REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

C. H. MASTERS, K.C.

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. Sir Henri Elzéar Taschereau, Knight, C.J.

The Hon. Charles Fitzpatrick C.J.

" Robert Sedgewick J.

" Désiré Girouard J.

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

" Wallace Nesbitt J.

" John Idington J.

" James Maclennan J.

" Lyman Poore Duff, J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Charles Fitzpatrick, K.C.

" Allen Bristol Aylesworth, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Rodolphe Lemieux, K.C.

ERRATA AND ADDENDA.

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

Page 65, in the last line, for "third" read "chief."

Page 107, in last line, reference to foot-note should be (2).

Page 157, add reference to report of judgment appealed from (38 N.B. Rep. 163).

Page 303, add reference to report of judgment appealed from (10 Ex. C.R. 139).

Page 321, add reference to report of judgment appealed from (Q.R. 15 K.B. 159).

Page 563, add reference to report of judgment appealed from (Q.R. 29 S.C. 50).

Page 633, add reference to report of judgment appealed from (Q.R. 14 K.B. 482).

MEMORANDA.

On the 2nd day of May, 1906, the Right Honourable Sir Henri Elzéar Taschereau, Knight, one of His Majesty's most Honourable Privy Council, resigned the office of Chief Justice of Canada.

On the 4th day of June, 1906, the Honourable Charles Fitzpatrick, a member of the King's Privy Council for Canada and one of His Majesty's Counsel learned in the law, was appointed Chief Justice of Canada, in the room and stead of the Right Honourable Sir Henri Elzéar Taschereau, resigned.

On the 4th day of August, 1906, the Honourable Robert Sedgewick, one of the Puisné Judges of the Supreme Court of Canada, died at the City of Halifax, in Nova Scotia.

On the 27th day of September, 1906, the Honourable Lyman Poore Duff, one of the Puisné Judges of the Supreme Court of British Columbia, was appointed a Puisné Judge of the Supreme Court of Canada, in the room and stead of the Honourable Robert Sedgewick, deceased.

APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOL. 36 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

The SS. "Albano" v. *The SS. "Parisian"* (37 Can. S.C.R. 284). Leave to appeal to the Privy Council granted, 9th May, 1906 (47 Can. Gaz. 153).

The SS. "Cape Breton" v. *Richelieu and Ontario Navigation Co.* (36 Can. S.C.R. 564). Appeal dismissed with costs, 14th Dec., 1906 (48 Can. Gaz. 279).

The Cushing Sulphite Fibre Co. v. *Cushing et al.* (37 Can. S.C.R. 427). Leave to appeal to the Privy Council was refused, 16th July, 1906.

Leahy v. *Town of North Sydney* (37 Can. S.C.R. 464). Leave to appeal to the Privy Council was refused, 17th July, 1906.

Maddison v. *Emmerson* (34 Can. S.C.R. 533). Appeal to the Privy Council dismissed, no costs allowed, 27th July, 1906 (47 Can. Gaz. 424).

Miller v. *The Grand Trunk Rway. Co.* (34 Can. S.C.R. 45). Appeal allowed by the Privy Council and judgment of the Supreme Court of Canada reversed with costs, 14th Feby., 1906. ((1906) A.C. 184.)

City of Montreal v. *Cantin* (35 Can. S.C.R. 223). Appeal to the Privy Council dismissed with costs, 14th March, 1906. ((1906) A.C. 241.)

McVity v. *Tranouth* (36 Can. S.C.R. 455). Leave to appeal to the Privy Council granted, 16th July, 1906.

Polushie v. *Zacklynski* (37 Can. S.C.R. 177). Leave to appeal to the Privy Council granted, 30th June, 1906.

In re, "Railway Act Amendment, 1904" (36 Can. S.C.R. 136. Appeal to the Privy Council dismissed, 5th Nov., 1906. (48 Can. Gaz. 159.)

The Rutland Railroad Co. v. *Béique* (37 Can. S.C.R. 303). Leave to appeal to the Privy Council refused, 25th July, 1906.

City of Toronto v. *The Grand Trunk Rway. Co.* (37 Can. S.C.R. 232). Leave to appeal to the Privy Council refused, 16th July, 1906.

Toronto Railway Co. v. *City of Toronto* (37 Can. S.C.R. 430). Leave to appeal to the Privy Council granted, 16th July, 1906.

Victoria-Montreal Fire Ins. Co. v. *Home Ins. Co. of New York* (35 Can. S.C.R. 208). Appeal to the Privy Council allowed with costs, 2nd Nov., 1906.

Wade v. *Kendrick* (37 Can. S.C.R. 32). Leave to appeal to the Privy Council refused, 17th July, 1906.

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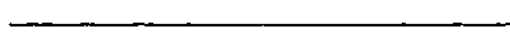

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

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

KATHARINE ANDREAS, ADMINISTRATRIX OF THE ESTATE OF NICHOLAS ANDREAS, DECEASED (PLAINTIFF) .... } APPELLANT;

1905
*Oct. 25.
*Nov. 27.

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Negligence—Finding of jury—Evidence.

A. brought an action, as administratrix of the estate of her husband, against the C.P.R. Co., claiming compensation for his death by negligence and alleging in her declaration that the negligence consisted in running a train at a greater speed than six miles an hour through a thickly populated district and in failing to giving the statutory warning on approaching the crossing where

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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the accident happened. At the trial questions were submitted to the jury who found that the train was running at a speed of 25 miles an hour, that such speed was dangerous for the locality, and that the death of deceased was caused by neglect or omission of the company in failing to reduce speed as provided by "The Railway Act." A verdict was entered for the plaintiff and on motion to the court, *en banc*, to have it set aside and judgment entered for defendants a new trial was ordered on the ground that questions as to the bell having been rung and the whistle sounded should have been submitted to the jury. The plaintiff appealed to the Supreme Court of Canada to have the verdict at the trial restored and the defendants, by cross-appeal, asked for judgment.

Held, Idington J. dissenting, that by the above findings the jury must be held to have considered the other grounds of negligence charged, as to which they were properly directed by the judge, and to have exonerated the defendants from liability thereon, and the new trial was improperly granted on the ground mentioned.

Held, also, that though there was no express finding that the place at which the accident happened was a thickly peopled portion of the district it was necessarily imported in the findings given above; that this fact had to be proved by the plaintiff and there was no evidence to support it; and that, as the evidence shewed it was not a thickly peopled portion, the plaintiff could not recover and the defendants should have judgment on their cross-appeal.

APPEAL from a judgment of the Supreme Court of the North-West Territories (1) setting aside a verdict for the plaintiff and ordering a new trial.

Wetmore J., in his opinion on giving the judgment appealed from, states the facts as follows:

"On the 22nd June, 1903, the deceased Nicholas Andreas passed west on what is known as South Railway Street in the Town of Regina, came to Albert Street and then proceeded north on this last-mentioned street towards the defendants' railway. There was a railway crossing at Albert Street. In attempting to cross the railway at this crossing the horses and waggon in which he was driving were struck by one of the defendants' trains coming from the west,

(1) 2 West. L.R. 249.

and he and the horses were killed and the waggon practically destroyed. The acts of negligence alleged and attempted to be proved were:

"1st. There was a failure to blow the whistle or ring the bell of the engine as provided by section 256 of 'The Railway Act,' 51 Vict. ch. 29, which was the Act in force at the time;

"2ndly. That the *locus in quo* was a thickly peopled portion of the town and the locomotive was passing there at a speed greater than six miles an hour;

"3rdly. That in view of the character of the crossing, it being one over which a great many people and teams passed, and the fact that there was a tool shed, which would to some extent obscure from view an approaching train, the crossing was dangerous, and the train was running at a dangerous and reckless rate of speed. In coming along South Railway Street and passing along Albert Street, up to about opposite where this tool-house was, an approaching train coming from the west could be seen without any obstruction at a distance of at least one mile and a half away. This tool-house was ten feet three inches by twelve feet three inches, the height was twelve feet from the ground to the peak, and the sides were seven feet seven inches. Among other things it was contended on behalf of the defendants that the uncontradicted evidence established conclusively that the death of Andreas was solely due to his own negligence; that if he had, as an ordinary prudent man would have done, looked in the direction of the west from which the train came he would have seen it; and that it must be assumed that he either omitted to take this ordinary precaution or if he did take it that he recklessly undertook to pass in front of the train and so his

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death was brought about by his own carelessness or recklessness; and that the trial judge should have non-suited the plaintiff at the conclusion of the case or directed a verdict for the defendants at the close of the whole case.

"Questions were submitted to the jury, which they answered as follows:

"1. Q. At what rate of speed was the engine running at the time it crossed Albert Street?

"A. Twenty-five miles per hour.

"2. Q. Was such a rate of speed a dangerous rate of speed for such a locality?

"A. Yes.

"3. Q. Was the death of the deceased caused in consequence of any neglect or omission of the company; is so, what was the neglect or omission which caused the accident?

"A. First, yes; second, failure to reduce speed of train as provided in 'Railway Act.'

"4. Q. If you find the plaintiff entitled to recover, at what do you assess the damages?

"A. (*a*) By reason of the killing of the deceased, $5.000. (*b*) For the destruction of the horses and the waggon, $400.

"The above questions were submitted on behalf of the plaintiff, and the following questions were submitted on behalf of the defendants and answered as stated below:

"1. Q. Could Andreas had he used ordinary care have seen the train in time to have avoided the accident?

"A. No, owing to the tool-house obstructing the view of the track for a considerable distance.

"2. Q. Could an ordinary man by the exercise of reasonable care have avoided the accident?

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"A. Same as No. 1.

"3. Q. Did the plaintiff's husband exercise reasonable care to avoid the accident?

"A. Same as No. 1.

"4. Q. Might he have exercised greater care, and if so in what respect?

"A. No.

"5. Q. Did the condition of the approaches to the crossing on Albert Street in any way contribute to the accident, if so, how?

"A. No.

"6. Q. Could Andreas when he first observed train No. 2 have jumped and avoided death?

"A. No."

On these findings judgment was entered for the plaintiff for the amount of the damages assessed. The defendants then appealed to the Supreme Court of the North-West Territories, *en banc*, to have the said judgment and findings set aside and judgment entered for them on the ground of failure by the plaintiff to prove negligence making them liable. On this appeal a new trial was ordered(1) on the specific ground that questions as to the bell being rung and the whistle sounded when the train approached the crossing should have been submitted to the jury.

The plaintiff then brought the present appeal seeking to have her judgment at the trial restored and the defendants, by cross-appeal, again asked for judgment.

Ford Jones, for the appellant, having stated the proceedings in the courts below, the court decided that the order for a new trial could not stand and called upon respondent's counsel to support his cross-appeal.

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Blackstock K.C. for the respondent referred to *Wright* v. *Grand Trunk Railway Co.*(1); *Lloyd* v. *Woolland Bros.*(2); *Skelton* v. *London & Northwestern Railway Co.*(3).

Ford Jones, for the appellant, cited *Lake Erie & Detroit River Railway Co.* v. *Barclay*(4); *Smith* v. *Southeastern Railway Co.*(5); *Bonnville* v. *Grand Trunk Railway Co.*(6).

THE CHIEF JUSTICE.—This action was brought, in 1903, by the appellant as administratrix of the estate of her deceased husband, one Nicholas Andreas. She alleges that:

1st. On the 22nd day of June, 1903, the said deceased was driving across the line of the respondents' railway with his team of horses and waggon, at a crossing on Albert Street, in the municipality of the Town of Regina, and that although all proper care and precaution was taken by him, a railway train, locomotive or railway engine in charge of the respondents' servants was illegally, wrongfully and negligently run or brought into collision with the horses and waggon of the said deceased, whereby the said deceased received such personal injuries that he and his said horses were immediately killed and his said waggon destroyed:

2ly. That the said train, locomotive or railway engine was being run through, and the said crossing was situate in, a thickly peopled portion of the said town at a greater rate of speed than six miles an hour, although the track of the said railway was not fenced according to the provisions of the statute in that behalf, namely, section 259 of the "Railway Act of 1888," and that the said death of the said deceased and the killing of his said horses and the destruction of his said waggon were caused thereby.

3ly. That it was the duty of the respondent company to ring the bell with which the said engine on the said train was furnished or to sound the whistle on the said engine at a distance of at least 80 rods westerly from the place at which the said railway crosses the said highway, and to keep the said bell ringing or to sound the said whistle at short intervals until the engine of the said train had crossed the said highway pursuant to the provisions of section 256

(1) 5 Ont. W.R. 802.
(2) 19 Times L.R. 32.
(3) L.R. 2 C.P.631.
(4) 30 Can. S.C.R. 360.
(5) [1896] 1 Q.B. 178.
(6) 1 Ont. W.R. 304.

of the "Railway Act" of Canada; that the respondent company neglected to ring the said bell or to sound the said whistle and to keep the said bell ringing or to sound the said whistle at short intervals until the said engine had crossed the said highway; and the said injuries to and the said death of the said deceased and the killing of his said horses and the destruction of his said waggon, were caused thereby.

4ly. That the said train negligently and unlawfully approached and crossed the said highway at a very dangerous and reckless rate of speed; no warning or signal of the approaching train was given; no watchman with signals was placed at the said crossing, and no fence or gates were constructed thereat; and the death of the said deceased and the killing of his horses and the destruction of his waggon were caused by reason thereof.

The respondents pleaded, 1st, denying the allegations of the appellant and not guilty by statute; 2ndly, that the death of Andreas was due to his own negligence, and that he could have avoided the accident by the exercise of reasonable care.

The case was tried at Regina before Mr. Justice Newlands. At the close of the appellant's case the respondents moved for a nonsuit, but the motion was refused. Questions were then submitted to the jury, and answered as follows:

Questions submitted at the request of the appellant.

At what rate of speed was the engine running at the time it crossed Albert Street? A. 25 miles per hour.

2. Was such rate of speed a dangerous rate of speed for such locality? A. Yes.

3. Was the death of the deceased caused in consequence of any neglect or omission of the company? If so, what was the neglect or omission which caused the accident? (1) Yes. (2) Failure to reduce speed of train as provided in "Railway Act."

4. If you find the plaintiff entitled to recover, at what do you assess the damages? A. (*a*) By reason of the killing of the deceased $5,000; (*b*) For the destruction of the horses and waggon $400.

Questions submitted on behalf of the defendants.

1. Could Andreas, had he used ordinary care, have seen the train in time to have avoided the accident? A. No, owing to the tool-house obstructing the view of the track for a considerable distance.

2. Could an ordinary man, by the exercise of reasonable care, have avoided the accident? A. Same as No. 1.

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3. Did the plaintiff's husband exercise reasonable care to avoid the accident? A. Same as No. 1.

4. Might he have exercised greater care, and if so, in what respect? A. No.

5. Did the condition of the approaches to the crossing on Albert Street in any way contribute to the accident? If so, how? A. No.

6. Could Andreas, when he first observed train No. 2, have jumped and avoided death? A. No.

The respondents then moved for the dismissal of the action, but that motion was refused and a verdict for appellant entered for $5,400. The respondents then appealed to the Supreme Court of the North-West Territories, where it was held (1) that though the verdict could not be sustained and the respondents' appeal had to be allowed, yet their motion for the dismissal of the action could not prevail, but that a new trial had to be ordered upon the ground that the jury were not asked special questions as to the ringing of the bell and sounding of the whistle. Against this order both parties now appeal, the plaintiff asking a restoration of the judgment she obtained at the trial, the defendants asking that the action be dismissed and the order by the court *en banc* for a new trial set aside.

Under the circumstances, the respondents' motion for a judgment dismissing the action and their appeal from the judgment refusing that motion is the first to be considered.

The jury's finding that Andreas was killed by the negligence of the respondents in failing, on the occasion in question, to reduce the speed of their train as provided by the "Railway Act" is exclusively based on section 259 of the "Railway Act of 1888," which enacts that:

No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village at a speed greater

(1) 2 West. L.R. 249.

than six miles an hour unless the track is fenced in the manner provided by this Act.

That was the first charge of negligence against the respondents in the statement of claim. Now, it is evident that this finding necessarily imports a finding that this accident occurred in a thickly peopled portion of Regina, a fact which the appellant had to prove, but of which there is no evidence to justify the verdict. In fact the contrary clearly appears. The evidence on the point is that east of Albert Street stretches the railway reserve extending from South Railway Street across the railway track to Dewdney Street about 500 yards north of the track. On this there are no houses. Then west of Albert Street the railway reserve extends from South Railway Street across the railway to a line 150 feet north of the track. There are no houses thereon nor within 200 feet of the railway (including streets) and that for a mile and a half west as previously stated there were no houses within the same limits. North of the railway reserve and street adjoining it and west of Albert Street between the reserve and Dewdney Street were a few scattered houses, west of which was open prairie.

Q. Are there many buildings? A. There is hardly any buildings,

says Watson, and Powel says:

There was not a great deal of settlement on the north side of the track. There are six or seven houses on Albert Street; one or two on Dewdney Street north and quite a number south. There was a fairly good settlement on Dewdney Street. The Government offices were there, mill, electric light. Considerable traffic across it. (Cross-examined). No residence within 200 feet of railway track. Train not running through residence portion of city. Not running through dwelling house or on a street.

And that evidence is not contradicted. Indeed it could not be. So much so that Mr. Justice Wetmore felt justified in remarking with the concurrence of all

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the other three judges that, if allowed the privilege of exercising his own knowledge of the locality, he would have had no hesitation in stating that in his opinion "the place of the accident was not a thickly peopled portion of the town." The verdict of the jury on this fact cannot, therefore, be sustained.

If this was not proved to be then a thickly peopled portion of Regina, this charge of negligence, it is conceded, fails and it is the only one found. The case was rightly left to the jury, however, because in answer to question No. 3,

> was the death of the deceased caused in consequence of any neglect or omission of the company, if so, what was the neglect or omission which caused the accident?

they might have felt justified in finding that the respondents had been guilty of the other negligence charged by the statement of claim, that is, in not sounding the whistle or ringing the bell as required by the statute. The judge had properly told them that:

> The first question is whether, from the evidence which has been given to-day, the provision of ringing the bell and blowing the whistle has been complied with. It is for you to find from the facts submitted to you whether these provisions I have mentioned have been complied with or not. You have heard all the evidence and I am going to leave it to you whether from that evidence these provisions were complied with and whether from the quarter-mile post they rang the bell and blew the whistle at intervals until they came over that crossing.

Now the jury, with such clear and direct instructions on the point, having answered that the cause of the accident was the failure to reduce speed under section 259 of the Act, must be considered as having negatived all the other charges of negligence. It is true that their finding as to the failure to reduce speed rendered it immaterial whether the bell had been rung

or the whistle sounded. But the appellant shaped her own questions to the jury and, by not pressing this charge before them or insisting upon an answer, must be held under the circumstances to have abandoned it. She cannot have been under the impression that each of her charges could form the subject of a separate trial. If the jury had answered to that third question: "Yes, failure to blow the whistle and ring the bell as required by the statute," and the court had set aside that verdict, no second trial could have been given her, whatever the evidence might have been, simply to enable her to try again her complaint of failure by the respondents to reduce the speed of the train on the same occasion.

The result is that the main appeal should be dismissed, the cross-appeal allowed and the action dismissed, with costs in all the courts against the appellant on both appeals.

GIROUARD J.—The appeal should be dismissed and the cross-appeal allowed, both with costs, for the reasons given by Mr. Justice Davies as to contributory negligence on the part of the deceased.

I express no opinion on the other branch of the case.

DAVIES J.—This case came before us as an appeal from the judgment of the Supreme Court of the North-West Territories and by way of cross-appeal.

Mr. Blackstock, for the Canadian Pacific Railway Co., which cross-appealed, admitted that he could not, in consequence of the late decision of this court in *Grand Trunk Railway Co.* v. *Hainer*(1), maintain the judgment appealed from on the ground stated. He

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contended, however, under his cross-appeal, either that the verdict of the jury should be set aside and judgment entered for the defendant or that there should be a new trial on the grounds, (1st.) that there was no evidence of negligence on defendants' part; (2ndly.) that, if there was, the deceased had been guilty of contributory negligence; and (3rdly.) that the damages awarded to the widow and her child, of $5,000, were grossly excessive, and that no evidence whatever of any pecuniary damage had been given.

I have read through the evidence given at the trial most carefully and have reached the conclusion that it is impossible to sustain the verdict and that the defendants are entitled to have judgment entered for them.

