysler K.C. contra.

GRAND TRUNK PACIFIC RAILWAY CO. v. BRULOTT.

1911

*Nov. 15.
*Dec. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Railway company—Findings of jury—Volens—Pleading.

APPEAL from a decision of the Court of Appeal for Ontario (1), maintaining the verdict at the trial in favour of the plaintiff (respondent).

The plaintiff Brulott, an employee of the defendant company, was assisting T., another employee, in repairing a car on a track in the yard when other cars were propelled against it whereby plaintiff was injured.

On the trial of an action against the railway company under the "Workmen's Compensation for Injuries Act," a verdict was found for the plaintiff and maintained by the Court of Appeal. On appeal to the Supreme Court of Canada the defendants contended that the verdict could not stand for two reasons:—1. That there was no finding that the injury to plaintiff resulted from his conformity to an order of a person in defendants' employ which he was obliged to obey:—2. That the trial judge, although requested by counsel for defendants to do so, refused to submit to the jury the question of whether or not the plaintiff voluntarily assumed the risk attendant upon working as he did when the accident happened.

The Supreme Court held, following the reasoning

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

(1) 24 Ont. L.R. 154.

1911

GRAND TRUNK PACIFIC RY. CO. v. BRULOTT.

of the Court of Appeal as to the first objection, that the jury were sufficiently directed on the point as to the plaintiff being bound to obey the order of the employee whom he was assisting in repairing the car and the evidence shewed that he did follow the latter's directions.

On the second objection Mr. Justice Davies dissented, holding that the question as to the plaintiff being *volens* should have been submitted. Mr. Justice Idington took the view that the issue as to *volens* should have been pleaded, while Duff and Anglin JJ. were of opinion that it was covered by the finding that the plaintiff was not guilty of contributory negligence. Mr. Justice Brodeur held that as plaintiff was acting under the orders of a superior at the time the maxim *volenti non fit injuria* did not apply. The appeal was accordingly dismissed.

Appeal dismissed with costs.

D. L. McCarthy K.C. for the appellants.

T. N. Phelan for the respondent.

TORONTO CONSTRUCTION CO. v. STRATI.

1911

*Nov. 20.
*Dec. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Explosion of dynamite—Evidence—Inferences.

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

The plaintiff brought this action as administrator of an Italian named Lanata, who was killed while in the employ of the defendant company, which was at the time engaged in construction work for the Canadian Pacific Railway Co., in Grenville County, Ont. Lanata, at the time of the accident by which he was killed, was employed as powder-monkey and in charge of a shack in which frozen dynamite was thawed out. The shack was about 14 by 16 feet in size, with a wooden door which was not kept locked when Lanata was out and into which the foreman of the works and the workmen used to go to get warmed. There was a sheet-iron stove in the centre of it fed with wood from the top and the dynamite was placed on shelves around the walls and on a movable shelf about four feet from the front of the stove. On the day he was killed Lanata had been sent by the foreman to get some dynamite from the shack, and, according to the evidence, had either not got inside, or had got in and out again when an explosion took place, and he was

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

(1) 19 Ont. W.R. 88.

1911

TORONTO CONSTRUCTION CO. v. STRATI.

found alive, his body intact and his clothing torn and burning, having apparently been thrown against the stump of a tree near the entrance to the shack.

Under these circumstances the trial judge gave judgment against the defendants for $2,000, which the Court of Appeal affirmed on the ground that the mode of thawing the dynamite was dangerous and contrary to the directions issued with each box, which directions were not read to nor explained to Lanata, who could not read himself, though they were known to the foreman and other officials of the company.

An appeal by the defendants from the judgment of the Court of Appeal to the Supreme Court of Canada was dismissed.

Appeal dismissed with costs.

G. H. Watson K.C. for the appellants.

W. N. Tilley and *T. R. Allen* for the respondent.

DOMINION LINEN MFG. CO. v. LANGLEY.

1911

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Nov. 17.
*Dec. 22.

Insolvent company—Sale of assets by liquidator—Sale "free from incumbrances"—Conversion—Breach of contract.

APPEAL from a decision of the Court of Appeal for Ontario(1), reversing the judgment at the trial(2), in favour of the plaintiffs (appellants).

The defendant, Langley, is liquidator of the Dominion Linen Mills, Ltd., which by an order of the High Court of Justice in January, 1906, was declared to be insolvent and liable to be wound up. Some time before the making of this order the company had hypothecated its principal assets, including its stock of manufactured linens, to the Crown Bank of Canada to secure advances and the bank had taken possession. By order of court the business was allowed to be carried as a going concern by the liquidator and advances to be procured from the bank for wages, etc., to be repaid out of the first moneys coming into his hands. While so carrying it on he advertised for tenders for purchase of the assets, and, in April, 1906, an agreement was entered into between the defendant and one Todd by which the latter became purchaser of the property of the company "free from incumbrances" and transferred the same shortly after to the plaintiffs, a new company formed to take over the business. The defendant received $5,800 on account

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

(1) 19 Ont. W.R. 648. (2) 14 Ont. W.R. 1163.

1911

DOMINION LINEN MFG. CO. v. LANGLEY.

of the purchase money and, by direction of the plaintiffs, and on their undertaking to hold him harmless, paid it over to the Crown Bank.

It appeared that the insolvent company used to send their goods to Scotland to be bleached, and a quantity was there when the winding-up order was made. The bleaching firm wrote to the defendant, stating the amount of their account in respect to their goods and asking for instructions. After some further correspondence the liquidator wrote them full information as to what had been done, and stated that the proceeds of sale of the assets would hardly pay the bank's claim. He ended his letter by saying: "I, as liquidator, have no objection to your disposing of the goods on the highest market, applying the proceeds of such sale on your claim and advising me accordingly." Under the law of Scotland the bleachers had no right to sell the goods to satisfy their lien without complying with certain formalities, which they did not do.

The plaintiffs brought action against the liquidator claiming damages for conversion of the goods so sold and, at the trial, were allowed to amend by adding a claim for breach of the contract to sell the assets of the insolvent company "free from incumbrances." At the trial they recovered judgment on the latter ground, which the Court of Appeal reversed, holding that there was no conversion, as the defendant's letter quoted above did not amount to instructions to sell, and that there was no breach of contract, as the term "free from incumbrances," as used in the contract with Todd, was not intended to apply to the charges for bleaching, but to the mortgage on the buildings and liens on the stock.

1911

DOMINION LINEN MFG. CO. v. LANGLEY.

The plaintiffs appealed to the Supreme Court of Canada, which, after hearing counsel for the respective parties, reserved judgment, and on a subsequent day dismissed the appeal.

Appeal dismissed with costs.

J. W. Bain K.C. and *M. L. Gordon* for the appellants.

Anglin K.C. for the respondent.

1911

*Nov. 20.
*Dec. 22.

CANADIAN GAS POWER AND LAUNCHES v. ORR BROTHERS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of goods—Express or implied warranty—Evidence.

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

The plaintiffs brought action for the balance of the price of an engine and dynamo sold to the defendants, who pleaded that they were sold under an express, or, if not, an implied, warranty that they would "run properly" and be fit for the special purpose for which they were intended and alleged a breach of such warranty. The plaintiffs contended that all necessary conditions were fulfilled to entitle them to payment and that defendants knowing the capabilities of the articles sold deliberately accepted them, taking the risk of failure.

The trial judge held that there was a warranty as alleged and that the plaintiff had not fulfilled their part of the contract. He, therefore, dismissed their action and gave judgment for the defendants on a counterclaim demanding a return of the money paid on account with interest. This judgment was affirmed by the Court of Appeal.

The plaintiffs appealed to the Supreme Court of

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

(1) 23 Ont. L.R. 616.

Canada which, after hearing counsel for the respective parties, reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

G. H. Watson K.C. for the appellants.

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

1911

*Nov. 22.

1912

*Feb. 20.

POIRIER v. THE KING.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Sale of hay—Rejection—Conversion—Damages—Counterclaim—Evidence.