The accident which resulted in the death of Andreas took place where the main line of the Canadian Pacific Railway crosses Albert Street in Regina, N.W.T. The locality is in the outskirts or suburbs of the town, and one of the most important questions, in fact under the findings of the jury the most important question, to be determined is whether or not the locality where the railroad crossed Albert Street was a thickly populated part of Regina.

The only finding of negligence on the part of the Canadian Pacific Railway Co. was the rate of speed at which the train crossed the street. The track was admittedly not fenced as prescribed by the Act, and if the place was a thickly peopled portion of the town the speed at which the train crossed the street, about twenty-five (25) miles an hour, was in direct violation of the provision of section 259 of the "Railway Act" as amended by 55 & 56 Vict. ch. 27, sec. 8. If it was not a thickly peopled portion the rate of speed was not negligence.

The question of negligence or no negligence therefore depended entirely upon the fact of the locality where the accident occurred being a thickly peopled part of the city or town.

This question of fact is one which might well under certain circumstances and conditions give rise to fair and reasonable doubts, and if the evidence in this case could do this I would hesitate long before interfering with the finding of the jury.

It was strongly contended by Mr. Blackstock that there was no express finding of the jury on the point at all and that as it was a crucial fact, and one on the existence of which the sole negligence of the railway company could be imputed, the plaintiff's case necessarily failed.

But while I think it is to be regretted that a question was not distinctly put to them whether this locality at Albert Street through which the railway passed was a thickly peopled portion of the Town of Regina, still I think a reasonable construction of the answers given by the jury to the questions as put cannot have any other interpretation than that they did so find. The sole question remaining is whether or not there was any evidence to justify the finding. Certainly none was given on behalf of the plaintiff. On the contrary the evidence of the witnesses called on her behalf conclusively establish, to my mind, that the locality at the crossing was not "a thickly peopled portion of the town" within the Act. I need not quote the evidence because there is no contradiction with respect to the facts stated by the witnesses. The result may be broadly stated to be, that the point where the railway track crosses Albert Street is about 200 feet north of South Railway Street and 1,050 feet, or about 350 yards, south of Dewdney Street, each of which

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streets Albert Street runs into and at right angles with. The railway track runs substantially east and west and Albert Street north and south; that there was no person living between South Railway Street and the railway track, nor for one hundred yards on the south side of South Railway Street, and no one living along the track anywhere within one hundred yards; that from South Railway Street to the track on the west side the land was simple prairie or open common, and on the east side was reserved and held vacant by the railway. The railway reserve was 150 feet wide west of Albert Street on both the north and south sides of the railway and east of Albert Street 200 feet wide, south of the track, and over 500 yards wide north of the track extending up to Dewdney Street. That there was some settlement north and west of Albert Street up to Dewdney Street, and that these houses, 6 or 7, with one or two exceptions, face on Albert Street, and behind them to the west is prairie or open common. The east side of Albert Street to the north of track as far as Dewdney Street, like the east side between the track and South Railway Street, was not built on at all. The Government offices and public buildings and the grist mill and electric light building were between one-quarter and one-half a mile to the westward and there was a fairly good settlement along Dewdney Street some 400 yards away. As Powell, the plaintiff's witness, put it:

> There are six or seven houses on Albert Street, one or two on Dewdney Street north and quite a number south. There was a fairly good settlement on Dewdney Street. The Government offices were there, mill, electric light.

And again,

> The Albert Street sidewalk joined the Dewdney Street sidewalk. There was a trail from the crossing across the prairie to the Government offices, barracks, etc.

Had it not been, therefore, for the evidence given by the company's engineer (Sims) to the effect that he had at the time of the trial swung a circle with a quarter mile radius centering on Albert Street crossing and found 155 dwelling houses within it, the question would not on the evidence have been open to the slightest doubt. This evidence, however, is quite consistent with the undoubted fact that there was "considerable settlement" along Dewdney Street and South Railway Street, but chiefly near the outside of the radius he swung and not near the centre of the circle. Unless all the plaintiff's evidence is to be disbelieved on this point that is the only explanation of the existence of 150 dwelling houses within the one-half mile circle.

The onus of proving the fact of the crossing being in "a thickly peopled portion of the city or town" lay upon plaintiff. She entirely failed to discharge it. The finding of the jury on the point, assuming that there has been a finding, is without any evidence to support it, and, therefore, the only evidence of any negligence on defendants' part is wanting.

Even if, however, there could be any doubt upon this point, I am also of opinion that defendants are entitled to judgment on the issue of contributory negligence. The finding of the jury on this point is as follows:

Could Andreas, had he used ordinary care, have seen the train in time to have avoided the accident? A. No, owing to the tool house obstructing the view for a considerable distance.

Now, what are the facts? There is no finding that he did not see, or could not if he had used ordinary care have seen, the train coming in towards the crossing he was moving towards from the time he turned at South Railway Street into Albert Street and all the

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time he was moving slowly with his team along Albert Street towards the crossing until his view was obstructed by the tool-house.

Now, the tool-house was a small house 10 ft. by 12 ft. and about 8 ft. high, standing up and alongside of the west side of Albert Street within, say, 18 ft. of the railway track. For the moment of time that he was passing this little tool-house his view would be obstructed, but to ask any reasonable being to hold that such momentary obstruction released him from the plain, simple and obvious duty which lay upon him of exercising reasonable care in looking at and for the train from the time he left South Railway Street until the moment when his vision was obscured by the little tool-house, is asking too much. He may not have looked during the passage of his team from South Railway Street till he actually passed the tool-house, and his horses were almost, if not quite, upon the track certainly within a few feet of it. Certainly the evidence would justify a finding that he did not look. But under the circumstances he was bound to look. His view was uninterrupted. Had he looked he could and must have seen the train coming towards the crossing he intended to pass over, at least a mile away. The evening was clear, bright and without wind. Everybody else who was called as a witness was looking and saw the train and the danger and feared an accident unless the deceased stopped. He alone appears to have been stolid, careless and indifferent. If ever a man jogged along carelessly to his death he appears to have done so.

An argument was attempted to be raised that his attention was distracted by an engine of the defendant company on a switch on the other side of the crossing and by a whistle from this engine and the shouting

of some workmen alongside of it calling upon him to stop. But the jury have not found this. On the contrary, they carefully limit the excuse for his negligence in not looking for nor seeing the fatal train approaching to the little tool-house obscuring his view. In effect they negative, or at any rate decline to accept, the suggestion that the deceased's attention had been distracted by the engine noises and calls of the workmen on the other side of the track and I think they were right in so doing.

I am, therefore, of opinion, alike on the ground of the failure on plaintiff's part to give any evidence from which reasonable men looking fairly at the whole circumstances could justify a finding of negligence on defendants' part, and also on the ground of contributory negligence on deceased's part, even if defendants' negligence had been proved, that the defendants' cross-appeal must be allowed and judgment entered for the defendants on the whole case.

I do not wish, by my silence on the point, to be understood as even remotely sanctioning the view that a verdict for $5,000 for the death of a man of the class and condition of the deceased in this case could be sustained in any event under Lord Campbell's Act without at least some evidence of the pecuniary damage his widow and child sustained.

The only property of any kind he ever was shewn to have owned was the team he was driving at the time of his death and this ownership is asked to be assumed from his possession only. What his occupation was, whether he did or did not own a farm, and if so, what was its value, or whether he was a mere servant or labourer, and if the latter, what wages he earned, and all other information from which reasonable inferences might be drawn of the pecuniary dam-

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ages incurred by his wife and family from his death, seem studiously to have been kept in the back ground.

The cross-appeal should be allowed with costs in all the courts and the main appeal dismissed with costs.

IDINGTON J. (dissenting).—In this case the plaintiff, as administratrix, recovered, by the verdict of the jury, $5.400, and judgment for her was entered thereupon by the learned trial judge.

Upon appeal therefrom to the Supreme Court of the North-West Territories, *en banc,* that court, not having before it the judgment of this court in *The Grand Trunk Railway Co.* v. *Hainer*(1), seemed so pressed with the exposition of the law in *The Grand Trunk Railway Co.* v. *McKay*(2) (as read by the members of the court), set aside the verdict and granted a new trial, in order that the other grounds taken at the trial by plaintiff, but not passed upon by the jury, might be tried out.

Thereupon the plaintiff, becoming aware of our decision in *The Grand Trunk Railway Co.* v. *Hainer* (1), took an appeal to this court.

Upon the opening of the argument it was properly conceded that if the findings of the jury were entitled upon the evidence to stand, *The Grand Trunk Railway Co.* v. *Hainer*(1) must entitle the plaintiff to succeed in this appeal.

The respondents had, however, by way of cross-appeal, raised the question that upon the whole of the evidence the plaintiff should have been nonsuited.

The case has, therefore, been argued upon this contention.

(1) 36 Can. S.C.R. 180. (2) 34 Can. S.C.R. 81.

The plaintiff sued for damages caused by the collision of the defendants' train with the team of the plaintiff's late husband, at a crossing in the Town of Regina, which resulted in the death of her said husband and the destruction of his team.

The defendants' railway, at the place in question, was unfenced in any way. The train was moving confessedly at the rate of twenty-five miles an hour.

The first question presented thus for consideration was whether or not this rate of speed was a violation of section 259 of the "Railway Act," ch. 29, of the statutes of Canada of 1888, which, as amended by 55 & 56 Vict. ch. 27, sec. 8, provides as follows:

No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than six miles an hour unless the track is fenced in the manner prescribed by this Act.

The portion of the Town of Regina through which the train in question passed at the place of the accident is alleged by the defendants not to have been then thickly peopled.

The evidence on this point is not as clear as it might have been made. It should not have been a difficult matter to have shewn how many houses actually existed at the time within a given radius of the spot where the accident occurred, and what these houses were, whether dwelling houses or other houses of that public character that would lead people to visit them.

I think, however, that there was sufficient evidence furnished (the most pointed being given by defendants' witnesses) at the trial, under the circumstances, to entitle the plaintiff to have the case on this point passed upon by the jury.

The learned trial judge had during the trial

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called attention to the fact that all the jurors lived in Regina and knew the locality. No one objected to the learned judge taking that view, and when he reiterated in his charge, without objection, the same thing, I think we must take it that the respondents by their silence assented to that way of treating the case.

If so they ought not now, in this court of appeal, to be heard to take any advantage of it.

There was nothing extraordinary in it. Every day in trying cases those engaged therein assume that to be common knowledge which, perhaps, is not strictly within the technical meaning of such kinds of evidence as renders notice thereof as part of common knowledge permissible.

If it is assumed as being assented to no one can complain. No one should complain.

Many of the allusions in the evidence bearing upon this point, that seem vague and almost unmeaning to me, were no doubt well understood by the court and jury possessed of a local knowledge.

I need not say that counsel can insist on shutting out such appeals to the personal knowledge of the jury, unless by means of a view directed by the court in the ways provided therefor by law.

They can, if they choose, in a civil trial at least, permit, instead of a view, the jurors to act on the knowledge of locality that they may possess.

The finding of the jury, read as it must be in light of the learned judge's charge, is clearly intended as a finding that the place in question was so thickly peopled as to require the train of defendants to move at a rate not exceeding six miles an hour. The court below seemed unanimously to think the evidence such as to render it a question for the jury.

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The respondents say, however, that even if they otherwise should be so found liable, the deceased by his own want of care brought about his own death. What is there to support this contention? Is it a case for ignoring the jury and withdrawing the case from them? Is the evidence of want of care all one way? Was the want of care inexcusable? What measure of care is called for on the part of travellers coming to a crossing?

It is not the measure of care that I or any judge or lawyer, whose sense of danger is quickened by long experience in dealing with such cases, may possess that is to be exacted. It is the care that must be expected on the part of an ordinary prudent man.

This case does not disclose whether or not deceased knew from daily or long experience that trains coming from the west approached the station there at such a high and, to a stranger, probably unexpected rate of speed.

For aught we know he may have crossed there only once before.

This crossing was just beside the station grounds. And if, as is highly probable, he assumed all trains stopped at the station a short distance east of the crossing he would likely know that such a high rate of speed as this train moved at might not be expected.

He did know that on his right hand and immediately beside him there was in the yard an engine moving backwards and forwards, which needed, or might be reasonably assumed to need, on his part, constant watchfulness.

We are asked to say, as *matter of law,* that whilst guarding his horses and exercising that constant watchfulness thus imperatively called for, he must be held wanting in the care of an ordinary man of

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prudence, and guilty of negligence, because he did not discover (within about twenty seconds, as I will shew) by also looking the other way, until too late, the incoming train on his left hand. Is that a proposition that in law can be maintained?

The only case nearly like it is the recent case of *Wright* v. *The Grand Trunk Railway Co.*(1), where undoubtedly the engine or train that engaged the injured man's attention was standing. In this case the engine diverting attention was, if two of the witnesses are to be believed, moving from time to time nearly, if not quite, up to the moment deceased came to the crossing.

It matters not here that other witnesses say to the contrary. It was for the jury to decide which were telling the truth.

It would seem also as if the motion of the reins in deceased's hands indicated that he had looked to the west and discovered his danger, but too late. And the few moments that the tool-house hid the coming train from the view of the deceased might, but for that obstruction, have enabled him to see it sooner and turn his horses aside and save himself.

To say that he could have looked before coming there is true. I am unable, however, after a most careful perusal of this evidence and of much of it several times, to feel quite sure just what he could have seen by looking. Those who tried the case were much more likely to understand the allusions in the evidence and know just how far such looking would have served deceased. How far from, in approaching, a crossing must a man look both ways?

The deceased had driven westward along South Railway Street which runs alongside on the south

(1) 5 Ont. W.R. 802.

side of the track. Then at the junction of South Railway Street with Albert Street which crosses the track the deceased turned northward along Albert Street. How far that point of turning is from the railway track in question I am quite unable to discover, with certainty, from the evidence before us. Why this was not made clear I am unable to understand. It is not only the turning point on the road, but the turning point of the case. Up to this turning point it is not probable that the deceased could have seen the incoming train from the west with which he collided. The track is, to a person on the eastern part (over which deceased drove) of that street, obstructed from view by the buildings of one Sinton, who was one of the witnesses. At the south-east corner of the said junction of streets are these buildings. And so far as I can make out, from the plans exhibited in argument, they are immediately facing that part of South Railway Street, to the east of them, over which deceased had come. There was a jog in that street, at the junction with Albert Street, that makes for our present consideration as if the South Railway Street had ended there. While we have heard a great deal about the possibilities of seeing the incoming train in question at the distance of a mile, we have not been shewn or pressed with any argument that would shew that any one could expect the deceased to have seen through Sinton's buildings or past them, so as to have seen the train before he turned, at the jog I refer to. How far had he then to go until he reached the crossing? How far past Sinton's buildings northerly could he go without seeing a train if it were a mile away? How far could he see along the railway track to the west, at any and each step of what he had to travel over, going northerly? I am unable on this evidence

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to do more than guess the answer to any of these questions. Yet it is upon an accurate answer to such questions, or some of them upon which we can rely, that this case hinges.

The witness Sinton stated that his house was about one hundred and sixty-six feet from the railway track. In cross-examination he was pressed, by counsel for defendants, to say whether it was not two hundred and thirty-seven feet and a half, and he was unable to say that he would contradict any one if he swore to that. The railway officials failed to clear this up. Defendants put in a plan that has a mark on Albert Street two hundred and thirty-seven and a half feet, but it does not shew properly from where or to where it is estimated to designate. And all the witness is asked by way of verifying it is as follows:

Now I notice on this plan certain measurements. Are those measurements correct? A. Yes.

This plan seems more for other purposes than any relating to this question of the distance from Sinton's house to the track. How am I to verify it? Am I to guess how wide South Railway Street is or was, and how wide Albert Street was or is, and apply this vague and uncertain kind of evidence and determine for myself the exact distance deceased had to go after reaching a point where he could see a train? Am I in short in a better position to know than the jurors who knew the locality and everything that was said by the witnesses in relation to the different localities, and understood everything that was said?

On the evidence it is purely guess work, to make any accurate estimate of the distance that the deceased had to travel after making the turn and getting out past Sinton's house so far on to Albert Street that

he could have had a view of the coming train or westward track. We do know from the evidence that the tool-house was nineteen feet from the track. We also know that the tool-house took up twelve or fourteen feet further space, but how it stood in relation to the track, whether with the length or the width facing Albert Street or the railway, which does not cross Albert Street at right angles, we are not told. These trifling differences might make but a few feet in the distance to be travelled to get past the house. But when evidence is put before the court that the house is only six or seven feet high and no explanation given as to which way the roof runs which was, at the peak thereof, twelve feet high, I think we are not helped as much as we might have been to an understanding of the exact situation. Then, assuming that the south side or end of this tool-house would be fifty-two to fifty-five feet south of the track and that one hundred and sixty-six feet from Sinton's is to be taken as the correct measurement, there would be one hundred and one or one hundred and four feet from Sinton's to the tool-house. From this should we deduct sixty-six feet for width of South Railway Street? If so, we then have only thirty-five or thirty-eight feet that the deceased passed without looking where he might have seen. Double the distance for argument's sake, and then we are left to say as matter of law that a man *whose attention was diverted to an actual danger on his right hand,* having missed the opportunity of looking whilst passing a particular seventy or eighty feet of road, is to be held guilty of such inexcusable negligence as to deprive him and his representative, by reason thereof, of any remedy, is something which I venture to say has never yet been ruled in an English or Canadian case.

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Let us consider the plans and compare them and then try another way. Plan Exhibit 1, that the company produced, shews what I take to be a measurement of two hundred feet from the track to the south line of the eastern part of South Railway Street, which line seems, when projected, to come out on the face of the north side of Sinton's buildings, which the evidence shews do mark on the ground the south boundary of the South Railway Street at that part. To understand this the jog must be borne in mind. Deduct from two hundred feet the width of the street, and we have a distance of one hundred and thirty-seven feet to travel, after the turn was fully made and deceased passed the junction. Let that be reduced by the distance taken up by the tool-house and nineteen feet beyond and it leaves only eighty-two or eighty-five feet over which deceased in his travelling could have looked westward and seen anything coming from the west on the track. Of course, I refer to such a distance, away west on the track, as the train must, according to the evidence, have been at this time when the deceased, it is said, ought to have looked.

Another way to find the distance from the track to Sinton's house is to assume the track, as the plan indicates it, in the centre of a road allowance of 300 feet, and add 66 feet for width of road to half of this and we have 216 feet altogether. Deduct one-half the width of the track, the distances to the tool-house and past that house, and part of road allowance, to get where team had got past Sinton's house; and this being fairly done, we have not in one way as much as above, or to take as an extreme view the other way of looking at it, more than one hundred feet for deceased to travel. Assume any of these results of estimated distances to be correct. Then at the rate of three or

four miles an hour the deceased had to cover such distance only about twenty seconds in which to look, whilst passing the open space, where he is charged with neglecting to look. Suppose he postponed doing so till nearer the track—and as a stranger not regarding the house, but the track—was it unreasonable neglect? Was it such neglect under the circumstances of having to watch to the right? Was it so especially when in law the defendants' train ought not to have travelled there at more than six miles an hour? What right have they to insist under such pressure from them, to the right and to the left of the driver, on such promptness of action—and decision on the part of the driver? Surely they had no right to create, by their unlawful act, a condition of things demanding such urgency on the part of deceased, and then turn round in light of the results and claim the benefit of their own wrong? The case of *Correll* v. *The Burlington, etc., Railroad Co.* (1), at p. 125, has some remarks which might be adopted here on this point. It is to be observed that once past the tool-house the team could not have been turned round. The approach to the crossing of the track sloped up, and was too narrow to permit of turning.

Another thing lost sight of in the evidence of some witnesses is the curve in the track within the mile back that has to be reckoned with, on this point of the case, and weighing the evidence given. What use to tell us about the possibility of seeing a train a mile distant, as witnesses do, who had from their point of view nothing to allow for obstruction or for this curve? Why was the evidence not confined to the point or points of view that deceased had and that alone? Why have we not a single witness that speaks

(1) 38 Iowa 120.

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pointedly as having tested any of those points of view, at any one of the places deceased is by the argument of defendants required to have looked? To my mind it is very singular indeed, if not suspicious, that if the company really had such a clear case from any of these points of view, that we are not favoured with any such tests. It is true that the engineer of the coming train, presumably as was his duty looking ahead, says he saw the deceased or his team. His evidence is open to comment, it is not quite consistent and leaves room for mistakes on his part. The degree of credence to be attached to it was peculiarly for the jury.

It is made clear that standing on the track, at the point where deceased was killed, and looking westward, one can see a long distance. It does not seem to have served deceased to look just then for the train was too near.

It devolved upon the defendants to make all this clear. Have they done so? It was no part of the plaintiff's duty to clear this up. She is entitled to insist that the burthen of proof which rests upon the defendants, setting up contributory negligence, should be met with that degree of certainty that will enable the court to say before submitting it to the jury that there is evidence of contributory negligence. And then, before withdrawing it from the jury as clearly proven, and entitling a judge to dismiss the action, the proof must be so clear and satisfactory that twelve reasonable men cannot be supposed honestly and reasonably to find it possible to come to the conclusion that it is not sufficient. And there must be no evidence to the contrary. If there be evidence to the contrary the case must go to the jury. Is that the case here? To grant a nonsuit on such evidence, as

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in this case, seems to go further towards the abolition of the right to a juror's judgment than any case has yet gone.

In many cases where there was no excuse for failing to look the courts have, in absence of that or any other evidence rebutting or explaining such failure, nonsuited. But here exists strong reason excusing, if ever a man had an excuse, for watching to the right more than the left. And to pass upon it the jury were the proper tribunal. I think the deceased had far more excuse than the unfortunate people in the *Hainer Case*(1). In that case the people were walking and had only to guard a few steps.

I think, also, that probably the jury here were quite as competent as I to determine what degree of foresight should be exacted from a man driving a team under the circumstances I refer to.

So far as the law has yet gone, I am unable to hold that a man must in law have looked both ways within the limits of a distance of only seventy-five to one hundred feet before reaching such obstruction to view as existed here at a railway crossing, or be thereafter his own assurer.

The "stop, look and listen" rule in Pennsylvania exacts in substance nothing more.

Another feature, pressed in argument as if against deceased, I take entirely the other way.

Men undoubtedly called to him and raised a great cry. But I think their efforts, however kindly meant, in all probability diverted him from looking to the west and made him look more intently the other way. Am I to forget also the many cases in which it has been said that momentary forgetfulness as a possible

(1) 36 Can. S.C.R. 180.

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factor in the conduct of every man is a thing to be considered in weighing what a prudent, careful man of the ordinary reasonable type may be held in law bound to do?

I cannot, having regard to all these considerations, which we must observe and which, indeed, so to speak, form part of this case and must in law be reckoned with, on the evidence before us, see how this case could properly have been withdrawn from the jury.

It was their province to weigh and decide upon such matters as I have adverted to, and they have decided adversely to the defendants, after a proper charge from the learned trial judge.

I think their finding must stand.

It was possible for the finding to have been the other way, and had it been so the result must have stood.

I think the appeal of the plaintiff ought to be allowed and the cross-appeal of the defendants dismissed and both with costs to the plaintiff.

The court below, upon contradictory evidence as to the point of ringing of the bell and blowing of the whistle, not passed upon by the jury, thought proper to direct a new trial. I understand that some of the majority of this court decide that the verdict covers the point because the jury gave only one reason and omitted any other.

With respect I must add, that without the majority of this court agreeing that such contributory negligence has been shewn as defeats the action, we ought not to interfere with the discretion of the court below in granting a new trial to clear up the issue upon which no verdict has been given.

MACLENNAN J.—After a very careful consideration of this case I am constrained to the conclusion that there was no sufficient evidence to warrant the finding of the jury that the part of the town at which the unfortunate accident occurred was a thickly populated part thereof, and, therefore, that the speed of the train was not illegal.

On this point I concur in the reasons of my brother Davies, which I have had an opportunity of reading.

I also agree with him in the opinion that there was no sufficient evidence of pecuniary damage suffered by the plaintiff and her child, by the death of her husband, to warrant the verdict of $5,000 to be divided equally between them.

On the question of contributory negligence I think the jury might quite properly find, as they did, upon the whole of the evidence, although they specify only one particular ground for their finding.

I am of opinion that the appeal should be dismissed with costs and that the cross-appeal should be allowed with costs here and in the court below.

Appeal dismissed with costs and cross-appeal allowed with costs.

Solicitors for the appellant: *Jones & Gordon.*

Solicitors for the respondents: *Mackenzie & Brown.*

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*Nov. 16.
*Dec. 22.

OSLER WADE, LIQUIDATOR OF THE PAKENHAM PORK PACKING COMPANY, LIMITED (PLAINTIFF) .... APPELLANT;

AND

JOHN KENDRICK AND RACHEL E. FORSYTHE (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—Act of directors—Unauthorized expenditure—Liability of innocent directors.

The directors of a limited company, without authority from the shareholders, passed a resolution providing that, in consideration of a firm of which two directors were members carrying on business of a similar character continuing the same until the company could take it over, the company indemnified it from all loss occasioned thereby. K. and F., two members of the firm, refused their assent to the terms of this resolution and declared their intention, of which the majority of the directors were made aware, to retire from the firm. F. subsequently wrote to the president and another director reiterating her intention to retire and declared that she would not be responsible for any further liability. The company afterwards took over the business of the firm, paying therefor $30,000 and receiving assets worth $12,000, and having eventually gone into liquidation the liquidator brought an action to recover from the members of the firm the difference. The Court of Appeal held that K. and F. were not liable though their partners were.

Held, that K. and F., having received the benefit of the money paid by the company, were also liable to repay the loss.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial against the respondents.

The plaintiff is liquidator of the Pakenham Pork

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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Packing Co., Limited, which purchased and took over a pork packing business carried on at Stouffville under the name and style of the Pakenham Pork Packing Company. This business had been carried on for some years by the defendant James Pakenham, under the above mentioned trade name, and was so continued until the 2nd of December, 1901. On that day a partnership was formed between the defendants for the carrying on of the business, the partnership to continue for six months subject to an earlier determination in case of the consummation of certain arrangements between the defendant Pakenham and two trustees for the Pakenham Pork Packing Company, Limited.

The Limited Company was incorporated on the 13th of June, 1901, by letters of incorporation under the Ontario Companies Act.

Among the incorporators were the defendants Pakenham, Byer and Kendrick, and one H. J. Morden, who was then the local manager of the Standard Bank at Stouffville. The company was empowered to carry on the business of packing, curing and dealing in pork and other meats and the various products thereof, and for these purposes to acquire the plant, business, assets and good-will of the partnership. There were five provisional directors, of whom Pakenham, Byer and Morden were three.

At this time the partnership business was being carried on by Pakenham alone, and he had on the 20th of May, 1901, entered into an agreement with Messrs. Stouffer & Coulson, of Stouffville, brokers, as trustees for the limited company to be formed, to sell, assign and transfer to the limited company all the machinery, plant and good-will of the partnership business, and to transfer the lease of the premises in which the

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business was carried on in consideration of $20,000 in cash, and $10,000 in fully paid up stock in the limited company.

The limited company did not organize until the 2nd of April, 1902. On that day the shareholders held their first meeting, elected directors and transacted other business.

Before that date, however, a partnership had been formed between the defendants Pakenham, Byer, Kendrick and Mrs. Forsythe, upon terms contained in articles of partnership dated December 2nd, 1901, and executed by all the parties. The purpose was to carry on the existing business in the same premises under the same name, but apparently there was no grant to the partnership of any of Pakenham's property engaged in the business further than that he agreed to give them the use of the machinery in the factory free of charge.

The capital of the firm was declared to be $10,500, represented by a line of credit arranged with the Standard Bank, to be secured to the bank by a joint note of the parties, and for such other sums as might be agreed upon. The profits and losses were to be divided and borne in equal shares.

It was further agreed that the partnership should continue for six months, unless terminated under a provision whereby, when the limited company so requested, the firm would hand over to the company the factory, plant, business and good-will of the business, free and clear of all cost and charge, and thereupon the partnership should be wound up and after payment of debts the profits, if any, should be divided among the partners share and share alike.

It appeared from the agreement, and was further shewn by the testimony, that all that the partnership possessed when entering into business was the right to

use the premises and machinery in and with which Pakenham carried on his business, and that the partnership was arranged and the three other persons brought in, in order to secure advances on a line of credit from the Standard Bank to enable the business to be carried until such time as it was expected that the limited company would be in a position to take it over.

The arrangement was brought about by the joint efforts of Pakenham and Morden, who was then manager of the bank and one of the provisional directors of the limited company. The partners other than Pakenham were really only partners as to profits and losses. The partnership assets would be the stock in trade, book debts, moneys and other property derived or acquired in the prosecution of the business. The partnership liabilities would consist of all debts or obligations incurred during the continuance of the term of partnership. The partnership capital was the line of credit in the Standard Bank.

The business was being carried on in this way at the date of the shareholders' meeting. At that meeting the shareholders approved of, adopted, ratified and confirmed the agreement of the 4th of May, 1901, and ordered that an agreement be executed to give effect thereto. By-laws were adopted and the defendants Pakenham and Byer were elected directors along with H. J. Morden, W. C. Renfrew and N. Clarke. Pakenham was appointed managing director with a salary of $2,500 per annum, and a percentage of profits for five years.

The first meeting of the directors was held on the 7th of April, at which all the directors except Kendrick were present. Pakenham was elected President; Renfrew, Vice-President, and A. Low, Secretary.

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The next meeting of importance was held on the 30th of May, the same four directors being present. Among other business transacted a resolution was passed directing the Secretary to put the company's seal on Pakenham's agreement.

These steps were probably taken in view of the near approach of the expiration of the term of the partnership which occurred on the 2nd of June.

But when that time arrived the limited company was not in a position to take over the business. And at a meeting of the directors held on the 4th of June, at which Pakenham, Byer, Morden and Renfrew were present, a resolution was passed "that in consideration of the Pakenham Pork Packing Company, comprising Messrs. Byer, Kendrick, Pakenham and Mrs. Forsythe, continuing and carrying on the present partnership business until such time as the business can be taken over by the Pakenham Pork Packing Company, Limited, that the said Pakenham Pork Packing Company, Limited, do indemnify and save harmless the said Pakenham Pork Packing Company from all loss occasioned by the continuation of said business by said partnership company."

Kendrick and Mrs. Forsythe did not assent to the terms of this resolution. On the contrary they both took the ground that they would not continue longer in the partnership, and of this Pakenham and Byer were made aware, as was also Morden.

Pakenham prepared a statement of the affairs of the partnership and submitted it to Kendrick and Mrs. Forsythe, from which it appeared that the assets amounted to $34,490, while the debt due to the Standard Bank amounted to $33,600, leaving a surplus of $890.

This was on the 6th of June, and on the same day

Mrs. Forsythe wrote letters in the same terms to Pakenham and Morden. That addressed to Pakenham was submitted to the Board of Directors on the 10th of June, and on motion of Morden, seconded by Byer, it was resolved that Pakenham write to Mrs. Forsythe and ask her to meet Byer and Kendrick in reference to her letter. There was a meeting, with the result that Mrs. Forsythe and Kendrick adhered to their resolution not to continue longer in the business.

At the trial it was shewn that the letter to Pakenham was lost, but that addressed to Morden was proved. It stated that after consideration of the statement of affairs of the partnership she had decided to withdraw therefrom, and that she would not be responsible for any further advance or liability in any way, and that from the statement furnished by the partnership their affairs appeared to be in a prosperous condition, and she, therefore, expected a cheque for $222.50 and a release signed by all the members of the partnership from further liability. She repeated that she would not be responsible for any further advances, and concluded, "from the statement you furnished me the company's affairs appear to be in a prosperous condition, and no doubt you will be able to get Mr. Renfrew or some other stockholder in the new company to take the position in the present company which I now vacate."

Thus the limited company as well as the Standard Bank, through the manager, Morden, had full notice of Mrs. Forsythe's position, and neither she nor Kendrick ever receded from their position in this respect.

At a directors' meeting in November, 1902, there were present Pakenham, Byer, Renfrew and Morden. On motion of Renfrew, seconded by Morden, it was resolved, that the limited company now take over

from the partnership, the plant and premises in accordance with the agreement made, the limited company to take from the partnership an assignment of all book debts, choses in action and rights of the partnership in connection with the business of the limited company; also to take and receive from the partnership all the stock in the factory and in transit, also to receive an assignment of the existing lease of the present premises—the limited company to indemnify the partnership against all its outstanding debts in connection with the business, according to a list to be furnished and attached to and form part of the agreement embodying the arrangement as hereinbefore set out, and the agreement with list of debts attached to be submitted to the directors for approval before being finally executed.

The transfer was subsequently effected and the company paid over the sum of $30,094.63 to the partnership. It was proved at the trial that the assets so transferred were worth only $12,000.

The court of appeal held that the respondents Kendrick and Forsythe were not liable for this amount. The liquidator appealed.

W. M. Douglas K.C. and *S. B. Woods* for the appellant.

Shepley K.C. for the respondent Forsythe.

John W. McCullough for the respondent Kendrick.

THE CHIEF JUSTICE and GIROUARD J. were of opinion that the appeal should be allowed.

DAVIES J.—This is an appeal from the judgment of the Court of Appeal for Ontario reversing, so far as the two respondents herein are concerned, a judgment

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of Street J. whereby an agreement made between a partnership company of which the respondents were two of the members and an incorporated company of which the appellant is liquidator was set aside and all the members of the partnership, including respondents, held liable for $18,363.66, the difference between $30,736.65, the amount paid out of the funds of the incorporated company for certain property and assets of the partnership, and $12,372.99, the admitted full value of such assets.

So far as Kendrick and Forsythe, two members of the partnership, are concerned they were held by the judgment appealed from not to be liable for this sum of $18,363.66, while their two associate partners, Pakenham and Byer, were held liable and the judgment of the trial judge so far as the latter were concerned confirmed.

These two, Pakenham and Byer, filled the dual positions of members of the partnership which sold its assets to the company, and directors of the company which bought those assets and paid the money for them. The court of appeal understood "that the trial judge did not set aside the transaction of the bargain and sale, but permitted it to stand and reduced the amount of the consideration to what he found to be the value taken by the limited company," and while holding this to be the appropriate form of relief as against Pakenham and Byer, the Appeal Court held it was not as against the other two, Kendrick and Forsythe.

The Chief Justice delivering the judgment of the court says:

> They were not directors of the company, they received no part of the moneys paid or deposited on the 31st October and they were guilty of no act which can render them personally responsible to the Limited Company in respect of the two items in question.

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It is true that Kendrick and Forsythe were not directors of the company and were not personally guilty of any improper or fraudulent act towards the company. But I am quite unable to accept the conclusion of the Chief Justice that

they received no part of the moneys paid or deposited on the 31st October ($30,094.63)

or that they were not responsible for the acts and representations of their co-partners who were also directors of the company.

This money was not actually paid into their own hands it is true, but it was taken by their partner Pakenham from the funds of the limited company of which he was president and manager, and paid into the bank to discharge and pay the $30,094.63 which, on that day, 31st October, the partnership of which they were members owed the bank and which, of course, they were personally liable for. The judgment appealed from relieves these respondents from their unquestioned liability on the 31st October for the amount of the debts of this partnership which exceeded the assets by $18,000, and it could only be sustained by holding the appropriation of the limited company's moneys to have been legally defensible, and such as a court of equity could sanction. Nor do I understand the judgment of the trial judge as understood by the court of appeal. His formal judgment does not in so many words rescind the agreement dated in November, 1902, and executed in January, 1903, for the bargain and sale of the partnership assets to the limited company. But the result of the judgment substantially is to do so, and in his reasons for judgment it is quite plain that what he intended to do was to rescind this agreement. After referring to the agreement he goes on to say:

Of course that was an absurd, outrageously absurd, agreement to make on behalf of the partnership. The assets—what are called assets—as distinct from the plant and buildings, belonged to the partnership. The plant, buildings, etc., belonged to Mr. Pakenham himself, so that is an easy way of separating them. And *because of the absurd nature of the agreement, it is a matter that cannot possibly stand, where the managing portion of the buyers, the incorporated company, were the principal partners in the partnership.* So that an account should be taken there of the moneys paid by the Limited Company in debts of the partnership in the shape of book debts and stock in trade, and the partnership should pay the difference between these two sums, and they should not have got it.

I fully concur in the conclusions of the trial judge as to "the absurd, outrageously absurd" character of this agreement. It does not seem to me to be so much an improvident or a questionable agreement as one utterly indefensible and unjust, if not actually fraudulent. It was not an agreement dealing with a speculative property or with property about which one might charitably imagine large differences of opinion could honestly exist, but one dealing with property and assets about the real value of which, if there had been no misrepresentations or concealment of material facts, there could not exist any substantial difference. In determining such value the trial judge with consent of counsel accepted the nominal or face value of the debts as given though it is well known they were not of such face value, and the value of the other assets as claimed by the defendants in the action. The counsel for the liquidator chose to accept this rather than go to a reference, and the difference between such value and the amount actually paid for these assets, viz., $30,094.63, was $18,000, the sum now in dispute and which the partnership benefited by and the limited company lost.

By such consent and such action of the court with respect to it the respondents are effectually answered when they suggest that rescission could not take place

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because they could not be restored to their former position. As a matter of fact they were placed by the judgment of the court in a much better position than they possibly could have been in if the stock and book debts were handed back to them, for they were allowed more than their highest value.

The court of appeal agree that the transaction is one which so far as Pakenham and Byer, the two partners who were also directors of the limited company, are concerned, cannot stand, and the whole question is whether it can stand as regards the other two members of the partnership, Kendrick and Forsythe, the now respondents, because they were not directors of the company or active participants in the transaction impeached.

The contention is that the agreement has not and ought not to be set aside, but that so far as Pakenham and Byer are concerned they must not, being alike vendors and purchasers, benefit from the transaction, but must be held liable for the $18,000 improperly taken from the limited company while their partners for whom they acted and who, as a consequence of their action, are benefited to the extent of the $18.000 cannot be held liable for it.

I am not able to accept such reasoning. The agreement made by Pakenham and Byer, directors of the company, with themselves as members of the partnership is not and cannot be defended.

It could only have been accepted by a disinterested director under misrepresentation or concealment of the facts, and it is plain to me that such was the case with respect to the director Clark. It does appear to me that if from the nature of their dual positions these two men, Pakenham and Byer, could not be permitted to benefit at the expense of the company and its share-

holders from such an agreement as they attempted to make between the partnership and the company, neither should their co-partners for whom they acted be permitted so to benefit.

If because of misrepresentation of material facts or failure to disclose them or the outrageous character of the bargain or the dual character of their positions or all or any of these things combined the benefits which Pakenham and Byer would have derived as members of the partnership if the agreement was maintained is denied them, surely it must on the same grounds and for the same reasons be denied to those partners of theirs for whom they acted. I cannot understand how these other two partners, the respondents Kendrick and Forsythe, can be permitted to escape liability for a sum of $18,000 while their partners, who consummated and carried out the transaction by which the escape is effected, are held liable for the same sum on the ground that under the circumstances the principles of equity will not permit them to reap and enjoy such unrighteous profits and advantages. The reasoning of the court proceeds, of course, on the ground that the agreement was not and could not be set aside, and that only the active participants in the wrong should be punished, but it omits the vital and cardinal facts that the active partners were the agents of the silent partners throughout the transaction, and that the result of the judgment would be to permit the latter to enjoy the fruits of an unrighteous contract made for them by their active agents and partners.

Pakenham was the one ruling active managing partner in the partnership, and also the ruling active managing director of the limited company. In this dual capacity he sold or attempted to sell the assets of

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the partnership to the limited company at a time when their extreme value was $12,000 for a price so outrageous and absurd ($30,000) that so far as he is concerned it is agreed on all sides and by all the courts it must be set aside and he be held liable for the unjust and improper benefits or profits he attempted to obtain. And so also with regard to Byer. But it is said that because Kendrick and Forsythe were not active participants in the wrong done to the shareholders of the company they are entitled to enjoy the fruits of such wrongful action which they equally shared with Pakenham.

Stripped of all irrelevant matter the facts become plain and simple. Without authority or justification Pakenham on the 31st of October took $30,094.63 of the money belonging to the shareholders of the limited company and paid it to the bank to extinguish the partnership company's debt.

It is contended that in the following month of November the transaction was ratified at a meeting of the directors of the company, four of them being present and two of the four being Pakenham and Byer, and the assets of the partnership agreed to be accepted as consideration for the money paid.

It is quite plain that these two latter were not disinterested or competent directors to bind the company to such a transaction, and it is equally plain that the resolution of the directors at such meeting was not an authority to carry out the transaction, or even a confirmation of it, because it expressly provided that a most important part of the transaction was to be determined upon at a further and subsequent director's meeting.