APPEAL from a judgment of the Exchequer Court of Canada (1), in favour of the suppliant for a part of his claim and dismissing the counterclaim of the Crown.

The suppliant by contract with the Crown, represented by the Minister of Agriculture, undertook to furnish and did furnish a quantity of hay to be delivered at St. John, N.B., and from there to be shipped to South Africa. A certain portion of the hay delivered was rejected by the officials of the Department as not up to the standard required by the contract, some of which was restored to the suppliant and some stored subject to his order. No order having been received in respect to the latter, and the storage space being required, the hay was sold by the Department and the proceeds paid to the suppliant, who filed a petition of right claiming the price of hay received by the Department and not paid for and damages for the sale of the stored hay without authority, which was alleged to be a conversion. He was given judgment for the hay delivered and accepted, but his claim for damages was dismissed, the court holding that the

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

(1) 13 Ex. C.R. 321.

1912

POIRIER v. THE KING.

"Exchequer Court Act" did not make the Crown liable for a tort committed by an official.

The contract provided that hay occupying a space of more than 70 cubic feet per ton, if accepted, should be subject to a reduction of $1.50 per ton from the contract price, and the Crown by counterclaim demanded payment of an amount representing the aggregate of the deductions for excess of space. The court dismissed the counterclaim for want of evidence.

On an appeal by the suppliant to the Supreme Court of Canada the court, after hearing counsel on behalf of both parties, reserved judgment, and, on a subsequent day, there being an equal division of opinion among the judges, the judgment of the Exchequer Court stood affirmed.

The Crown took no cross-appeal on the counterclaim.

Appeal dismissed without costs.

Auguste Lemieux K.C. for the appellant.

R. C. Smith K.C. for the respondent.

1912

*Feb. 20.
*Feb. 22.

BENNETT v. HAVELOCK ELECTRIC LIGHT CO.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—Purchase of director's property—Secret profit.

APPEAL from a decision of the Court of Appeal for Ontario(1), reversing the judgment of a Divisional Court(2), by which the judgment at the trial, dismissing the action, was reversed.

Mathieson, a resident of the Village of Havelock, purchased the only water-power in the village, capable of producing electric power, for $300. He offered it to the municipal council, or any company, at the same price if either would undertake to establish a system of electric lighting and electric power, but could not induce any one to do so. He then associated himself with four other persons and a company was formed, the five pledging their own credit for the necessary funds. Mathieson sold the water-power to the company for $5,000, which he divided with his four associates.

Bennett and another shareholder in the company brought action to have the sale set aside and an account taken of the secret profit made by the five. His action was dismissed by the trial judge, but maintained by the Divisional Court, where judgment was entered against the four defendants, Mathieson being discharged from liability, for $1,000 each. The Court

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

(1) 25 Ont. L.R. 200. (2) 21 Ont. L.R. 120.

of Appeal reversed the latter judgment and the action stood dismissed.

The plaintiffs then sought to appeal to the Supreme Court of Canada, but, on motion therefor, the appeal was quashed on the ground that there was no joint liability of the defendants and none of them was liable for a sum exceeding $1,000.

Appeal quashed with costs.

S. T. Medd, for the motion.

D. O'Connell, contra.

1912

*March 26, 27.
*May 7.

WARREN, GZOWSKI & CO. v. FORST & CO.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Evidence—Telephone conversation—Corroboration.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment of a Divisional Court(2), by which a verdict for the plaintiff was set aside and a new trial ordered.

The action in this case arose out of a stock transaction which was initiated by a telephone conversation between the plaintiff Gzowski and a member of defendants' firm. There was a dispute as to the date and terms of this conversation and, at the trial, the defendants tendered the evidence of their stenographer, who was in their office where the telephone was when it took place. The trial judge refused this evidence on the ground that the stenographer could not know who the other party to the conversation was. The verdict for the plaintiff was set aside and a new trial ordered on account of the rejection of this evidence.