Such other meeting was, it is contended, held on Jan. 21st, 1903, at which five directors, Pakenham,

Byer, Clark, Morden and Renfrew were present, when it was resolved, Renfrew dissenting, that the agreement in question "should be approved and executed by the different parties."

But Clark, one of the directors, states explicitly, that he voted to approve because he thought he could not help himself being misled by the assurances given him by Pakenham and his solicitor that the limited company was bound to carry the agreement out in furtherance of a previous resolution which the directors had come to in the preceding month of June. It is clear beyond argument that the previous resolution referred to in no sense bound the company or the directors to any such approval or ratification, and that Clark's vote and adhesion were obtained by a clear misrepresentation of the facts.

Then, again, it is equally clear that if Pakenham did not deliberately misrepresent the material facts which the directors ought to have known he failed to disclose those facts to them.

The mischief, however, had at that time been done, the misappropriation of the funds had already taken place, and if the parties to it then desired to obtain the ratification of the company either at a meeting of the directors or of the shareholders of the company, such ratification could only be obtained on a full and plain statement of the true facts being laid before them.

No ratification by the shareholders ever took place. The matter was never laid before them, and the resolution of the directors relied upon as sufficient was passed, not with the facts truly laid before them, but under clear misapprehension and suppression of those facts, if not specific misrepresentation.

Such a resolution so obtained could not operate to

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bind the shareholders or the limited company to any transaction so inequitable, unjust and outrageous as the one now in question, and to me it is inconceivable that any disinterested director with the true knowledge of the facts would have voted such ratification. Renfrew dissented. Pakenham and Byer from their fiduciary relationship to the partnership and the company were disqualified. Clark was misled, and the only remaining director was Morden, the manager of the bank which had advanced the money and to which it was owing.

It must be remembered that while Kendrick and Forsythe had at the expiration of the partnership articles given the clearest notice that they would not be bound for further advances made to the partnership and that they desired to terminate it and put an end to it, they still remained liable for the then existing debts of the partnership of which this $30,094.63 formed part. No notice or determination on their part could avail to relieve them of such liability. The partnership remained in liquidation during the summer and autumn months, and on the 31st of October when the moneys of the limited company were applied by Pakenham in paying off this partnership debt to the bank the liability of the partners existed.

Such appropriation as I have already shewn was quite illegal and improper. It was not, in my opinion, at any time subsequently approved of or legally ratified by the company either in meeting of the directors or shareholders, and that being so I am at a loss to conceive on what principles Kendrick and Forsythe can be held to be released from their liability for this partnership debt or that liability fastened upon the limited company. All parties agree that it was not until the 1st November, 1902, that the incorporated com-

pany took over the property. Up to that time at least the partnership was in liquidation.

Some observations of the Chief Justice of the court of appeal were called to our attention as implying a doubt in his mind whether the rule in *Clayton's Case*(1) could not be invoked to relieve the partners from their liability for the debt to the bank. But it seems to me quite clear that as between the parties to this suit, the shareholders of the limited company acting through the liquidator and the partners of the partnership company, no such rule could have any application. No juggling with figures on the part of the bank and no method of keeping their accounts adopted by them could possibly affect the liabilities, as between themselves, of the parties to this suit. The point was mentioned by counsel, but not pressed or elaborated, and was practically disposed of at the argument, it appearing to be clear from the record that at the trial the liability of the several partners to the bank for the $30,094.63 paid with the money of the limited company was admitted.

The last and remaining contention of Mr. Shepley was that rescission could not be granted in this case, because the parties could not be restored to their original position. There was no dispute as to the general proposition, but its application to the facts of this case was denied, and I have already partially dealt with it. The full value of the assets of the partnership at the date when the $30,094.63 was paid over was allowed to the respondents. They were not prejudiced nor placed in a different position with regard to these assets. Their value was agreed to at the trial and the partnership was allowed full credit for them. The respondents, therefore, are not in a posi-

(1) 1 Mer. 572.

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tion to invoke the application of the principle referred to.

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

IDINGTON J.—The defendants, Pakenham, Byer, Kendrick and Mrs. Forsythe, were partners in a pork packing business.

The Pakenham Pork Packing Company was a joint stock company incorporated under the Ontario Joint Stock Companies Act and organized in April, 1902.

The partnership was heavily indebted to the Standard Bank and relieved themselves by improperly using, in May, 1902, seven thousand dollars of the corporate company's money.

This was done by the simple process of drawing a cheque signed by the hand of Mr. Pakenham upon the corporate company's bank account, and placing it to the credit of the partnership account.

On the 31st October, 1902, the process was repeated, but this time the cheque was for $30,094.63, and was signed by the same Mr. Pakenham's hand in the name of "Pakenham Pork Packing Company, Limited," *per* "Jas. Pakenham, managing director."

In neither case was there any transaction between the partnership and the company that lent any colour of right to such a proceeding. There was nothing but audacity,—or should I say kind philanthropy to aid a hard pressed concern—to justify such an action.

The company went into liquidation and the plaintiff, as liquidator, sued to recover from the partners these moneys.

Mr. Justice Street, who tried the case, gave judgment for the plaintiff, for both sums less a sum of

$12,372, that the parties at the trial agreed had come to the hands of the company, from the goods of the partners, by a later proceeding to which I will refer presently.

The Court of Appeal held he was right in respect of $7,000, but wrong as to the second sum as regards the respondents Kendrick and Mrs. Forsythe.

This is an appeal by the liquidator from such judgment of the Court of Appeal.

It seems that the right of action as to both sums was on the first of November, 1902, complete.

I have abstained thus far from referring to aught else in the case in order that the matter may appear clearly in what I believe to be its true light. It was conceded by the counsel for respondent, Mrs. Forsythe, that there was no bargain by which these takings of the company's money could be justified, at least up to the 31st October, 1902, and possibly the 19th November, when there took place what, with steps following it, he relied upon.

Counsel for Kendrick took the position that, on the 4th of June, 1902, at a meeting of four directors of the company of whom defendants, Pakenham and Byer, were two, a resolution was passed that the company, in consideration of the partners named continuing and carrying on the partnership business until such time as the business could be taken over by the company, the company indemnified and saved harmless the partnership from all loss occasioned by such continuation.

This curious resolution passed at such a meeting of directors composed of two of the men thus indemnified, and only two other directors, when the business of the Board could only be conducted by a quorum of three, needs only these facts to be stated to shew how

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little in law it is worth considering here. No agreement followed it then, or was founded upon it.

The beneficent document was not considerate enough even to promise that the company should get the benefit of the profits, if any, earned by the carrying on of the business.

The company had no more to do with that partnership business than with any other, had never promised to buy it or become bound in any way in regard to it. Proximity and a common parentage were all that lent a colour to the confused notions of the business relations of the partnership and company.

The partners, however, on the 31st of October, 1902, got from the bank their securities which they had given for the partnership debt, and this, undoubtedly, as the result of Mr. Pakenham giving, as already stated, on that date the cheque of the company for $30,094.63.

It was faintly suggested in argument that this man Pakenham was the managing director of the company and hence his co-partners could deal with him in making a bargain such as implied by this transaction.

But there was no bargain nor any pretence of bargain till 19th November following. He had no authority from the company to do what he did on the 31st October, 1902. He had authority from the respondents, as their partner, though in liquidation only, and their adoption of his acts by accepting the results completed a confirmation thereof, if it were needed. The reliance placed upon the later acts of the company's officers as binding, indeed, the only alleged binding thing relied on, presupposes want of authority in Pakenham on 31st October. Yet the respondents held, in the meantime, their surrendered securities, and I repeat thereby confirmed if needed be the

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authority of Pakenham to get for, and bring to them, such valuable documents.

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Both respondents rely upon what took place on 19th November, 1902, and at later meetings, when an agreement professing to be an assignment pursuant to a bargain of the previous July, used in its operative part the words

of the partnership business now being operated by the company as a going concern, together with all the stock in trade in and upon the said premises or in any way the property of the said parties of the first part in connection with the said business, and doth also assign, transfer and set over unto the said parties of the second part all the book debts, claims, demands and choses in action of them and the said parties of the first part arising out of or in connection with the said business carried on under the name of the Pakenham Pork Packing Company other than and except any rights as against the parties of the second part, and the intention and agreement being that the said parties of the second part shall in all respects occupy the position of the parties of the first part in respect of the said business so carried on.

It proceeded to bind the company to pay all the debts according to schedule "A" attached.

No one seemed able to specify these debts and the matter stood over till January, 1903.

The learned trial judge properly, as I think, characterized this as an absurd, outrageously absurd, agreement.

I do not think it necessary to consider it further than to say that I fail to see in it anything that released or in any way abrogated the right of action that had enured to the company the moment their money was on the 31st October, 1902, wrongfully taken from them.

The agreement of July was so amended by consent at the trial as to take away any basis for resting this agreement upon that.

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It does not profess to be a ratification of what Pakenham had presumed to do on the 31st October.

It was sanctioned only by Pakenham, Byer and Clark, of the directorate. The meeting of directors consisted of only four directors. One of them opposed its adoption. Clark explains how he was improperly led by Pakenham to believe the company already bound by the July agreement which obviously they were not.

It required three directors to make a quorum.

I am unable to understand how the action of Pakenham and Byer, sitting as directors and personally interested in the matter, could give vitality thus to what had been done by Pakenham on 31st October even if, though it does not profess to relate back thereto, it could, by intendment of law, be made so to relate back. In fact Pakenham had already presumed on 31st October to take over the stock in trade and all that this professes to assign.

Could he do so? The whole board were by the by-law of the company only authorized

to make or cause to be made for the company any description of contract *which the company may by law enter into.*

That certainly would not have rendered a contract made by all the directors for themselves with the company lawful, without the express sanction of the shareholders.

Nor do I think the resolution of January, 1903, brought about by imposing upon Clark, as he explains, or supported by Morden, under circumstances I need not enlarge upon, but which made him a person deeply interested in not discharging his duty as a director, remedies or rectifies the matter.

I am unable to see how this case where the

directors, or a majority of them, acting, were doing it for themselves, stands any higher that where they all may have done so, in such a supposed case.

And when the result sought is to set up a bargain for $30,000 and for what it was admitted was then worth only about $12,372, one is not apt to infer, in law, any authority, in the minority of one or two disinterested directors to form for fellow interested directors a contract.

It is to be noted that the Ontario Joint Stock Companies Act as amended expressly forbids directors voting on sales by or to themselves, and emphasizes thus what possibly was law before in most cases one can conceive of. I think, however, it may well be held as going beyond the law as it stood before and render *ipso facto* void all contracts resting upon such voting so as to need no rescission.

In this view there is no need of setting aside this agreement. It is, however, as I hold, only necessary to find that it failed in law to set up or place on any legal basis the acts of 31st October, 1902, which cannot be supported.

And as to the supposed difficulty of putting the parties respondent here in the same position as they were before that time, the only difficulty is that created by these respondents and their partners putting assets they had in the control of the officers of the company, and such mistake is easy of remedy by allowing the value of those assets, which was done by the judgment of the learned trial judge.

The disposal of their partnership goods was what respondents say they awaited, and hence less difficulty in this part of the case.

They have disposed of, at no doubt a good price,

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$12,372 worth of what they wanted to sell and dispose of.

The appeal should be allowed and judgment of trial judge restored with costs here and below.

MACLENNAN J. concurred.

Appeal allowed with costs.

Solicitor for the appellant: *S. B. Woods.*

Solicitor for the respondent Kendrick: *James McCullough.*

Solicitor for the respondent Forsythe: *W. S. Ormiston.*

JAMES E. BIGELOW (DEFENDANT)...APPELLANT;

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*Nov. 30,
Dec. 1.
*Dec. 22.

AND

THE CRAIGELLACHIE-GLENLIVET DISTILLERY COMPANY (PLAINTIFFS).................... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of goods — Contract by correspondence—Statute of Frauds—Delivery — Principal and agent — Statutory prohibition—Illicit sale of intoxicating liquors—Knowledge of seller—Validity of contract.

B., a trader, in Truro, N.S., ordered goods from a company in Glasgow, Scotland, through its agents, in Halifax, N.S., whose authority was limited to receiving and transmitting such orders to Glasgow for acceptance. B.'s order was sent to and accepted by the company and the goods delivered to a carrier in Glasgow to be forwarded to B. in Nova Scotia.

Held, affirming the judgment appealed from (37 N.S.R. 482) Idington J. dissenting, that the contract was made and completed in Glasgow.

Where a contract was made and completed in Glasgow, Scotland, for the sale of liquor by parties there to a trader in a county in Nova Scotia where liquor was forbidden by law to be sold on pain of fine or imprisonment and the vendors had no actual knowledge that the purchaser intended to re-sell the liquors illegally, the contract was not void and the vendors could recover the price of the goods.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial by which the plaintiffs' action was maintained with costs.

The plaintiffs carried on business at Glasgow, in

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) 37 N.S. Rep. 482.

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Scotland, as distillers, and appointed sales agents at Halifax, in Nova Scotia, with authority restricted to receiving and transmitting orders, the acceptance of such orders being in the discretion of the plaintiffs' officers in Glasgow. The defendant carried on a trade in liquors in Nova Scotia without the license provided by the "Liquor License Act," R.S.N.S. 1900, ch. 100, and had a place of business at Truro, in the County of Colchester, where the "Canada Temperance Act" was in force. The defendant placed orders for whisky by written memoranda with the plaintiffs' agents at Halifax, and his orders were transmitted in the regular course of business to the plaintiffs in Glasgow. The plaintiffs accepted the orders and shipped the whisky from Glasgow to the defendant at Truro, N.S., and, after he had received the goods, passed drafts upon him for the price with freight added, which were accepted by the defendant upon presentation, but were dishonoured at maturity. The plaintiffs brought the action on the drafts for the price of the liquors sold and the defendant pleaded that the contract was void, having been made in Nova Scotia with the object of enabling him to re-sell the liquors there in contravention of the statutes prohibiting such sales under penalty of fine and imprisonment.

The judgment appealed from affirmed the decision of the judge at the trial maintaining the action and holding that the contract was completed only at Glasgow, upon the acceptance of the orders and delivery of the goods to the carrier, and that there was no evidence to shew that the plaintiffs had any knowledge of the intention of the defendant to re-sell the liquors contrary to law.

Lovett for the appellant. The contract was made at Halifax, N.S., where the agents received appellants'

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orders and, after communicating with the respondents, notified the appellant of the acceptance of the orders on the part of the respondents. See Leake on Contracts (4 ed.) pp. 18, 19, 20, 25. At any rate, the order was never accepted by the respondents except at Truro, N.S., where the goods were delivered. *Taylor* v. *Jones*(1).

The contract comes within the Statute of Frauds, and the place of contract is the place where the written agreement or memorandum was signed, or where there is a delivery and acceptance. *Coombs* v. *Bristol and Exeter Ry. Co.*(2); *Aris* v. *Orchard*(3); *Alderton* v. *Archer*(4). The written memorandum was signed by the appellant in Nova Scotia; the receipt and acceptance of the goods took place at Truro, likewise the acceptance of the drafts with bills of lading attached. The acceptance of the order, if any, was given and despatched by the agents of the respondents from Halifax.

The word "sell" in section 86, chapter 100, R.S. N.S., 1900, should be given its ordinary and popular meaning; and, if any part of the transaction took place in Nova Scotia, the transaction is within that statute. The provision is pointed not only at the contract but at the performance of the contract, including all negotiations leading up to the final delivery of the property purchased. The court should not strain it in order to enforce any other view as to the place where part of the agreement was carried out, if the contract violates the policy of its forum. *Hope* v. *Hope*(5), *per* Turner L.J. See also *Rousillon* v.

(1) 1 C.P.D. 87.
(2) 3 H. & N. 510.
(3) 6 H. & N. 160.
(4) 14 Q.B.D. 1.
(5) 8 DeG. M. & G. 731.

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Rousillon(1); *Kaufman* v. *Gerson*(2); *Green* v. *Van Buskirk*(3).

The authority to the agent was, by its express terms, an authority to sell, and the only limitation (if any) ever placed on that authority, was an understanding that the agents should submit orders to their principal and have the principal's approval before accepting the orders. The evidence does not warrant even this restriction, but, even if granted, it does not affect the sale initiated between the purchaser and the agents, and closed eventually by a communication from the agents to the purchaser.

The payment of freight at Glasgow is of no consequence as regards the place of the contract: *Fragano* v. *Long*(4), *per* Holroyd J.; *Dunlop* v. *Lambert*(5), *per* Cottenham L.C.; *Ross* v. *Morrison*(6); *Werle & Co.* v. *Colquhoun*(7). The acceptance of an offer must be communicated to the offerer or some one authorized by him to receive acceptance; Benjamin on Sales (1891) p. 43; *Emerson* v. *Graff*(8); and where an acceptance is transmitted through an agent the place from which the agent despatches such acceptance is the place of contract; *Ivey* v. *Kern County Land Co.*(9). A carrier is not an agent to accept goods in sales covered by the Statute of Frauds; *Hanson* v. *Armitage*(10); *Norman* v. *Phillips*(11); *Meredith* v. *Meigh*(12); and where goods are to be shipped by water and vendor does not insure or notify vendee so that he has an opportunity to insure goods they

(1) 14 Ch. D. 351.
(2) [1904] 1 K.B. 591.
(3) 5 Wall. 307; 7 Wall. 139.
(4) 4 B. & C. 219.
(5) 6 C. & F. 600.
(6) 36 N.S. Rep. 518.
(7) 20 Q.B.D. 753.
(8) 29 Pa. St. 358.
(9) 115 Cal. 196.
(10) 5 B. & Ald. 557.
(11) 14 M. & W. 277.
(12) 2 E. & B. 364.

remain at risk of vendor; Chalmers (1902), p. 72; Bell's Law of Sales, p. 89.

The contract is invalid if contrary to the laws of the place where it is to be performed; Minor, Conflict of Laws, 401-2 and 418; Westlake, p. 258, sec. 212. Such a sale made in Nova Scotia is invalid as being in contravention of penal statutes prohibiting the re-sale of the whisky; *Brown* v. *Moore*(1). If there was knowledge in the agents or circumstances which fairly put them on inquiry, the principal is affected with that knowledge. They were, by the express terms of the appointment, the sole agents of the principals in respect to the sale of their liquors in Nova Scotia. The orders for such liquors were obtained by these agents and accepted by them and knowledge acquired by them in the course of such duties is the knowledge of their principals; *Ross* v. *Morrison*(2); *Suit* v. *Woodhall*(3); *Backman* v. *Wright*(4).

W. B. A. Ritchie K.C. for the respondents. The evidence proves a contract of sale made in Scotland. The agency did not extend beyond the receiving and transmitting of such orders as might be handed to the agents by persons wishing to purchase goods from the plaintiffs, and no other act was performed. Delivery of the goods was made by the respondents directly to the appellant at Glasgow, and bills drawn upon appellant for the freight as well as the price of the goods. This was the usual course of business between the parties; *Grainger & Son* v. *Gough*(5). Until the prin-

(1) 32 Can. S.C.R. 93.
(2) 36 N.S. Rep. 518.
(3) 113 Mass. 391.
(4) 27 Vt. 187.
(5) (1896) A.C. 325.

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cipal received the orders and accepted or agreed to accept there was no contract; *Finch* v. *Mansfield*(1).

Even persons intimate with defendant's business might not know that he was conducting it illegally, by reason of the fact that he was a wholesaler and conducting a licensed liquor business in Halifax; that he had a perfect right to warehouse his goods in Truro and even to deliver to customers there if sales were made in Halifax; *Pletts* v. *Beattie*(2); and that he also had a right to sell from Truro for delivery in any county in Nova Scotia or the adjoining provinces where there was no prohibitory law in force. Illegality is not to be presumed and there is evidence that defendant carried on his business throughout the Maritime Provinces. Giving the fullest possible effect to the evidence of defendant, it does not shew knowledge on the part of plaintiffs of the existence of the laws in force in Nova Scotia restricting the sale of intoxicating liquors or that the appellant was buying goods for the purpose of re-selling in violation of any law. As the sales were made in Scotland, the respondents were under no obligation to consider whether or not the appellant intended to re-sell the goods in Nova Scotia with or without a license, and, at all events, the sales were not illegal unless made with the intent on the vendor's part that the property, when sold, was to be applied to an illegal purpose; *Pellecat* v. *Angell*(3); *Clark* v. *Hagar*(4); *Finch* v. *Mansfield* (1); *Stephenson* v. *W. J. Rogers, Limited*(5).

(1) 97 Mass. 89.
(2) (1896) 1 Q.B.D. 519.
(3) 2 C. M. & R. 311.
(4) 22 Can. S.C.R. 510 at pp. 531-541.
(5) 80 L.T.N.S. 193.

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THE CHIEF JUSTICE.—I would dismiss this appeal. Mere knowledge by the respondents, in Glasgow, if they had any, that the appellants might, perhaps, intend to re-sell this liquor in defiance of the law of Nova Scotia, is no bar to this action, and the finding by the two courts below that this sale took place in Glasgow is unimpeachable.

A case of *Magann* v. *Auger* (1) in this court, in addition to those cited at bar, may be referred to on this point.

GIROUARD J. concurred in the judgment of the majority of the court.

DAVIES J.—I am of opinion that the appeal should be dismissed and the judgment below affirming that of the trial judge confirmed.

The action was brought to recover the amount of certain bills of exchange drawn by the respondents upon the appellant and accepted by him for the purchase price of certain whisky ordered and received by him from the respondents.

The respondents are Glasgow merchants carrying on business there in the spirits and wine trade. The defendant is a trader carrying on business in Truro, Nova Scotia.

The respondents had agents in Halifax, N.S., whose duties were to receive orders for goods and forward them on to the respondents at Glasgow by whom they were either accepted or refused.

The orders in question in this case were given by the appellant to these agents verbally and were by them transmitted to the respondents who accepted them and shipped the goods as ordered to the appel-

(1) 31 Can. S.C.R. 186.

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lant in Truro, Nova Scotia, by whom they were afterwards received and used.

The freight and charges upon the goods were included with the price of them in a draft drawn upon appellant, accepted by him and returned by him to respondents in Glasgow.

No questions are raised as to the quality or condition of the goods or as to the acceptance of the draft in the usual course of business by the respondents.

The learned trial judge held that under the contract as proved the delivery of the goods to the carrier in Glasgow was a completion of the contract and that the property in them passed on such delivery to the appellant and gave judgment accordingly.

The Supreme Court of Nova Scotia affirmed that finding and judgment.

On appeal here it was contended that the contract was not complete until there was an *acceptance* of the goods by the defendant in Truro and that, under the Statute of Frauds, there was no binding contract until after such acceptance, which having taken place in Nova Scotia the contract must be held as having been *made there,* and being a sale there of alcoholic spirits in violation of the laws in force in that province was void.

I have no difficulty whatever under the facts in holding that the judgments of the courts below were correct.

The Statute of Frauds is invoked, but as there was both an acceptance of the goods and a signature of the purchaser to the acceptance of the draft this statute was complied with.

The only question that was arguable, and it was put with great ingenuity by Mr. Lovett, was that that signature to the acceptance having been made and

the goods accepted in Nova Scotia the contract must be held to have been made there.

On the argument I put this question to the learned counsel. Supposing the defendant had gone to Boston and had accepted the draft there, could it be held that the contract was made in Massachusetts, or, if the defendant had met the plaintiff on the high seas on board one of the transatlantic steamers and had given him $1 as earnest money to bind the contract, would the contract have been held to have been made at sea and governed by the law of the nationality of the ship.

At common law there was undoubtedly, on the acceptance of the order and the shipping of the goods, a good binding contract and the property in the goods immediately passed to the grantee.

The mere fact that the requisites of the Statute of Frauds were complied with elsewhere than in Glasgow did not, in my opinion, operate to change the place where the contract was originally made.

The acceptance of the draft by the defendant and its transmission by him to the plaintiffs in Glasgow operated as a compliance with one of the requisites of the Statute of Frauds, but did not alter in any respect its terms or the liabilities of either of the parties under it. It merely enabled those liabilities to be enforced.

I have read the different authorities cited by the appellant, but cannot find in any of them authority for the position that the mere fact of one of the requisites of the Statute of Frauds being complied with at a place other than that where the contract was made and completed, operated to change the place where that contract was made or defendant's liability under it according to the law of that place.

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The effect of the words in the 17th section of the Statute of Frauds, "no contract," etc., "shall be allowed to be good" is not to make a contract void which does not comply with the provisions of the Statute of Frauds, but merely to render certain evidence indispensable when it is sought to enforce it.

In *Maddison* v. *Alderson* (1), at p. 488, Lord Blackburn says:

> I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract.

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

IDINGTON J. (dissenting).—The case of *Grainger & Son* v. *Gough* (2), so much relied upon in the courts below, and in argument here, does not, I think, touch the point to be decided here.

The point of that decision was that the foreign merchants could not be said to have, within the meaning of the Income Tax Act, carried on business in England though employing agents to solicit orders there.

Lord Herschell put that, at p. 336, thus:

> How does a wine merchant exercise his trade? *I take it, by making or buying wine and selling it again with a view to profit.* If all that a merchant does in any particular country is to solicit orders I do not think he can reasonably be said to exercise or carry on his trade in that country.

These sentences point out clearly what the court there had to decide and did decide.

The questions to be considered there were entirely different from those raised here.

(1) 8 App. Cas. 467. (2) [1896] A.C. 325.

Incidentally some of the questions here presented had to be looked upon there as part of a larger whole.

But the decision of the questions raised here either one way or the other could not have affected the decision there or the reasoning that led up to it.

In this case we have to determine whether or not the plaintiffs' claim rests, in any sense, upon a sale or delivery, by respondents, of liquor in Nova Scotia.

If the entire contract and its performance can be taken out of Nova Scotia then there cannot be said to have been in the contract any violation of the License Act of that province.

The business was done through an agent in Halifax, who had but limited authority.

No matter what the respondents set up now; clearly they thought when establishing the present agent in the Nova Scotia agency in question that he was an agent to *sell*. Their letter authorizing him expressly says:

> We, therefore, hereby appoint you to act as our agents in the sale of our Gaelic and other brands of whisky for the whole of the Province of Nova Scotia on the same terms on which your father, Mr. Eagar, worked.

It is said there was a flat rate price from which the agent could not depart. But respondents might accept, reject or modify, and submit such modification for the customer's acceptance. Four months' credit seems to have been understood. I presume this was from verbal understanding.

There was no written order by letter, cable or in any way, from the appellant to the respondents. Orders both oral and written were given to the agent. None are produced. If any such had been directed to the respondents they would have been produced, no doubt, because the third difficulty the respondents

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had and have is want of compliance with the Statute of Frauds. The agent clearly was not the agent of the appellant, but of the respondents. When he got orders he cabled his principals, in such form as he saw fit, the substance of them.

Neither agent nor customer signed the cables sent. The specimen letter from the agent, produced in evidence, is directed to the respondents, but signed by the agent as if he were a principal.

In no way do these communications bear out the suggestion of the Halifax agent being like a messenger or the post-office formally transmitting what had been entrusted merely for transmission. The agent was not the messenger or other agent of the appellant.

The transformation of the orders, the course of transmission and method of business must be borne in mind in seeking to understand the evidence of the respondents' witness, Holm, which is as follows:

> I say the contract for the sale of said goods was made by defendant, tendering the *order to plaintiffs' agents for transmission by them (the agents) to the plaintiffs in Glasgow, and by the plaintiffs' acceptance in writing conveyed through their agents in Halifax. The goods were sold in Glasgow, Scotland.*

This seems to imply clearly that this was the usual mode of dealing and the acceptance so notified might be either unconditional or with a modification from the usual terms and until such notification to the appellant there was no acceptance of the order and no contract.

Upon notification according to this custom of the appellants, if the acceptance were unconditional they became bound and the contract was complete. Can it be said that a contract so arrived at was not formed in Nova Scotia?

It would seem too plain for argument that such

was the result in that case. And as a result the contract would be void. The witness's swearing in effect to the law does not change the facts.

The next alternative presented is that the respondents did not forward any communication, but proceeded to ship the goods to Truro or Halifax, as indicated either by the order or the course of business-dealing between the parties.

But if the usual course of dealing was, as the respondents, by the evidence I quote, indicate it was, then they were shipped in the absence of a memo.

signed by the parties *to be charged* by such contract or *their* agents thereunto lawfully authorized

solely upon the chance of the appellant's acceptance of the goods on arrival.

They had, by the established course of business as sworn to, no authority from the appellant to rest upon in so shipping.

The appellant, in default of any acceptance notified to him (in the way and manner established between him and the respondents to carry on their business), closing the bargain could have rescinded his order. There was nothing to bind him. There could be no bargain, binding or otherwise, till the notification or the actual acceptance of the goods.

Then such an acceptance ended in the completion as well as the beginning of a bargain in Nova Scotia. It was also the performance of the contract there.

In any way one looks at the matter, either as a contract or its performance, the result is in law fatal to the contract as the basis of an action.

It seems idle to suggest a bargain at common law, as was argued, whereby the Statute of Frauds would or might be excluded.

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It seems clearly settled law that

> the receipt of goods by a carrier or wharfinger appointed by the purchaser does not constitute an acceptance, these agents having authority only to receive not to accept the goods for their employers.

See Benjamin on Sales, p. 153, and cases there cited.

Norman v. *Phillips*(1), where the order was to send the goods to a specified station of the Great Western Railway to be forwarded to him *as on previous occasions,* seems to go much further than needed here, but in common with this includes the element of former course of dealings so pressed upon us in argument.

It is to be observed that the evidence of the respondents' witness already referred to, in answer to the 6th question of cross-examination, states that

> during the business connection between plaintiffs and defendant part of the goods supplied were addressed and delivered at Halifax and part at Truro.

The case of *Coombs* v. *Bristol & Exeter Railway Co.*(2) seems to be conclusive on the point. The purchaser under a verbal agreement to buy of the vendor all the whalebone he could procure at a certain price to be sent by a particular railway, the purchaser agreeing to pay the carriage, it was held that the purchaser could not sue as consignee because the contract was void as within the Statute of Frauds and no title had passed.

The distinction urged here that at common law the contract was good notwithstanding the absence of writing or other requirement of the statute and because the railway could not invoke the statute as it

(1) 14 M. & W. 277. (2) 3 H. & N. 510.

would be presumed the title had passed, was urged and considered there.

It was pointed out in answer in the judgment delivered that the statute expressly says that the contract shall not be good.

There the obvious distinction is also pointed out between such cases, and the cases where, the contract being in writing and therefore valid, the consignee had been held entitled to sue the carrier for the loss of the goods.

Alderton v. *Archer*(1), and *Taylor* v. *Jones*(2), are instructive as tests of where a contract is to be held as made when signed in one place and sued upon in another, or the converse case of a signature to a letter ordering, that *was only accepted,* as in one alternative here, by delivery of the goods ordered at the place where the letter was written.

On the whole I see no reason to doubt that in any way one can look at this claim of the respondents the contract was made and performed in Nova Scotia, and that being void when so made there the appellant should succeed.

The appeal ought, therefore, to be allowed with costs and the action be dismissed with costs of the appeal and in all the courts below.

MACLENNAN J.—The principal question on this appeal is whether or not the goods, for which the bills sued upon were accepted, were sold in Nova Scotia by the plaintiffs, they having no license as required by the provincial law, or whether the sale was made in Glasgow, Scotland.

The goods having been received by the appellant, and he having accepted the bills therefor drawn upon him by the respondents for the price, it was for him,

(1) 14 Q.B.D. 1. (2) 1 C.P.D. 87.

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when now refusing to pay for them, to make out his defence by clear evidence that the sale was void, having been made in Nova Scotia.

I am of opinion that he has not done so, and that the judgment appealed from is quite right.

The plaintiffs were distillers and dealers in whisky, and carry on their business in Glasgow, Scotland, and the defendant is resident and does business at Truro, in Nova Scotia. The plaintiffs had agents at Halifax, in Nova Scotia, named Eager & Son, whose authority was limited to the receiving and transmitting of orders for goods, but having no authority to bind the plaintiffs by accepting them. The orders for the goods in question were received by Eager & Son and transmitted to the plaintiffs. Of these there were three, the first in March, the second in April and the third in May, 1903. The respective shipments were made on the 26th March, the 30th April and the 16th May. The orders were sent by cable. These cables were printed in the case, in cypher, without translation, and we have no means of ascertaining their purport. It appears, however, that the orders were for the specified quantities of goods to be shipped to the defendant at Truro with the required number of capsules and labels, on usual terms and shipping instructions. The goods were shipped according to instructions, freight prepaid, and bills of lading taken, no doubt consigning the goods to the defendant. A bill was drawn for the price of the goods, including the freight, and a small charge for the bill of lading, and, finally, a bill of exchange was drawn on the defendant for the whole and accepted by him.

Now, I think the effect of all this was, in each case, a sale of the goods to the defendant at Glasgow; that the moment the goods were thus shipped the property

therein passed to the purchaser, and the sale became complete.

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It is said that the purchaser had a right to inspect the goods on arrival, and to reject them. No doubt, if the goods were not the goods ordered, he could reject. Otherwise not.

In *Brogden* v. *Metropolitan Railway Co.*(1) Lord Blackburn says:

But I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request, express or implied, that he must signify his acceptance by doing some particular thing, then, as soon as he does that thing, he is bound. If a man sent an offer abroad, saying, "I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must ship the first cargo as soon as you get this letter," there can be no doubt that, as soon as the cargo was shipped, the contract would be complete and, if the cargo went to the bottom of the sea, it would go to the bottom of the sea at the risk of the orderer.

It is said, however, that there is no evidence that the defendants' orders were in writing or conformed to the Statute of Frauds and that, therefore, there was no sale of these goods until they were accepted and received by the defendant at Truro.

I think that is not the effect of the evidence. The defendants lived and did their business at Truro; Eager & Son were at Halifax. The defendant in his evidence says:

All business done with the plaintiffs was done through him (Eager). I did it all. All our orders were given to Eager, either at his office or man at Halifax. These two letters are from Eager—M1 and M2. I received the goods referred to in them and the drafts sued on * * * were for these goods.

The letters referred to are written from Halifax and addressed to the defendant at Truro. The first says:

(1) 2 App. Cas. 666.

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We (Eager & Son) have received from your Halifax office the following order for 10 one-quart casks of Gaelic with the required number of capsules for shipment on through bill of lading to Truro, N.S. We have forwarded the order to Messrs. The Craigellachie Glenlivet Distillery Co.

The other says:

We have forwarded your memos to the following firms asking them to ship to you, etc., etc.

I think the fair inference from the defendants' evidence and from these letters is that the orders referred to were in the form of letters from the defendant, duly signed by him, and which were transmitted to the plaintiffs and the effect of which is stated in these two letters of acknowledgment, marked M1 and M2.

In another passage of his testimony, the defendant says:

The goods for the earlier draft were ordered from our Halifax office. The order, though given in Halifax, I think was given from Truro to our man in Halifax. All the orders for the goods in question were ordered from company's office in Halifax or *by letter* from Bigelow & Hood, Truro, to Eager. I cannot tell which method was employed in these instances.

I think it would be entirely contrary to usage and experience to suppose that these orders were not in writing and signed by the defendant.

Then, it is said that the sale was made in Halifax, inasmuch as the acceptance of the defendant's order was made through Eager, and the evidence of Mr. Holm, a director of the plaintiff company, is relied on, in which he says:

I say the contract for the sale of said goods was made by defendant tendering the order to the plaintiffs' agents for transmission by them (the agents) to the plaintiffs in Glasgow, and by the plaintiffs' acceptance in writing, conveyed through their agents in Halifax. The goods were sold in Glasgow, Scotland.

This is not contradicted either by the defendant or by Eager, and, no doubt, if the sale in question was completed as thus described, it must be held to have been made in Halifax, for there could be no completion while the acceptance of the orders was still in the hands of the plaintiffs' agent and uncommunicated to the defendant. There is, however, no such acceptance in writing produced or proved by the defendant in relation to either of the three shipments in question.

We have seen that the orders were transmitted to the plaintiffs by cable, and it also appears that the shipments were made promptly. The first order was on the 21st of March; shipment, 26th March. The second order, 28th April; shipment, 30th April. And the defendant says the order for the shipment of 16th May was given about that date. Now, if what Mr. Holm speaks of as *acceptance of orders in writing* was transmitted by letter, it could not possibly have been received or conveyed to the defendant until after the goods had been shipped and after the property in them had passed to the defendant by the shipment. On the other hand, even if the acceptance had reached the defendant before the goods had been shipped, still the acceptance would pass no property. The sale would not be complete until goods of the kind sought to be purchased had been appropriated to the contract.

What the statute, section 86, enacts, is that "No person shall sell * * * any liquor * * * without * * * license." Until the goods were shipped there was no *sale*. There was or may have been an *agreement* for the sale of a named quantity, but there was no *sale* of liquor, and, therefore, no completed offence. And the sale must be taken to have been made where the goods were when the property passed

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from the plaintiffs to the defendant, and that was when they were appropriated to the contract at Glasgow.

But, even if there had been no signed orders given by the defendant, a verbal contract of sale is not void, but is good, if followed by acceptance and receipt of the goods.

I am, therefore, of opinion that the appellant's first ground of appeal wholly fails.

But the appellant relies on another ground, that the goods were sold for the purpose of enabling the appellant to re-sell the same in Nova Scotia contrary to law.

I think the vague evidence on which it is sought to support this proposition is wholly insufficient, and I agree with the reasons given by the learned judges in the courts below on this point.

The appellant also placed some reliance on section 173 of the "Liquor License Act," but that section merely makes it unlawful for a *licensee* to sell to an *unlicensed* person if he knows that it is purchased for the purpose of re-selling.

The appeal must be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant: *H. V. Bigelow.*

Solicitor for the respondents: *Thomas Notting.*

THE COUNTY OF INVERNESS (DEFENDANT) .... APPELLANT;

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*Dec. 14.
*Dec. 22.

AND

JAMES McISAAC (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Railway aid — Construction of agreement—Expropriation — Description of lands — Reference to plans—R.S.N.S., 1900, *c.* 99—3 *Edw. VII. c.* 97(*N.S.*).

A municipality passed a resolution by which it agreed to pay for lands required for the right of way, station grounds, sidings and other purposes of a railway as shewn upon a plan filed under the provisions of the general railway Act. At the time of the resolution there were four such plans filed, each shewing a portion of the land proposed to be taken for these purposes and including, in the aggregate, a greater area than could be expropriated for right of way and station grounds under the provisions of the Acts applicable to the undertaking of the railway company. The Legislature passed an Act confirming such resolution. To an action by the owner of the land taken, on an award fixing the value of that in excess of what could be so expropriated, the corporation pleaded no liability on account of such excess and also, that there was no specific plan on file describing the land.

Held, affirming the judgment appealed from (38 N.S. Rep. 76) that the first defence failed because of the Act confirming the resolution and, as to the second, that the four plans should be read together and considered to be the plan referred to in such resolution.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1) affirming the judgment of Mr. Justice Fraser by which the plaintiff's action was maintained with costs.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) 38 N.S. Rep. 76.

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The municipal corporation of the County of Inverness, N.S., passed a resolution, in January, 1902, by which it agreed to aid the construction of a railway by providing and paying for lands, at Broad Cove Mines, required by the railway company for right of way, station grounds, sidings or other railway purposes as included on a plan on file under the provisions of the Acts by which the company had authority to expropriate lands for the purposes of their undertaking. This resolution was confirmed and declared binding upon the municipality by a special statute, 3 Edw. VII. ch. 97 (N.S.). At the time when the resolution was passed there were four such plans filed, as complying with the terms of the general railway Act, each shewing portions of the lands so required; they were supplementary and complementary to each other and, taken together, shewed the whole of the land taken from the plaintiff (about fifty-one acres) in respect of which the present controversy arose. Upon an arbitration two awards were made; the first in regard to the ground occupied by the permanent way and station building, about seven acres, being the maximum which could be expropriated for such purposes under the Nova Scotia general railway statutes; and the second for the remainder of the lands, about forty-four acres, taken from the plaintiff for terminal purposes of the railway at Broad Cove Mines.

The municipality refused to pay the amount of the second award on the ground that the area thus taken was in excess of the quantity of land which might be expropriated under the statutes applicable to the railway, and that no such area being shewn upon any specified plan it, consequently, was not included in the reference made to the plan mentioned in the resolution.

An action to recover the amount of this second award was maintained at the trial by Mr. Justice Fraser, and his decision was affirmed by the judgment now appealed from.

Newcombe K.C. and *A. A. Mackay,* for the appellant.

Mellish K.C. and *H. Y. MacDonald,* for the respondent.

The judgment of the court was delivered by

DAVIES J.—I think this case turns entirely upon the meaning of the resolution passed by the Municipality of Inverness in January, 1902, and which was subsequently, in 1903, confirmed and made law by the Legislature of Nova Scotia.