The Supreme Court of Canada, after hearing counsel for both parties, reserved judgment, and on a subsequent day dismissed the appeal with costs.

Appeal dismissed with costs.

Nesbitt K.C. and *Arnoldi K.C.* for the appellants.
Macdonnel K.C. for the respondents.

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

(1) 24 Ont. L.R. 282. (2) 22 Ont. L.R. 441.

TEMISKAMING MINING CO. v. SIVEN.

1912

*May 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence — Accident in mine — Fall of rock—Covering of shaft — Fellow servant.

APPEAL from a decision of the Court of Appeal for Ontario (1), maintaining the verdict for the plaintiff at the trial.

The plaintiff, Siven, was working in the defendants' mine when he was injured by a rock falling down the shaft and striking him. The rock came through a man-hole above the shaft where men were engaged in stoking and there was a trap-door over the mouth of the shaft which was open at the time. Before proceeding with the stoking the workman in charge sent a helper to see if this trap-door was shut and when the latter called out "everything is all right" went on with the work. If the trap-door had not been open the plaintiff could not have been injured.

The plaintiff brought an action at common law and under the "Mining Act" for damages in which the jury found that the defendants were guilty of negligence for not providing a suitable pentice for the protection of workmen in the shaft (as required by sub-sec. 17 of sec. 164 of the "Mining Act" of Ontario); they negatived contributory negligence by the plaintiff and

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

(1) 25 Ont. L.R. 524.

1912

TEMISKAMING MINING CO. v. SIVEN.

assessed the damages at $2,500, for which judgment was entered for the plaintiff.

The Court of Appeal maintained this verdict and held that the defendants could not rely on the doctrine of common employment as the accident was caused by breach of a statutory duty to which that doctrine does not apply.

The defendants appealed to the Supreme Court of Canada, which, without reserving judgment, dismissed the appeal with costs.

Appeal dismissed with costs.

H. E. Rose K.C. for the appellants.

A. G. Slaght for the respondent.

BOECKH v. GOWGANDA QUEEN MINES.

1912

*March 22, 25.
*June 4.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—Subscription for shares—Misrepresentations — Action for calls—Charge to jury—Misdirection—Objection—Pleading.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment for the plaintiffs (respondents) at the trial.

The respondents brought action to recover calls upon shares of their capital stock claimed to have been subscribed for by appellant. The main defence was that the subscription for the shares was procured by fraudulent misrepresentations upon discovery of which appellant had repudiated it. The jury found that he was not misled by any statements made to him and that he had delayed his repudiation for an unreasonable time after becoming dissatisfied. Judgment was entered for the plaintiffs at the trial and defendant appealed directly to the Court of Appeal, where he complained of misdirection and non-direction to the jury. His objections on these grounds were overruled for the reason that they were not taken at the trial and the jury were properly instructed as to the subject-matter. Another objection was that a question, "Do you find in favour of the plaintiffs or the defendant ?" should not have been submitted, as to which the Court of Appeal held that it was taken too

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

(1) 24 Ont. L.R. 293.

1912

BOECKH v. GOWGANDA QUEEN MINES.

late, and, even if it had been raised at the trial, it could not prevail, as the judge had a right to put the general question if he thought fit, if his charge was such as to enable the jury to deal with the issues by a general verdict.

A third objection that there was no proof of a by-law authorizing the sale of shares at a discount was disposed of on the ground that, as such a by-law existed, proof could have been easily made and the plaintiffs would be allowed to put in a copy before the Court of Appeal.

The court also held that an allotment made without compliance with the provisions of sec. 106 of the "Ontario Companies Act" was voidable only and could not be avoided except upon a record properly framed for the purpose.

On appeal by the defendant to the Supreme Court of Canada the judgment of the Court of Appeal was affirmed for the reasons given therein.

*Appeal dismissed with costs.**

John W. McCullough for the appellant.

W. R. Smyth K.C. for the respondent.

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*Leave to appeal to Privy Council was refused, 25 July, 1912.

FAVREAU ET AL. v. ROCHON ET AL. 1912

*March 8, 11.
*June 14.