The previous filing of the plans by the railway company may not have operated to pass the title of the whole fifty-one acres of McIsaac's land, attempted to be expropriated by the railway company, by reason of the limitations imposed upon this mode of expropriation by the general railway Act. I do not find it necessary to express any opinion on this point. But, when the statute of 1903 was passed confirming the municipal resolution and making it a part of the statute law of the province, the question is reduced to the meaning of that resolution and enactment and whether or not they provided for and included the lands of the respondent which the company had clearly attempted to expropriate and take.

As to the actual taking, surveying and fencing of the fifty-one acres there is no doubt, and as to the fyling of a plan by the company, shewing the whole fifty-one acres to have been taken many months before

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the resolution was passed, there is no dispute. The only question argued at length before us was whether this plan so filed could be considered as within the specific terms of the resolution.

Four distinct plans had been filed, and I have no difficulty in acceding to the argument of Mr. MacDonald, adopting, on this point, the judgment of Fraser J., that the whole four plans must be read together as they are capable of being read, each being in some respect supplementary and complementary to the other, and together constituting the plan referred to in the resolution as the railway plan on file. If this is done and the enactment of the resolution construed, as it must be, as a statutory compact, binding alike on the company and the municipality, then all doubt as to the quantity of plaintiff's land taken is at an end.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent: *H. Y. MacDonald.*

In re TRECOTHIC MARSH.

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*Dec. 6, 7.
*Dec. 22.

THE DOMINION COTTON MILLS COMPANY .... APPELLANTS;

AND

THE TRECOTHIC MARSH COMMISSIONERS .... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Construction of statute—"Marsh Act," R.S.N.S. 1900, *c.* 66, *ss.* 22, 66—*Jurisdiction of marsh commissioners—Assessment of lands—Certiorari—Limitation for granting writ—Practice—Expiration of time—Delays occasioned by judge—Legal maxim—Order nunc pro tunc.*

Where a statute authorizing commissioners to assess lands provided that no writ of certiorari to review the assessment should be granted after the expiration of six months from the initiation of the commissioners' proceedings:—

Held, Girouard J. dissenting, that an order for the issue of a writ of certiorari made after the expiration of the prescribed time was void notwithstanding that it was applied for and judgment on the application reserved before the time had expired.

Held, per Taschereau C.J.—That where jurisdiction has been taken away by statute, the maxim *actus curiæ neminem gravabit* cannot be applied, after the expiration of the time prescribed, so as to validate an order either by antedating or entering it *nunc pro tunc;* that, in the present case, the order for certiorari could issue as the impeachment of the proceedings of the inferior tribunal was sought upon the ground of want of jurisdiction in the commissioners but the appellants were not entitled to it on the merits.

Per Girouard J. (dissenting).—Under the circumstances, the order in this case ought to be treated as having been made upon the date when judgment upon the application was reserved by the judge. Upon the merits, the appeal should be allowed as the commissioners had no jurisdiction in the absence of

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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proper notices as required by the twenty-second section of the "Marsh Act," R.S.N.S. 1900, ch. 66.

Per Davies J.—The statute allows any person aggrieved by the proceedings of the commissioners to remove the same into the Supreme Court by certiorari; the claim for the writ on the ground of jurisdiction was either abandoned or unfounded; and the statutory writ could not issue after the six months had expired.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1), setting aside an order made by Mr. Justice Graham, on the application of the appellants, directing that a writ of certiorari should issue to remove into the said court the record and proceedings of the Board of Commissioners for the Trecothic Marsh assessing a rate upon the lands of the appellants for expenses incurred in the drainage and dyking of the marsh.

The rate in question was made by the commissioners under the authority of the "Marsh Act," R.S. N.S., 1900, ch. 66, which gives power to commissioners appointed under its provisions to levy rates for the cost of the works upon the proprietors of lands interested in the drainage and dykes. Section 22 of the Act imposes the condition that, in cases where it is necessary or expedient to borrow money to carry out the works, notice should be given to the proprietors before undertaking the expense. The 74th section provides for a review of the proceedings of the commissioners upon certiorari, on the application of any proprietor considering himself aggrieved, but forbids the granting of any such writ of certiorari except within six months next after the initiation of the proceedings or notice that they are being taken.

The company applied for an order to have the record and proceedings removed into the Supreme Court, by way of certiorari, within the time pre-

(1) 38 N.S. Rep. 23.

scribed, but the judge reserved his judgment upon the application and made the order for the issue of the writ only some days after its expiration. The judgment now appealed from set aside the order upon the merits of the case, holding that the assessment upon the lands of the appellant had been properly imposed. The questions at issue upon the present appeal are stated in the judgments now reported.

W. B. A. Ritchie K.C. and *Sangster* for the appellants.

Newcombe K.C. and *Mellish K.C.* for the respondents.

THE CHIEF JUSTICE.—In this case a majority of the court have come to the conclusion that the appeal be dismissed upon the ground that the order granting the writ of certiorari at the instance of the appellant company was issued after the expiration of six calendar months contrary to section 74 of the Act in question, which decrees that any proprietor aggrieved by any proceeding of a commissioner may remove the same by writ of certiorari into the Supreme Court, but that no such writ shall be granted except within six calendar months next after such proceeding was taken, or the proprietor had notice that it was taken.

I would not dissent from the proposition that, after the six months, the jurisdiction to issue the writ was gone, and that the judge in this case was *functus officio*, if the demand for a certiorari had not been based upon the want of jurisdiction in the commissioners. *Threadgill* v. *Platt*(1); *Credit Co. Ltd.* v. *Arkansas Central Ry. Co.*(2); *per* Strong J. in

(1) 71 Fed. Rep. 1. (2) 128 U.S.R. 258.

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The Chief Justice.

Ontario & Quebec Ry. Co. v. *Marcheterre*(1); *Canadian Mutual Loan and Investment Co.* v. *Lee*(2).

I would also assent to the proposition that the maxim *actus curiae neminem gravabit* cannot be applied so as to confer a jurisdiction that has been expressly taken away by statute. *Cumber* v. *Wane*(3). I also agree that, where the time has expired, a court cannot give itself jurisdiction by antedating its judgment and ordering it to be entered *nunc pro tunc*. That would clearly be overriding the statute and defeating the intention of the law-giver. A court could not so indefinitely extend its jurisdiction in opposition to the law.

I would think in this case, however, that the writ of certiorari was rightly issued on the ground that a statute taking away the writ, like this one does, after the six months, has no application when the judgment or proceedings of an inferior tribunal are impeached, as here, for want of jurisdiction in that tribunal.

I will, however, not dissent from the judgment dismissing the appeal, as I am of opinion that the appellants' grounds of complaint against the assessment in question are unfounded. It is with great hesitation that I would, on a statute of this nature, interfere with the conclusion of the provincial court.

I deem it inexpedient to review here the various questions raised by the appellants as, under the circumstances, any expression of opinion by me thereon would be *obiter*.

The appeal is dismissed with costs.

(1) 17 Can. S.C.R. 141.

(2) 34 Can. S.C.R. 224.

(3) 1 Sm. L.C. (11 ed.) 338.

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GIROUARD J. (dissenting).

As I understand this appeal two questions present themselves; First: Was the writ of certiorari granted within the prescribed time? 2ndly: Were the commissioners acting within their jurisdiction?

The powers of these commissioners are defined in the "Marsh Act," ch. 66, of the Revised Statutes of Nova Scotia, 1900, which deals with those large and valuable tracts of land in Nova Scotia which have been reclaimed from the sea by means of dykes since the days of the French Acadians. Commissioners were appointed and levied a rate upon the proprietors interested, among others the Dominion Cotton Mills Co., now appellants. They applied for a writ of certiorari under section 74 of the said statute. Sub-section 2 contains, however, the following limitation:

> No such writ shall be granted except within six calendar months next after such proceeding was had or taken, or the proprietor had notice that it was had or taken.

Before the expiration of the six months, the appellants applied for the granting of the writ of certiorari to a judge of the Supreme Court of Nova Scotia, as provided by the Act, but his Lordship took the case *en délibéré* and granted the writ after the six months had expired. No objection was raised in the two courts below, and for the first time it is raised in this court.

I do not look upon it as affecting the jurisdiction of the court of first instance, but as a mere matter of procedure which could be and was in fact waived. At common law, the court of first instance could always issue a writ of certiorari to bring before it the proceedings of an inferior court like that of those commissioners. Its jurisdiction was not created by the "Marsh Act," it was simply limited, and if the parties

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interested do not in proper time take advantage of this limitation they must suffer for it. The majority of this court is of opinion that the objection is well taken, but, with due respect, I cannot accede to that decision. I respectfully submit that it is contrary to the well-settled jurisprudence of this country and of this court. *Attorney-General* v. *Scott*(1); *Couture* v. *Bouchard*(2); *Danaher* v. *Peters*(3); *St. James Election Case*(4); *The Queen* v. *Justices of County of London*(5).

I will content myself with making a short quotation from the decision of this court in *Danaher* v. *Peters*. In that case the statute was imperative, as in this case:

> All applications for a license, etc. *shall* be taken into consideration etc. not later than the first day of April.

It was held that licenses applied for before, but granted after, that period were not invalid. To decide otherwise would be simply a denial of justice. The appellants were within their rights when they applied within the six months, and if the judge chose to keep the case before him after that period, either one day, or several days, or several weeks, or several months, the appellants should not suffer for it, as was held in the *Attorney-General* v. *Scott*(1):

> In a case like this, parties cannot be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the day that the case was taken *en délibéré*,

And, with regard to prescription, I may add that it is suspended from the day the court or judge is duly seized of the subject matter.

(1) 34 Can. S.C.R. 282.
(2) 21 Can. S.C.R. 281.
(3) 17 Can. S.C.R. 44.
(4) 33 Can. S.C.R. 137, at p. 143.
(5) (1893) 2 Q.B. 476.

Having taken this view of the first question raised I now come to the merits. I am of the opinion that under section 22 of the "Marsh Act," the commissioners could not proceed, as they knew that it would be necessary to borrow money for the purpose of paying for the expenses of the work. The following are the words in the said section, par. 1:

> And in all cases in which the work is such that it will be necessary or expedient to borrow money for the purpose of paying for the expenses of such work, he shall give notice to the proprietors of his intention to execute such work one month before commencing the same.

He is bound, then, to provide the clerk with a description of the proposed work and of the land proposed to be benefited, and an estimate of the cost of the work, and upon that, within a month the proprietors may signify their assent or dissent in writing, and if this is not done the commissioners cannot proceed any further. It is admitted that this condition precedent for the jurisdiction of the commissioners was not complied with, and for that reason the writ of certiorari should be granted, and finally all the proceedings of the said commissioners set aside.

I would, therefore, allow the appeal with costs.

DAVIES J.—While I agree that this appeal must be dismissed on the ground that the certiorari was not granted until after the expiration of the six months prescribed by statute, I do not wish to be considered as expressing any opinion upon the legality or otherwise of the proceedings impeached, excepting in so far as they invoke the question of jurisdiction.

The grounds upon which the application was made were many and various. Two of them only raised the question of jurisdiction. One of these was that the

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lands sought to be taxed were not marsh lands within the meaning of the Act, and the other that the work done for which the rate was levied was done by persons purporting to act as commissioners in charge who had no authority or jurisdiction. On both of these grounds the judge to whom the application was made refused to grant the writ. No appeal was taken from that refusal by the Dominion Cotton Mills Co. The second ground was not argued before us, evidently having been abandoned after the judgment of the Supreme Court of Nova Scotia affirming the decision of the trial judge upon it. The first ground, however, as to the lands not being marsh lands at all was argued by Mr. Ritchie. I do not stop to inquire whether, not having appealed from the refusal of the judge to grant the writ on this ground, the point was open to him upon this appeal. It is sufficient to say that I fully concur with the judgment of the court below upon it approving the decision of the trial judge.

All questions of jurisdiction being removed those remaining were questions of the regularity and justice or otherwise of the proceedings. First, did the 74th section of the Act prohibiting the granting of a writ under the statute after the expiration of six months apply to this application; secondly, if it did not apply, were there merits justifying the granting of the writ under the statute?

On the first point the question whether the legislature intends a provision of a statute to be imperative or directory must depend in each case upon the language used and upon the scope and object of the statute.

Most of the decisions, therefore, on other acts, to which our attention was called, or to which we have

referred, furnish us with little, if any, assistance, and do not affect the decision which I have reached.

The case of *The Queen* v. *Justices of County of London*(1), is perhaps the strongest in respondent's favour. But, as observed by Kay L.J. at p. 496, the section 42, sub-section 13 of the Act there under consideration,

> only incidently mentioned the day before which all appeals should be determined. There is no express enactment that all appeals should be determined before that day nor that any appeal not then determined shall not be determined at all.

The 74th section of the Act, chapter 66 of the Revised Statutes of Nova Scotia, 1900, the meaning of which we have to determine, is as follows:

> 1. If any proprietor is aggrieved by any proceeding of a commissioner or commissioners or of any person purporting to act under the provisions of this chapter, he may remove such proceeding into the Supreme Court by means of a writ of certiorari.
>
> 2. No such writ shall be granted except within six months next after such proceeding was had or taken or the proprietor had notice that it was had or taken.
>
> 3. No such writ shall be granted until the proprietor has given the security required upon issuing writs of certiorari in other cases.
>
> 4. Any proceedings so removed into court may be examined by the court or a judge, and such determination made as is proper.
>
> 5. The court or judge may from time to time remit the proceedings to the commissioner, or other person purporting to act under the provisions of this chapter, for reconsideration, with all necessary directions, and the same shall be so reconsidered.

Here the application for the writ was made before the six months had expired, but the writ was not granted or allowed till after the expiration of the prescribed period.

Complete supervisory powers were by the fourth and fifth sections given to the court or a judge, and the amplest provision made for obtaining a proper deter-

(1) [1893] 2 Q.B. 476.

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mination by the court, for correcting irregularities in the procedure and for protecting the interests of any proprietor who thought himself aggrieved by any proceedings of the commissioners.

But it is obvious that the legislature thought it necessary to impose a time limit upon the exercise of these powers by the court otherwise there would never be finality in the proceedings or that complete confidence which would enable the commissioners to proceed with heavy expenditures or to borrow the necessary capital to carry out contemplated improvements. The sub-section, it will be observed, does not prescribe any time within which the application for the writ must be made, but one after which the writ must not be granted.

Having regard to the whole scope, operation and intention of the Act and of the peremptory and negative words of sub-section 2, I am of opinion (questions of jurisdiction not being involved) that it was not in the power of the judge to grant the writ applied for after the six months had expired.

I would, therefore, dismiss this appeal with costs.

IDINGTON J.—The appellants applied to Mr. Justice Graham of the Supreme Court of Nova Scotia for a writ of certiorari which he granted on the 11th November, 1904, to remove into said court a certain record of a rate made on the 21st of March, 1904, by a Board of Commissioners for Trecothic Marsh purporting to have been made pursuant to power conferred upon them by "The Marsh Act" of Nova Scotia.

Upon appeal to the said court *en banc* the order granting said writ was set aside. From this the appellants have appealed to this court, and amongst other answers made to such appeal is the objection that sec-

tion 74, sub-section 1, of said Act, giving the right to such writ is restricted by sub-section 2, as follows:

> No such writ shall be granted except within six calendar months next after such proceeding was had or taken, or the proprietor had notice that it was had or taken,

and that notice of the rate was given appellants on 30th March, 1904; and, therefore, in either alternative of this sub-section the six months had expired before the writ was actually granted.

It seems that the notice of application for writ was within, and the time named therein for return of the notice was well within, the six months in question.

By reason of the necessary enlargement of the motion it would seem the motion was not heard until the 30th of September, 1904, as appears from the filing of the appellants' affidavits in reply.

It was hardly possible for the learned judge under such circumstances to have heard and considered all the material before him, and now before us, and have given a well-considered judgment in a rather complicated matter within the time.

If the time for judgment granting the writ fell beyond the limit of six months allowed, it seems clear that the appellants have only themselves to blame and cannot shove responsibility for it upon the court.

It seems, therefore, as if the case fell within the line of cases, where the applicant has failed in so many cases, because he had not complied with the terms, that the legislature had prescribed for him, to exercise a right within.

Indeed the appellants would seem to have very little excuse, for they must be taken to have known through their manager and otherwise, I infer, that such expenditure at their door was being made upon these works, as would require from them, as well as

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others, pretty heavy contributions for the work in question, and that money would need to be borrowed to repay such expenditure, and that the whole proceedings were at least highly irregular and possibly beyond the jurisdiction of the commissioners, and that in all probability the commissioners were relying upon that notice and probable knowledge of the appellants, without any very distinct protest or opposition from them.

The initial step, to go on with the work, on a scale that, after repeated failures, must have plainly meant, to ordinary business men, a borrowing of money, made it the duty as soon as that step was placed on record as it was by the commissioners in May, 1902, to object and resist, if they intended ever to do so, the commissioners so proceeding without jurisdiction. That was a proceeding that the appellants could have attacked by means of a writ of certiorari, or other obvious and effective means the law gives those concerned to keep public authorities, such as these commissioners, within the limits fixed by law for the discharge of their duties.

Whether all this and more that was done may amount in law to such acquiescence on the part of appellants as to be an answer to them challenging here or elswhere this burthensome tax I need not inquire or say here.

It seems to be a very complete answer, however, to the case of hardship if that alone could, as it cannot, avail to help in the construction of this statute.

It is to indicate, that in my opinion there is not the slightest reason for such appellants urging that they might have been entitled to claim judgment some time before midnight of the 30th September in a case argued on such date, that I refer to these facts.

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The case falls well within the principles laid down by Lord Esher in *The Queen* v. *Justices of County of London*(1), at p. 488. And the giving effect to the objection that appellants were too late does not involve any interpretation of the statute, in such a way as to lead to manifest public mischief, such as Bowen L.J., at p. 492 of the same case submits must, if possible, be avoided in trying to interpret statutes.

The sub-section 2 which I quote above is of the most imperative character possible, and prohibited the granting of the writ, at the time it was done, unless some such principle as the last named judge adverts to, becomes applicable, as I conceive it did not under the facts in this case.

When we consider the scope of the Act, the manifest intention to prevent appeals of any kind, the great importance of avoiding delay and enabling the financial arrangements in such cases to be completed at the earliest possible date, and that the entire working of the Act rests upon the commissioners being kept within the lines of power given them, and so ready a means as the writ of certiorari is expressly given for that purpose, in such wide comprehensive terms, we see the need for the imperative terms of the Act, and need for exacting compliance with them.

If the acts done by the commissioners had not in themselves any efficacy in law and have not acquired efficacy by reason of the acquiescence of the appellants as evidenced by their acts and omissions, then there is less reason to look for another than the plain ordinary meaning of sub-section 2 in order to prevent them producing manifest absurdity or a denial of natural justice.

(1) (1893) 2 Q.B. 476.

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On the other hand if the things complained of were technical rather than going to the root of the matter then no harm done. Maxwell on Statutes, p. 9, says:

> So if an Act provides that convictions shall be made within a certain period after the commission of the offence, a conviction made after the lapse of that period would be bad, although the prosecution had been begun within the time limited, and the case had been adjourned to a day beyond it, with the consent, or even at the instance, of the defendant (*a*). So, when an Act gives to persons aggrieved by an order of justice a certain period after the making of the order for appealing to the Quarter Sessions, it has been held that the time runs from the day on which the order was verbally pronounced, not from the day of its service on the aggrieved person.

What he thus says is borne out by at least two of the cases, *Rex* v. *Bellamy*(1), and *Rex* v. *Tolley*(2).

The more recent case of *Re Nottawasaga and Simcoe*(3) in the Court of Appeal for Ontario, seems much in point as giving effect to the word "shall" under an interpretation Act similar to that governing its use in Nova Scotia legislation and in relation to the action or want of action on the part of a judge relative to the cognate matters of assessment in Ontario.

These authorities seem to go much further than we need to go in the disposal of this appeal.

I think the appeal should be dismissed.

I am in doubt on the question of costs because it seems the point now taken and given effect to was not taken below or here until taken in argument of the appeal though something like it is raised in another sense in respondents' factum.

MACLENNAN J.—I concur in the judgment dismissing the appeal with costs.

(1) 1 B. & C. 500.
(2) 3 East 467.
(3) 4 Ont. L.R. 1.

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Appeal dismissed with costs.

Solicitor for the appellants: *H. W. Sangster.*

Solicitor for the respondents: *W. M. Christie.*

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*Dec. 7,
9, 11.
*Dec. 22.