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

Builders and contractors—Breach of contract—Action for quantum meruit—Rescission—Cross-action for damages—Appropriate relief—Waiver.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), by which the judgment of the Superior Court, sitting in review at Montreal(2), was set, in part, aside, and the judgment of Lafontaine J., at the trial, was in part restored.

The appellants entered into a contract for the construction of a row of houses for $13,940, and the time for their completion was agreed upon. There was some delay in the completion of the buildings and the respondents, after taking possession of the buildings, refused to make the final payment provided under the contract on the ground of faulty execution of the works, deviation from specifications and negligence. In an action to recover the balance of $8,800 remaining unpaid the respondents filed a defence and instituted a cross-action against the appellants for rescission of the contract, reimbursement of $5,200 paid on account, and for $9,300 damages for breach of contract, asking also for the demolition of the buildings on account of defective construction. The cases were tried together in the Superior Court and the judgment

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

(1) Q.R. 21 K.B. 61. (2) Q.R. 38 S.C. 421.

1912

FAVREAU v. ROCHON.

by Lafontaine J. dismissed the appellants' action, awarded the respondents $513 for damages, and ordered the return of the money paid on account. By the judgment of the Court of Review this judgment was varied by increasing the damages to $5,800 and allowing the appellants $2,930 for balance due them on the contract price. By the judgment appealed from the Court of King's Bench restored the judgment at the trial in so far as it dismissed the action of the appellants and awarded $513 to the present respondents.

On the appeal, by the contractors, to the Supreme Court of Canada, after hearing counsel for both parties, the court reserved judgment and, on a subsequent day, the judges being equally divided in opinion (the Chief Justice and Duff and Anglin JJ. considering that the appeal should be dismissed; Davies, Idington and Brodeur JJ. considering that the appeal should be allowed and the judgment of the Court of Review restored), the judgment of the Court of King's Bench stood affirmed, no costs being allowed.

Appeal dismissed without costs.

R. C. Smith K.C. and *Paul Lacoste* for the appellants.

Bisaillon K.C. for the respondents.

IN RE RISPIN. CANADA TRUST CO. v. DAVIS.

1912

*May 22.
*June 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Trust for benefit of son — Discretion of executor — Death of beneficiary—Funds not disposed of.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of the Chancellor on questions arising as to disposition of an estate under a will.

The will in question devised the testator's real estate and chattels to his son and the rest of his property to his executor in trust with directions as follows: "And I authorize and request him to pay the interest * * * and the principal in whole or in part to my son * * * as in the judgment of my executor as may be prudent with reference to the habits and conduct of my son; my will and intention being that it shall be wholly in the discretion of my said executor to pay the interest and principal in such amounts and at such times as he may think right or to withhold the payment altogether." The son received various amounts from the executor while he lived and, after his death, a considerable sum remaining, the question arose as to its disposition, namely, whether it should go to the heirs of the son or to the next of kin of the testator.

The courts below held that there was an intestacy as to this sum and that the next of kin of the testator,

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

(1) 25 Ont. L.R. 633.

1912

IN RE RISPIN.

to be ascertained as at the date of his death, were entitled to it.

The executors of the son appealed to the Supreme Court of Canada which, after hearing counsel for the respective parties, reserved its judgment and, on a subsequent day, dismissed the appeal with costs, the testator's executor and official guardian to have out of the estate their solicitor and client costs incurred over and above the party and party costs to be paid by the appellant.

Appeal dismissed with costs.

F. G. Meredith K.C. and *John Macpherson* for the appellants.

Betts K.C. for the respondent.

W. R. Meredith for the Official Guardian.

KAISERHOF HOTEL CO. v. ZUBER.

1912

*May 23.
*June 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Sale under power—False bidding—Withdrawal of bid.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment of a Divisional Court(2), by which the judgment at the trial in favour of the plaintiffs was reversed and the action dismissed.

The defendant Zuber was holder of a second and a third mortgage on hotel property and the plaintiffs owned the equity of redemption. Under powers of sale contained in his mortgages Zuber took proceedings to sell the property and the plaintiffs brought action to restrain the sale, and obtained an interim injunction which was afterwards discharged. The property was then put up for sale at auction. One Boehmer, acting for the appellants, instructed a man named Fish to bid and he ran the price up to $43,500, the respondent Roos having bid $43,000. At request of Zuber's solicitor the auctioneer inquired of Fish if he was prepared to pay the money if the property was knocked down to him and he requested and was given half an hour to satisfy the mortgagee of his ability to do so. He did not return at the expiration of that time and Roos withdrew his last bid. The property was offered for sale again and knocked down

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

(1) 25 Ont. L.R. 194. (2) 23 Ont. L.R. 481.

1912

KAISERHOF HOTEL CO. v. ZUBER.

to Roos at $39,500, and was conveyed to him a few days later by Zuber.

The appellants then proceeded with their action to restrain the sale, adding Roos as a party, and alleged that it was not conducted in a fair, open and proper manner; that Roos was not the highest bidder; that the conditions of sale were unduly onerous; that there was collusion between Zuber and Roos to enable the latter to obtain the property for less than its value; and that Roos was acting as agent for Zuber and the sale was not *bonâ fide*.

The trial judge gave judgment for the plaintiffs on the grounds that the conditions of sale did not furnish full information as to the first mortgage and as to existing leases and liens; that the deposit to be made by the purchaser was fixed at twenty per cent.; and that only seven days were given for the purchaser to make objections to the title. This judgment was reversed by a Divisional Court, which held that no one was deterred from bidding by reason of the conditions and that there was no omission or misstatement of any fact material to be known; that the price obtained for the property was a fair one; and that Roos had a right to withdraw his bid when Fish failed to put up the deposit. This judgment was affirmed by the Court of Appeal and the plaintiffs then appealed to the Supreme Court of Canada.

After hearing counsel for both parties the Supreme Court reserved judgment, and at a subsequent date dismissed the appeal with costs.

Appeal dismissed with costs.

Secord K.C. for the appellants.

Watson K.C. for the respondents.

ANGLO-AMERICAN FIRE INS. CO. v. MORTON.

1912

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*March 27.
*June 14.

Fire insurance—Change of risk—Evidence—Use of gasoline.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment at the trial in favour of the defendants (appellants).

This was an action on a policy insuring premises used at the time as billiard and pool rooms and a bowling alley, and the main defence was that a portion of the premises having been leased for a restaurant without notice to the company this was a change material to the risk which avoided the policy. The trial judge gave judgment for the company on this ground.

The Court of Appeal reversed this judgment on the ground that the defendants had not proved that the change in the use of the premises was material and that, in the absence of such evidence, it could not be said that a restaurant, even where gasoline is used, is more hazardous than a billiard room.

On an appeal by the defendants to the Supreme Court of Canada, the court, after hearing counsel on behalf of both parties, reserved judgment and, on a subsequent day, there being an equal division of opinion among the judges, the judgment appealed from stood affirmed.

Appeal dismissed without costs.

D. W. Saunders K.C. for the appellants.
Hamilton Cassels K.C. for the respondents.

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

(1) 19 Ont. W.R. 870.

1912

*Feb. 26.

WINNIPEG ELECTRIC RAILWAY CO. v. HILL.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Electric railway—Breach of company's rules.

APPEAL from a decision of the Court of Appeal for Manitoba(1), maintaining the verdict for the plaintiff (respondent) at the trial.

The plaintiff, a physician practising in Winnipeg, was called to another town late at night and hired a special car from the defendant company to bring him back. While returning in this car the motorman allowed the conductor to do the driving and, through the negligence or incompetence of the latter, a collision occurred with another car by which the plaintiff was injured. On the trial of an action claiming damages for such injury the jury found that the motorman, in exchanging places with the conductor, was acting in breach of his duty, and that the failure of the servants of the company to perform their duties constituted negligence on the part of the company. A verdict was entered for the plaintiff with damages assessed at $2,000.