ANTHONY J. MADER (PLAINTIFF)..APPELLANT;

AND

THE HALIFAX ELECTRIC TRAMWAY COMPANY (DEFENDANTS).. } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Trial—Finding of jury—Exercise of statutory privilege.

Where on the trial of an action based on negligence questions are submitted to the jury they should be asked specifically to find what was the negligence of the defendants which caused the injury; general findings of negligence will not support a verdict unless the same is shewn to be the direct cause of the injury.

Where a street car company has by its charter privileges in regard to the removal of snow from its tracks and the city engineer is given power to determine the condition in which the highway shall be left after a snow storm a duty is cast upon the company to exercise its privilege in the first instance in a reasonable and proper way and without negligence.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the plaintiff and ordering a new trial.

The plaintiff is a physician residing and practising in the City of Halifax and enjoying an income from his practice of about $10,000 per annum. The respondent is a company operating an electric tramway in said city. The action is brought to recover damages for injuries received by appellant on the 15th of February, 1904, by reason of being thrown out of his sleigh in crossing respondents' track on Cunard

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

Street in said city. The writ was issued on the 27th day of June, 1904.

At the time of the accident there was considerable snow on the street, the deep snow having been cleared by respondents of their track, leaving steep banks on each side.

The rules in the schedule to respondents' Act of incorporation (Nova Scotia statutes, 1895, ch. 107) are by the Act made part of same and Rule 9 is as follows:

"The company may remove snow and ice from its tracks, or any portion of them, to enable it to operate its cars, provided, however, that in case said snow and ice shall be removed from its track, it shall be its duty to level it to a uniform depth to be determined by the city engineer, and to such a distance each side of the track as the said engineer shall direct, or to remove from the street all snow and ice disturbed, ploughed, or thrown out by the plough, leveller or tools of the company within forty-eight hours of the fall or disturbance of said snow or ice, if the city engineer shall direct."

The action was tried at Halifax before the judge in equity (Mr. Justice Graham), with a jury, on the 21st and 22nd days of November, 1904. The questions submitted to the jury and their answers thereto are as follows:

1. Q. Was the accident caused by snow removed by defendant company from its track and left on the street without being levelled in accordance with a determination of the city engineer? A. Yes.

2. Q. Had the snow thrown from the defendants' track at the crossing in question been removed and levelled by the defendant company to the satisfaction

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of the city engineer at the time of the accident? A. No.

3. Q. Did the defendant company exercise reasonable care in regard to the condition in which it left the street at the crossing in question when disturbing snow to clear its track? A. No.

4. Q. Other than the amount of a compensation for the service of the medical practitioners at what sum do you estimate the damages? A. Seven thousand, one hundred and twenty-two dollars and forty cents.

5. Q. What sum do you allow as a reasonable compensation for the services of the medical practitioners? A. ($250.00) Two hundred and fifty dollars.

Counsel for the respondent moved on the trial after the verdict was rendered for judgment irrespective of the findings, but the learned trial judge decided that appellant was entitled to judgment for the damages assessed ($7,342.40) and costs.

The respondents moved for a new trial and also appealed from the decision of the trial judge refusing to enter judgment for respondent.

The motion and appeal were heard by a court consisting of Meagher, Fraser and Russell JJ., and the decision of the majority of the court was read by Russell J., and was to the effect that the appeal be dismissed, but the motion for new trial allowed and all the findings of the jury set aside. Meagher J. dissented from the decision on the motion.

From the judgment ordering a new trial the present appeal is asserted. The defendants took a cross-appeal claiming a nonsuit as moved for in the court below.

Borden K.C. and *W. B. A. Ritchie* K.C. for the appellant.

Newcombe K.C. and *Mellish* K.C. for the respondents.

The judgment of the court was delivered by

DAVIES J.—We are all of the opinion that this appeal should be dismissed. The Supreme Court of Nova Scotia set aside the findings of the jury and directed a new trial to be had, and in view of that I will abstain from making any remarks upon the case or the evidence at the former trial which could possibly prejudice either party.

The trial judge directed judgment to be entered upon the findings of the jury. He did not profess to supplement their findings by any additional finding of fact of his own. We are, therefore, relieved from considering the question raised at the argument whether he could under the "Judicature Act of Nova Scotia," in a case such as this, where a jury had been applied for and granted and specific questions put to them, supplement their findings on these questions by findings of his own.

I think the first question, in the form in which it was put, open to the criticism passed upon it by Russell J. in delivering the judgment of the court, and that it might well have misled the jury. I think also that the third question and answer are fatally defective because they do not shew any necessary connection between the general negligence found by the jury and the plaintiff's accident. Nor do I think that any such connection could be fairly and necessarily inferred from all the findings together.

It is elementary law that a defendant cannot be

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held liable for any act of negligence he may have been guilty of unless such negligence be the direct and proximate cause of the plaintiff's injury.

In a case such as this the jury should be asked specifically to state what the negligence of the defendant company was which caused the plaintiff's injury. Mere general findings of negligence, unless such negligence is shewn and found to be the direct and proximate cause of the injuries complained of, are quite insufficient to support a judgment.

The defendant company has the statutory right or privilege of removing snow and ice from its tracks to enable it to operate its cars, and Rule 9, which is comprised together with other rules in a schedule attached to and made part of the company's charter, gives the city engineer full power to determine whether the snow so removed from the car tracks shall be taken away from the street altogether or levelled to a uniform depth for such a distance each side of the track as the engineer may determine.

But apart altogether from this rule, but at the same time not inconsistent with it, there is a duty cast by law upon the Electric Company to carry out their statutory privilege in the first instance in a reasonable and proper way, and without negligence. If after or during a snow storm or at any time they remove snow and ice from their track and throw it upon the part of the highway adjoining the track in a careless and negligent way, or leave it piled or heaped or placed upon the highway in a negligent way or manner, and an accident is thereby caused to any person lawfully using the highway the company would be clearly liable. This, of course, would be subject to proof of contributory negligence on the part of the injured person and the finding that their negligence in the

way and manner of placing the snow and ice upon the roadway was the direct and proximate cause of the injury. This is a matter entirely apart from any determination of the engineer as respects the uniform levelling of the snow and ice or its entire removal.

The questions that naturally arise in this case are: Was there such negligence as I have spoken of, and was it the direct cause of the plaintiff's injuries? and also, in case these questions are found in the negative: Did the engineer come to a determination with reference to the disposition of the snow and ice on this roadway in question and did he communicate it to the company? If so, did the company carry out his orders in a reasonable, careful and proper way? If not, in what respect did they fail to obey the orders or negligently carry them out, and was this failure or negligence the direct cause of plaintiff's injuries?

If the dangerous condition of the street at the time of the accident arose from other causes than the negligence of the defendant company, such, for instance, as the street traffic in changing climatic conditions causing ridges of snow and ice, or the action of the adjoining householders in throwing snow and ice from the sidewalk into the street, of course the company could not be held liable.

These are questions a jury is peculiarly qualified to answer and I have no doubt, with the experience gained in the first trial, questions will be framed in such a way as to enable a satisfactory and final disposition of the case to be made.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Henry C. Borden.*

Solicitor for the respondents: *W. H. Fulton.*

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*Nov. 28-30.
*Dec. 22.

THE BRITISH AND FOREIGN BIBLE SOCIETY............ APPELLANTS;

AND

FREDERICK TUPPER AND EDWIN DICKIE........................ RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Promoter—Evidence—Testamentary capacity.

Where the promoter of, and a residuary legatee under, a will executed two days before the testator's death and attacked by his widow and a residuary legatee under a former will, the devise to the latter of whom was revoked, failed to furnish evidence to corroborate his own testimony that the will was read over to the testator who seemed to understand what he was doing, and there was a doubt under all the evidence of his testamentary capacity, the will was set aside.

Girouard J. dissenting, held that the evidence was sufficient to establish the will as expressing the wishes of the testator.

Per DAVIES J.—The will should stand except the portion disposing of the residue of the estate, the devise of which, in the former will, should be admitted to probate with it.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment of the judge of probate for Colchester County by which a will of Abraham N. Tupper was set aside.

These proceedings were instituted in the Court of Probate for the Count of Colchester, N.S., at Truro, under the provisions of section 34 of the "Probate Act" (N.S.) which provides that any executor may be required by any person interested in the estate to

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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have the will proved in solemn form. The testator, Abraham N. Tupper, who died on the 23rd day of February, 1902, left a will bearing date February 20th, 1902, also one bearing date September 4th, 1901. In the will of 20th February, 1902, the testator named his wife, Harriet N. Tupper, executrix, and the respondents, Frederick Tupper and Edwin Dickie, executors, and these proceedings for proof in solemn form of that will were instituted by the testator's widow.

The learned judge of probate pronounced against the will of 20th February, 1902, upon the ground that, in view of such will having been prepared by Frederick Tupper, who was one of the residuary legatees named therein, and of the doubtful capacity of the testator when instructions were given for the will, and entire incapacity at the time when it was executed, those seeking to establish the will had not done so by evidence of the clear and unquestionable character required in such cases, and he decided, therefore, that the will should not be admitted to probate. On appeal to the court *en banc* this judgment was set aside and the will of February, 1902, declared to be valid and the last will of the testator. The appellant society were residuary devisees under the former will of 1901, and parties to the proceedings in the probate court.

W. B. A. Ritchie K.C. for the appellants.

Newcombe K.C. and *Mellish K.C.* for the respondents.

THE CHIEF JUSTICE (oral.)—The appeal should be allowed and the judgment of the probate court restored. The appellants' costs on the appeal to the

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Supreme Court of Nova Scotia and on the appeal to this court should be allowed against Frederick Tupper personally.

GIROUARD J. (dissenting).—It seems to me, on the evidence, that in February, 1902, the deceased intended to and did make a new will purporting to dispose of his entire estate. The majority of this court proposes to reject this new will as invalid, as there is a suspicion that attaches to it, and which, in their opinion, has not been cleared up. The court *en banco* has unanimously found against the appellants, reversing the ruling of the probate judge who had held that the last will and testament of the deceased was a former one made in September, 1901.

At no time in the courts below did any one of the parties imagine that the court would make a third will out of the two made by the testator, as suggested by my brother Davies. The parties contesting the last will, and claiming under the first one, did not set up any such contention in any contestation or argument.

The probate judge did not suggest any such adjustment. He rejected the last will *in toto*. Taking his view of the evidence I doubt that he could have rendered a different decree. The full court of Nova Scotia understood the fact in a different light and restored the last will of February, 1902.

Taking the view of the facts proved in the case as expressed in the strong opinion of Mr. Justice Graham, in which I concur, I am of the opinion that the whole of the last will should prevail, and I would dismiss the appeal with costs.

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DAVIES J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia (Fraser J. *hesitante*) reversing the decision of the county court judge for the County of Colchester (N.S.), acting as probate judge, refusing to admit to probate a will purporting to be that of the late Abraham N. Tupper, bearing date the 20th February, 1902, three days before his death.

The learned trial judge pronounced against the will of February 20th, 1902, upon the ground that, in view of such will having been prepared by Frederick Tupper, who was one of the residuary legatees named therein, and of the, at least, doubtful capacity of the testator when instructions were given for the will, and entire incapacity at the time when it was executed, those seeking to establish the will had not done so by evidence of the clear and unquestionable character required in such cases, and the learned judge concludes his judgment by saying:

> Not being, therefore, judicially satisfied that this will is the true last will and testament of the deceased, I think that it should not be admitted to probate and so direct.

The judgment of the trial judge and also that of Graham J., who delivered the judgment of the Supreme Court of Nova Scotia, are very voluminous and exhaustive. The latter judgment reviews all the facts and the conclusion is that any suspicions which may have been aroused as to the will of February 20th, 1902, not expressing the true mind and desire of the testator because of its having been prepared by his brother Frederick Tupper, who was a large beneficiary under the will, were sufficiently satisfied and allayed by the circumstances of the case and by the evidence of the draftsman beneficiary Frederick Tupper.

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The will of 20th February, 1902, was contested by his widow, Harriet N. Tupper, his adopted daughter, Matilda Tanner, and also by the appellant the British and Foreign Bible Society and the Congregational Church of Truro, but the only contestant appealing to this court is the Bible Society.

The Bible Society and the Congregational Church were residuary legatees under a previous will made about five months before his death, viz., on the 4th September, 1901, and which was produced in evidence and proved.

The latter will of 20th February, 1902, did not profess expressly to revoke the former one of 4th September, 1901, and as I shall hereafter shew only did so impliedly in so far as the provisions of the latter will altered or were inconsistent with the former one.

The testator at the time of his death was seventy-six years of age. He left no issue but had an adopted daughter, Matilda Tanner, now a widow, who, with her daughter Gladys, aged about ten, lived with the testator and his wife as part of the family.

The testator was one of the leading supporters of and contributors towards the Congregational Church at Truro, and was secretary of the British and Foreign Bible Society at Truro, in which he had always been greatly interested and to which he had frequently expressed his intention of leaving a portion of his property. At the time of the execution of the will of the 4th September, 1901, the testator was in good health and of strong testamentary capacity. The will which he then executed was one drawn by himself and in his own handwriting. The evidence was clear and strong that his interest in and warm sympathy with the Bible Society and the Congregational Church had continued unabated until his death, and

that on the other hand the relations between himself and brother had been for some time past very cool, if not strained. They seldom exchanged visits or saw each other.

There were substantial differences between the two wills which need not be set out at length. Under the former will neither Frederick Tupper nor his sister, Mrs. Fulton, got anything. They were not even mentioned in it. Under the latter they each got one of his farm properties. The farm devised to Frederick was valued at about two thousand dollars ($2,000), and the lot devised to Mrs. Fulton at about five hundred dollars ($500), and these two Frederick Tupper and Mrs. Fulton, in addition to the specific devises to them, *were substituted as residuary devisees in the places of the Bible Society and the Congregational Church.* There was also a substantial difference in the provisions made for his adopted daughter and grand-daughter, those in the first will being very much more favourable to them.

The entire value of his estate was agreed to be about $10,000.

Inasmuch as Mrs. Tupper, the widow, only had a life interest in the property left for her support the value of this residuary devise would be dependent upon the time of her death, and if that happened soon after her husband's death would be *very large* having reference to the value of the whole estate.

Having reached the conclusion concurred in by both courts below, that the evidence as to undue influence and want of testamentary capacity was not strong or conclusive enough to justify the setting aside of the last will, I do not deem it necessary to go at any greater length than I have done above into a discussion of the differences between the two wills.

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The questions at issue here are, I think, reduced to the one whether or not the evidence in support of this will in favour of which the court is asked to pronounce, and under the terms of which the writer of the will became entitled to such substantial benefits, is sufficient to satisfy the court judicially that the paper does express the true mind and will of the deceased.

So far as the devise of the farm to Frederick Tupper is concerned, and so far as all the other parts of the will are concerned down to, but not including, the residuary devise, I am not satisfied that the doubts and suspicions naturally aroused by the evidence and all the circumstances are sufficient to justify us in pronouncing against the will. I have already said there is no sufficient evidence of the exercise of undue influence by either Frederick Tupper or his sister, Mrs. Fulton. I am more than doubtful whether the testator was at the moment of time of the execution of the instrument of sound mind and memory and capable of understanding the contents of what he was signing. I think there was sufficient evidence, however, to justify the courts in concluding that at the time he gave his instructions to the draftsman or writer, Frederick Tupper, he knew what he was doing and authorized the changes made from the former will outside of the disposition of the residue. As there is reasonable ground for holding the will as drawn (always excepting the residuary devise) did conform to the instructions the dying man gave it can, under the authority of *Perera* v. *Perera*(1), be upheld as valid.

But then we are face to face with the question whether the testator had actually changed his mind

(1) (1901) A.C. 354.

with regard to the residuary devise and had determined to omit the Bible Society and the Congregational Church from his will altogether, and substitute as beneficiaries for them his brother, who drew the will, and his sister, and whether he actually instructed his brother to make such an important change.

Then what is the law where a will is written or prepared by a party in his own favour. In Williams on Executors (10 ed), 1905, at page 86, it is said:

> By the Civil law, if a person wrote a will made in his own favour the instrument was rendered void. That rule has not been adopted by the law of England, which only holds that where the person who prepares the instrument or conducts its execution is himself benefited by its dispositions this fact, unless it be merely the case of a small legacy to him as executor, or other such circumstances, creates a suspicion of improper conduct and renders necessary very clear proof of volition and capacity as well as of a knowledge by the testator of the contents of the instrument.

This doctrine was fully considered by the Lords of the Judicial Committee in the case of *Barry* v. *Butlin* (1). In delivering the judgment of their Lordships in that case, Parke B. made the following observations:

> The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in by both sides. These rules are two; the first is, that the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the court that the instrument propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. These principles, to the extent that I have stated, are well established; the former is undisputed; the latter is laid down by Sir John Nicholl, in substance, in *Paske* v. *Ollat* (1), *Ingram* v.

(1) 2 Moo. P.C. 480. (2) 2 Phillim. 323.

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Wyatt(1), and *Billinghurst* v. *Vickers*(2), and is stated by that very learned and experienced judge to have been handed down to him by his predecessors; and this tribunal has sanctioned and acted upon it in a recent case, that of *Baker* v. *Batt*(3).

These rules of law were expressly adopted by Lord Cairns and approved by the other law Lords in the case of *Fulton* v. *Andrew*(4), at page 461.

In the case of *Brown* v. *Fisher*(5) Sir James Hannen, the president, in delivering judgment, after citing with approval the doctrine laid down in Williams on Executors, above quoted, and the rules of law formulated by Parke B. cited above and approved of by Lord Cairns, goes on to say:

> I have usually taken the opportunity of referring to that as laying down what is the guiding principle to be acted on in cases of this kind. Now in the present instance the will was indeed prepared by a solicitor who was, however, carefully excluded by the plaintiff from all communication with the testator. The plaintiff of course says that he did so by the authority of the testator, but he has no evidence in corroboration of that statement and it depends entirely upon his own evidence, whereas there is a strong presumption against its correctness from all the circumstances of the case.

The learned president in that case held that where a beneficiary who had procured and subsequently propounded a will failed under those circumstances to satisfy the court by "*affirmative and conclusive evidence*" that the testator did in fact know and approve of the contents of the will, which he had actually executed, the court applying and acting upon the principles laid down by the House of Lords in *Fulton* v. *Andrew*(4), would refuse probate of the will with costs.

Now, applying these principles to the case before us let us look at the facts. I appreciate fully the grave

(1) 1 Hagg. Ecc. Rep. 388.
(2) 1 Phillim. 187.
(3) 2 Moo. P.C. 317.
(4) L.R. 7 H.L. 448.
(5) 63 L.T. 465.

importance of reaching the conclusion that there is no sufficient evidence to warrant us in finding that the testator had so changed his mind with regard to the residue and that he had so instructed his brother.

The evidence seems to me to shew beyond reasonable doubt that the great purpose he had in mind in making a new will was so to change the old one of the previous September as to meet the objections raised by his wife, and several times talked over with her by him, as to the impolicy of postponing the time when the residuary devise was to take effect so far as the Congregational Church was concerned. It is reasonably clear, however, that in doing so he decided to make still further changes, and amongst them to give his brother and sister each a farm and a lot of land, and also to alter the provisions he had made for his adopted daughter, and to a limited extent those made for his wife. These changes were more or less talked over and explained by Frederick Tupper with Mrs. Tupper, the testator's wife, the day the will was drawn, and though perhaps not fully explained or not fully understood by the wife and the adopted daughter, still I have reached the conclusion that the evidence taken as a whole is sufficient to establish that these changes were determined upon by the testator and were made.

Outside of the evidence, however, of Frederick Tupper himself there is not a scintilla of evidence to establish the faintest intention on the testator's part to change the beneficiaries of the residuary devise of his September will. The trial judge distinctly declines to accept the uncorroborated evidence of Frederick Tupper on this crucial point, and I am bound to say I concur in his conclusions. Much necessarily depended upon the credibility of the witnesses.

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The trial judge distinctly states with respect to Mrs. Tupper's testimony that

> she convinced me of being a most conscientious and intelligent witness and I attach full weight and credit to her testimony.

She emphatically denies that Frederick Tupper either read to her, as he says he did, the whole will or that he ever intimated in any way that the residuary clause had been changed. She admits, however, that other portions of the will were read to her. I would gather from her evidence that substantially all of the will except the residuary devise was so read.