The Court of Appeal, in maintaining this verdict, held that though the conductor may not have been acting as a servant of the company when the accident took place, the act of the motorman in abandoning his

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

(1) 21 Man. R. 442.

1912

WINNIPEG ELECTRIC RY. CO. v. HILL.

post was negligence for which the company was responsible.

The defendants appealed to the Supreme Court of Canada which, after hearing counsel on their behalf, and without calling on counsel for the respondent, dismissed the appeal.

Appeal dismissed with costs.

Chrysler K.C. for the appellants.

E. A. Cohen for the respondent.

1911
*Nov. 7, 8.
1912
*March 21.

MACLAREN AND OTHERS v. THE ATTORNEY-GENERAL OF QUEBEC AND HANSON BROS.

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

Public domain—Floatable or navigable rivers—Grant from the Crown—Riparian owners—Title to bed of river—Erection of townships—Description of areas included—Costs.

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

The plaintiffs alleged that they were proprietors of certain lots of land in the Townships of Low and Denholm, in the County of Wright, one lot being bounded on the west side and the other on the east side by the Gatineau River and lying directly opposite to each other. They contended that, as the River Gatineau was not navigable nor floatable, but merely *flotable à bûches perdues,* they were, as riparian proprietors, owners of the bed of the river between the lots in question, each title carrying with it ownership *ad medium filum aquæ.* The lots were granted in fee simple by the Crown in the years 1860 and 1891, respectively, and the grants contained no special reservations in regard to the bed of the river. At the locus in dispute the course of the river is interrupted by "Paugan Falls," a natural water-power capable of development for com-

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

(1) Q.R. 21 K.B. 42.

mercial purposes. The Township of Low was erected, by proclamation, in 1859, out of the wild lands of the Crown, and its eastern limit was bounded by the waters of the river; in a similar manner the Township of Denholm was erected, in 1860, with its western limit bounded by the waters of the river; the description of the lots stated they were, respectively, situated within Low and Denholm.

In 1899, the defendants, Hanson Brothers, purchased from the Government of Quebec that part of the bed of the river lying between the lots in question, and received a Crown grant therefor. Upon the institution of the action against them, the Attorney-General for Quebec intervened to protect the rights of the defendants in virtue of the grant to them, alleging that the river was navigable and floatable; that its bed was a portion of the Crown domain, and that it had never become the property of the plaintiffs. It was also contended by the defendants that, as the lots were described in the plaintiffs' title as bounded by the river and situate within the area of the respective townships, no property in the bed passed to them in any event.

The trial judge, in maintaining the plaintiffs' action, held that the river was not a navigable river, and that, by the ruling of the Supreme Court of Canada in *Tangway* v. *Canadian Electric Light Co.*(1) it was also non-floatable. As to the other point he held that a grant giving a non-navigable and non-floatable river as the boundary of the land sold could not be read as implying a reservation of its bed or as excluding rights in it from the grant. The Court of King's Bench re-

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

1912

MACLAREN v. ATTORNEY-GENERAL OF QUEBEC.

versed this judgment on both grounds, holding the river to be floatable and that the plaintiffs' grant conveyed no title to the bed of the river.

On appeal by the plaintiffs to the Supreme Court of Canada, after hearing counsel on behalf of both parties, judgment was reserved, and, on a subsequent day, the judges being equally divided in opinion, the appeal stood dismissed without costs.

*Appeal dismissed without costs.**

Aylen K.C. for the appellants.

R. C. Smith K.C. and *Brooke K.C.* for the respondents.

*Leave to appeal to Privy Council was granted on 16th July, 1912.

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CHATTEL MORTGAGE — *Assignments and preferences — Hindering and delaying creditors—Assignment of book debts —Surety.*] The Ontario Seed Co. owed a bank some $8,000 for which J. was surety by bond and indorsement of notes for all but $500. The bank also held as further security an assignment of the company's book debts. The company gave to A., a brother of J., a chattel mortgage of all its personal property and agreed to assign to him the book debts. A. then gave to the company an amount sufficient to pay the bank's claim, J. having supplied him with funds for the purpose, and the company gave its own cheque to the bank with a direction to assign the book debts to A., which was done.—*Held,* that the evidence justified the finding at the trial that the chattel mortgage was given for the benefit of J., who was aware at the time it was given that the company was insolvent, and that it was void under the provisions of the "Assignments and Preferences Act" and should be set aside.—After the assignment of the book debts to A. the company was allowed to go on collecting them.—*Held,* that such assignment was valid, but that the assignee could not retain the value of what had been collected out of the proceeds of the

CONSTITUTIONAL LAW — *"Marriage and divorce" — "Solemnization of marriage" — Jurisdiction of Parliament — Jurisdiction of legislature — Federal validating Act — Religious belief—Canonical decrees — Civil rights — "B.N. A. Act"* (1867), *ss.* 91 *and* 92—*Arts.* 127 *et seq. C.C.*] The parliament of Canada has no authority to enact a bill in the following form:—1. The "Marriage Act," chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section: —"3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony.—"2. The rights and duties, as married people, of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever." (Affirmed by Privy Council, 29th July, 1912.) —*Per* Idington J.—The retrospective part would be good as part of a scheme for concurrent legislation by Parliament and legislatures confirming past marriages which, probably, neither effectively can do. The prospective part, so far as possible to make it an effective prohibition of religious tests, may be good, but doubtful, and the probable purpose can be reached by a better bill.—*Per* Davies, Idington and Duff JJ.—The law of the Province of Quebec does not render null and void, unless contracted before a Roman Catholic priest, a marriage in such province between two Roman Catholics that would otherwise be binding. Anglin J. contra. Fitzpatrick C.J. expressing no opinion.—The law of Quebec does not render void, unless contracted before a Roman Catholic priest, a marriage otherwise valid where one party only is a Roman Catholic.—The Parliament of Canada has no authority to enact that a marriage between

Constitutional Law—*Continued.*

Roman Catholics, or a "mixed marriage," not contracted before a Roman Catholic priest and whether heretofore or hereafter solemnized shall be valid and binding. (Affirmed by Privy Council, 29th, July, 1912.)—*Per* Idington J.—Parliament has power to declare valid such a marriage heretofore solemnized to be concurred in by the legislature of the province concerned, and the like power as to a marriage hereafter to be solemnized if and when the province fails to provide adequate means of solemnization. (See [1912] A.C. 880.) IN RE MARRIAGE LAWS **132**

2——*Construction of statute — Quebec "Sunday Act" — 7 Edw. VII. c.* 42, *amended by 9 Edw. VII. c.* 51—*Prohibition of theatrical performances—Local, municipal and police regulations—Criminal law — Legislative jurisdiction — Validation by federal legislation — "Lord's Day Act," R.S.C.* 1906, *c.* 153.] In the "Act respecting the observance of Sunday," 7 Edw. VII. ch. 42 (Que.), as amended by 9 Edw. VII. ch. 51 (Que.) the provisions prohibiting theatrical performances on Sunday are not of the character of local, municipal, or police regulations. On the proper construction of the legislation, treated as a whole, they purport to create offences against criminal law and, consequently, are not within the legislative competence of a provisional legislature under the "British North America Act, 1867." *The Attorney-General* v. *The Hamilton Street Railway Co.* ([1903] A.C. 524) followed. The legislation in question derives no validity from the provisions of the "Lord's Day Act," R.S.C. 1906, c. 153. Judgment appealed from (Q.R. 20 K.B. 416) reversed, Idington and Brodeur JJ. dissenting.—*Per* Idington J., dissenting. —The provisions of section 2 of the statute 7 Edw. VII. ch. 42 (Que.), are severable from one another as well as from the other provisions of the statute, and, consequently, although other provisions may be *ultra vires*, the prohibition in respect of theatrical performances on Sunday is a police regulation which is within the competence of the provincial legislature.—*Per* Brodeur J., dissenting.—The legislation in question deals merely with local matters affecting police regulations and civil rights