It is true that Frederick Tupper states that he received the instructions to make himself and his sister the residuary devisees and that he did read the will to the testator as it now appears. But the trial judge distinctly refuses to believe that statement, and I am bound to say that a careful perusal of the whole evidence satisfies me that his finding in this respect was in accordance with the weight of testimony.

The evidence of Mrs. Tanner, the adopted daughter, and Mrs. Tupper, is very strong that it could not have been read to the testator, at any rate not in the way and manner required by the law.

As to what is a sufficient reading of a will such as this making important changes in the will executed a few months before and substituting the draftsman of the second will and his sister as the residuary devisees instead of the former beneficiaries, the observations of Lord Cairns and Lord Hatherley in the case of *Fulton* v. *Andrew* (1) are most apposite and instructive. At pages 462, in commenting upon the law laid down by Lord Penzance to the jury in the case of *Atter* v. *Atkinson* (2), Lord Cairns says:

(1) L. R. 7 H.L. 448. (2) L.R. 1 P. & D. 665.

In the first place the jury must be satisfied that the will was read over, and in the second place must also be satisfied that there was no fraud in the case. Now, applying those observations to the present case, I will ask your Lordships to observe that we have no means of knowing what was the view which the jury, in the present case, took with regard to the reading over of the will. The only witnesses upon the subject were those witnesses who were themselves propounding the will. No person else was present—no person else knew anything upon the subject. It appears that these witnesses stated either that the will was read over to the testator, or that it had been left with him over night for the purpose of being read over. The jury may, or may not, have believed that statement, or may have thought, even if there had been some reading of the will, that *that reading had not taken place in such a way as to convey to the mind of the testator a due appreciation of the contents and effect of the residuary clause*—and it may well be that the jurors, finding a clear expression of the intention of the testator, or what they may have thought to be a clear expression of the intention of the testator, in the instructions for the will, were not satisfied that there was any such proper reading or explanation of the will as would apprise the testator of the change, if there was a change, between the instructions and the will.

And again at page 465:

It was suggested that, when once the jurors had before them uncontroverted evidence that the will was read over to the testator, any verdict on their part that the residuary clause was not known to the testator would be opposed to their finding upon the issue that he was of sound and disposing mind. I say that that again was a question for the jurymen, and it might well be that they would not believe the evidence with regard to the reading over of the will. Upon these grounds, endeavouring to place myself in the position in which the court of probate was placed when it had to deal with this rule *nisi*, I feel myself obliged to say that there was nothing which could be alleged against this verdict of the jury which required the court to direct a new trial. It was eminently a question for the jury, and I see no reason whatever to be dissatisfied with the verdict.

And Lord Hatherley at page 468 says:

A matter which appears to me deserving of some remark, and upon which the Lord Chancellor has already fully commented, is the supposed existence of a rigid rule by which, when you are once satisfied that a testator of a competent mind has had his will read over to him, and has thereupon executed it, all further inquiry is shut out. No doubt those circumstances afford very grave and strong

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presumption that the will has been duly and properly executed by the testator; still circumstances may exist which may require that something further shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and memory, and also having had read over to him that which had been prepared for him, and which he executed as his will. It is impossible, as it appears to me, in the cases where the ingredient of fraud enters, to lay down any clear and unyielding rule like this.

And again at page 473:

The case is a singular one in its character, and without wishing to shake the force of the observations made by the learned judge of the probate court, as to the danger (which is a real danger) of holding that any man of sound mind who has put his hand to an instrument after having had that instrument read over to him, can have meant otherwise than what he said; admitting all that, yet I do say that at least the jury should be satisfied that it was read over to him, *and not only that it was read over to him, but that it was read over in such a manner as that the discrepancy between the instructions and the will was brought before the consideration of the testator.* It appears to me that in this case there is nothing to induce us to say that the jurors were not warranted in their conclusion.

Adopting these legal conclusions of these eminent jurists it seems to be impossible on the evidence in this case to reverse the findings of the trial judge or to hold that this will was ever read over to the testator so as to convey to his mind a due appreciation of the contents and effect of the residuary devise, and that he was taking away from the Bible Society and the Congregational Church all that he had devised to them by the will of September and substituting the draftsman and his sister for the society and the church.

Mrs. Fulton, one of the residuary devisees herself, who was present with testator a great part of the day the will was drawn, admits that she never gathered from the testator any idea of an intention to make Frederick and herself or either of them residuary legatees. She says that no mention ever was made of the residue nor that he intended to give Frederick

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or herself any portion of it, and further that when the testator told her it was his intention to give Frederick the farm and her the Layton lot that he (the testator) also said that Frederick would like the Layton lot too, but *that the farm was enough for him*. This was within a few hours or so of the execution of the will.

This by itself would, of course, be far from conclusive, but Mrs. Tanner, the adopted daughter, who was present in and out of the room most of the time when the testator was giving the instructions about the will, states what took place on the point I am discussing as follows:

Q. Did he say anything to the deceased while you were there? A. The first question I heard him ask papa was, "Newcombe, when Harriet is done with this, what do you want done with it?" He asked him that question once, and papa's answer was, "I want it collected and put in the bank for Harriet's use." Fred then said, "Newcombe, when Harriet is done with this—when she is dead—what do you want done with this?" and he said again, "I want it collected and put in the bank for Harriet's use," and Fred rose and said, "That is not what I asked you. I want you to pay attention to what I say. Don't think about anything else. When Harriet's done with this money, what do you want done with it?" and papa said, "I want it collected and put in the bank for Harriet's use," and before he had done speaking Fred left the room impatiently. When he left the room he went into the dining room. When he left the room I went to the bedside and applied a cooling lotion to the patient's forehead. He said, "Where has Fred gone?" I pointed to the dining room door and he said, "He has gone to judgment." Shortly after that I went out into the kitchen for some nourishment. Fred Tupper returned to the sick room as soon as I left. I came back in two minutes and he left the room as soon as I came in. I remained for some time and then went out for some stimulant, and he came in when I went out again. I don't know whether any writing was going on. He had left some notes on the dining room table, and the second time I came out I looked over the notes.

Q. Were these notes completed then? (witness shewn notes). A. It seems to me that the paper I saw was written on both sides. I could not be positive, but I think the papers I then saw were written on both sides. There were two half sheets lying on the table, and I am quite sure I read both sides.

Q. Was this in the notes that you read—that the balance left

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of his estate after the death of his wife was to go to Fred Tupper and Mrs. Fulton; was that in the notes you read? A. No.

Q. When was it you first saw the provision about giving the residue of the estate to Fred Tupper and Mrs. Fulton? A. It was later in the evening. I saw it in the completed will.

From the time Fred Tupper finished the will to the time the witnesses came, the will was not read over to Mr. Tupper to my knowledge. I had an opportunity of knowing. I was attending and taking charge of the patient. I was not out of hearing long enough for the will to have been read over to him.

She was severely cross-examined on the point, but persisted in her evidence, saying:

I did not hear the will read. I don't think it was read. There was no chance for it to be read without my hearing it.

An attempt was made to discredit her evidence on this point because she said at one place in her cross-examination that she did not hear any conversation they had about the residue. There was no discussion with the testator in my presence as to "what should be done with it when Mrs. Tupper was done with it." But in a few moments afterwards she explains that she understood the question of counsel to refer "to discussions between Fred Tupper and Mr. Tupper" in her hearing, and that in the answer above quoted she was "referring to discussions between Fred Tupper and Mrs. Tupper."

Mrs. Tupper is equally, if not more, emphatic about the reading of the will. She swears first that Fred Tupper professed to read the will over to her, but never read the part referring to the gift of the residue to himself and his sister. Again and again she repeats this over, and declares that she never knew anything about it until she learned of it after the will was signed from Mrs. Tanner. She is equally emphatic in stating that the will could not have been read over by Fred Tupper to her husband after the

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former had done writing it, and declares that before it was signed she said to Fred Tupper that the will should be read over to her husband and that he replied either "it has" or "I did," and did not read it then as she desired him to do.

A careful study and analysis of the whole evidence has convinced me that there is sufficient to uphold the second will of the 20th February, 1902, except the residuary clause; that the only evidence in support of this clause is that of Fred Tupper, the draftsman of the will and joint beneficiary with his sister under this clause; that there is no corroborative evidence of any kind whatever either as to the testator entertaining or expressing any intention of changing the residuary legatees under the previous will or of his having instructed Fred Tupper to make the change; that the only proper conclusion which should be drawn from the evidence as a whole is that while the other parts of the will may have been read over to the testator the residuary devise certainly was not read or was not at any rate so read that the testator might have understood or did understand it; that at the time of the giving of the instructions for the drawing of the will the testator may be held to have been of sound disposing mind and memory and capable of making a valid testamentary disposition of his estate; that he was not in such a condition at the time of the actual execution of the will and, therefore, there will not, from the mere proof of execution in the light of his then capacity, arise any presumption of knowledge of the contents of the will. But on this question of presumption the law as laid down in *Fulton* v. *Andrew* (1), by Lord Cairns is that even where there is affirmative evidence of knowledge by reason

(1) L.R. 7 H.L. 448.

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of the will having been read over to a testator competent in mind before execution there is no unyielding rule of law shutting out all further inquiry.

Then, if so, what is the law with respect to the residuary devise appearing in the will and yet found not to be the will of the testator? Must the entire will be set aside and probate refused, or may the part proved be accepted and the part not proved rejected? And in the latter case is there an intestacy as to the residue, or in cases where there is no express revocation of previous wills may the parts of the previous will not inconsistent with the later one be accepted and probate granted with respect to them?

There have been doubts in former times upon the point, but the later cases seem to have removed those doubts and placed the law upon the basis of right and common sense. In *Allen* v. *McPherson*(1) all the distinguished jurists who there delivered judgments, but especially Lord Lyndhurst, at page 209, and Lord Campbell, at page 233, expressed themselves in terms which leave no doubt that the ecclesiastical courts formerly could and the Court of Probate can now admit part of an instrument to probate and refuse it as to the rest.

The present law is well summarized on pages 87-88 of Powles and Oakley on Probate (ed. of 1892). It reads as follows:

What is now the law on this point has been very clearly and simply laid down by Lord Penzance in the case of *Lemage* v. *Goodban*(2). His Lordship says:—"The case of *Plenty* v. *West*(3), so far as it supports the doctrine that the use of the words 'last will' in a testamentary paper necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto* v. *Gilbert*(4), and *Stoddard* v. *Grant*(5). * * * Cases of the present character are properly

(1) 1 H.L. Cas. 191.
(2) L.R. 1 P. & D. 57.
(3) 1 Rob. E. 264.
(4) 9 Moo. P.C. 131.
(5) 1 Macq. 163, 171.

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questions of construction, and in deciding on the effect of a subsequent will on former dispositions, this court has to exercise the functions of a court of construction." The principle applicable is well expressed in Mr. Justice Williams' book on Executors (9 ed.), pp. 139-140. He says:—"The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former or the two be incapable of standing together; for though it be a maxim, as Swinborne says above, 'that no man can die with two testaments,' yet any number of instruments, whatever be their relative date, or in whatever form there may be, (so as they be all clearly testamentary) may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former, as to those parts only where they are inconsistent." This passage truly represents the result of the authorities. The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document.

In the notes of this paragraph cited from the tenth edition of Sir E. V. Williams' book on Executors, page 120, many of the later cases are cited. In *In the Goods of Petchell*(1) Sir James Hannen acted upon the rule laid down in the text of Williams, and admitted the two instruments together to probate as together containing the will of the deceased. The case is one very much in point, for the part of the first will in that case admitted to probate was the residuary devise, which, as in this case, was held not to have been revoked. See the remarks of the President, Sir James Hannen, pp. 156-157. See also *In the Goods of Sir J. E. Boehm*(2), where it was held that probate of a will omitting or striking out the name of Georgiana in the second clause of gift might be granted to executors. *Morrell* v. *Morrell*(3).

(1) L.R. 3 P. & D. 153.
(2) [1891] P.D. 247.
(3) 7 P.D. 68.

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The cases are not all uniform and the true rule to be adopted seems to be that followed by Sir James Hannen in *Dempsey* v. *Lawson*(1), where after reviewing the cases that learned judge concludes that the use of phrases such as "my last will" does not necessarily import a revocation of a previous will, and that not even the presence or absence of a general revocating clause is conclusive. That in the alternate result it must come down to a question of intention to be gathered from a comparison of both wills. He adopted as a proper rule that laid down by Lord Penzance in *Lemage* v. *Goodban*(2):

> The intention of the testator in the matter is the sole guide and control. But the intention to be sought and discovered relates to the disposition of the testator's property and not to the form of his will. What dispositions did he intend, not which or what number of papers did he desire or expect to be admitted to probate, is the true question.

This no doubt must be the true rule. As Sir J. Nicoll says in *Methuen* v. *Methuen*(3):

> In the Court of Probate the whole question is one of intention; the *animus testandi* and the *animus revocandi* are completely open to investigation in this court.

The late case of *Townsend* v. *Moore*(4) is most instructive on the point I am discussing. Part of the head note to the report of that case reads:

> But when the provisions of two testamentary documents, the priority of which is uncertain and in neither of which there are expressed words of revocation, are apparently inconsistent, the court will endeavour so to construe the words that if possible the two documents may stand together and may both be admitted to probate as expressing together the whole testamentary intention of the testator.

The Appeal Court in this case reviewed most of the authorities to which I have referred and approves and

(1) 2 P.D. 98.
(2) L.R. 1 P. & D. 57.
(3) 2 Phillim 416, at p. 426.
(4) (1905) P.D. 66.

adopts the paragraph from Williams on Executors which I have above quoted. It also reviews and approves of the decisions in the case of *Lemage* v. *Goodban*(1), and *In the Goods of Petchell*(2), and Vaughan Williams L.J. quotes extensively from the judgment of Sir James Wilde in the former case and also from that of Sir James Hannen in the latter. In the quotation from the latter judgment is the following:

The law thus laid down was acted upon by my predecessor, Lord Penzance, in *Lemage* v. *Goodban*(1). In that case there were two instruments, both purporting to be the last will and testament of the deceased. In each will there was a residuary clause, but in the latter it was perfectly unintelligible and it was impossible to give effect to it. The court held it was justified in granting probate of both instruments, because the earlier contained a residuary clause which it was thought it was not the intention of the testator to revoke. That precedent I am entitled to act upon in this case. * * * Acting on the decision to which I have referred, I have come to the conclusion that I am justified in holding that the testatrix intended that the residuary bequest, which is found in the first will, but not in the later, should form part of her will, and that by varying in the second instrument the dispositions of the former she did not intend to revoke the residuary clause contained in the earlier paper.

The conclusion reached by the L.J. is stated at page 83 as follows:

Upon the authorities I come to the conclusion that, if on any reasonable construction the two documents can stand together, it is the duty of the court of probate to admit both documents to probate.

Romer L.J., at page 84, states the law to be:

But when there are two testamentary documents, and the court is able to gather that one was not intended wholly to revoke the other, but that both were intended to be effective, at any rate to some extent, then I think, on authority and on principle, that the two documents must be admitted to probate, so that effect may be given to them, so far at any rate as circumstances will permit. How

(1) L.R. 1 P. & D. 57-62. (2) L.R. 3 P. & D. 163-156.

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far that could be done would be left to a great extent to a court of construction to determine. The authorities to which my brother Vaughan Williams has referred shew, I think, that this is the correct view of the law, and I need not further dwell upon them.

In the present case I am of opinion that the intention of the testator to be gathered from the dispositions of the two wills, omitting the residuary devise from the latter which I reject for the reasons before stated, is that the two wills should stand together and rather than that an intention to create an intestacy with regard to the residue should be presumed the residuary devise in the first will, which is not in any way inconsistent with the proved portions of the second will, and is not, therefore, revoked by it, should together be taken and held to constitute the true will of the deceased and the two instruments ought to be admitted to probate as in *In the Goods of Petchell*(1) as together containing the will of the deceased.

On the question of the addition of another executor by the second will, see *In the Goods of Matthew Leese*(2), where Sir C. Creswell held, page 443:

> The executors of the second will are entitled to ask for probate of the first as well as the second will.

I think the cases of *Lemage* v. *Goodban* (3), in 1865, and *In the Goods of Petchell*(1), (1874), and *Townsend* v. *Moore*(4), conclusive as to the right of the court to admit to probate both instruments as containing the will of the deceased.

I am, therefore, of the opinion that the appeal should be allowed, the judgment of the Supreme Court of Nova Scotia reversed, and the record remitted to the court of probate for the County of Colchester with directions to admit the two instruments of the

(1) L.R. 3 P. & D. 153.
(2) 2 Sw. & Tr. 442.
(3) L.R. 1 P. & D. 57.
(4) [1905] P.D. 66.

dates of 4th September, 1901, and the 20th February, 1902, to probate as containing together the true will of the testator, viz., the unrevoked residuary clause of the first will and the second will omitting its unproved and rejected residuary clause.

With respect to costs I think the costs of all the parties so far as the probate court is concerned should be paid out of the estate, but that the costs of this appeal and that to the Supreme Court of Nova Scotia should be allowed to appellant as against Fred Tupper one of the respondents. The other respondent joining as one of the executors for the sake of conformity not having costs against him.

IDINGTON J.—In the case of *Barry* v. *Butlin*(1) Baron Parke delivering the judgment of the court said:

> The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two; the first that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.
>
> The second is that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

These rules have been observed ever since in a line of cases of the highest authority and express what undoubtedly is the law that ought to govern our decision here.

Have the respondents satisfied all the require-

(1) 2 Moo. P.C. 480.

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ments of these rules by the evidence put before the Court of Probate in which the alleged will now in question was propounded?

The learned trial judge seems to have correctly apprehended the law that must govern him. He had to deal with much conflicting evidence given by witnesses in his presenee and has not only failed to find, after an exhaustive analysis of the evidence, that the alleged will can be held proven, but has also referred to Mrs. Tupper as being

> a most candid, frank, conscientious and intelligent witness, (and that he) attached full weight and credit to her testimony.

I have read all of the evidence in the case and much of it more than once, and its perusal impresses me that what the learned trial judge thus says of Mrs. Tupper is absolutely correct.

If she is thus to be relied upon and her evidence accepted in its entirety it is impossible to uphold the alleged will.

I need not for the purposes of disposing of this case go further. I had written at length an analysis of the whole evidence, and it became apparent to my mind that in the statement of facts in his very able judgment the learned trial judge had in no particular overstated the case against the will.

In some particulars, needless to enlarge upon here, the facts seemed to me more strongly against the position of the respondent, Fred. Tupper, than the learned judge saw fit to present them.

I do not see any good purpose to be served by giving here at length the analysis I made, but content myself with adopting the judgment of the learned trial judge which I think should be restored.

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

I think the respondent, Fred. Tupper, should pay the general costs of both appeals. He is entitled to costs out of the estate as given by the trial judge.

But when he ventured beyond that, he was doing more than his duty as a trustee required, and ought, I think, to abide by the usual result of such a venture.

MACLENNAN J.—After a very careful study of the evidence in this case I have come to the same conclusion as the learned trial judge. It would serve no useful purpose to state the impressions made upon my mind by the evidence of the various witnesses, as was so elaborately done by both the trial judge and by Mr. Justice Graham who delivered the opinion of the Supreme Court. Suffice it to say, that I think the respondent, Frederick Tupper, who prepared the will, has not discharged the onus which rested upon him, as a comparatively large beneficiary under the will, as required by the cases of *Fulton* v. *Andrew*(1); *Tyrrell* v. *Painton*(2), and *Adams* v. *McBeath*(3). Nor am I satisfied that the deceased was, during the preparation and at the time of the execution of the will, of sufficient testamentary capacity to enable us to uphold it as valid.

Appeal allowed with costs.

Solicitor for the appellants: *W. B. A. Ritchie.*

Solicitor for the respondents: *R. F. Laurence.*

(1) L.R. 7 H.L. 448, 571. (2) (1894) P.D. 151.
(3) 27 Can. S.C.R. 13.

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*Dec. 4.
*Dec. 22.

JENNIE HUTCHINGS (PLAINTIFF) . . APPELLANT;

AND

THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA (DEFENDANTS) . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Life insurance—Condition of policy—Premium note—Payment of premium.

When the renewal premium on a policy of life assurance became due the assured gave the local agent of the insurance company a note for the amount of the premium, with interest added, which the agent discounted, placing the proceeds to his own credit in his bank account. The renewal receipt was not countersigned nor delivered to the assured and the agent did not remit the amount of the premium to the company. When the note fell due it was not paid in full and a renewal note was given for the balance which remained unpaid at the time of the death of the assured. The conditions of the policy declared that if any note given for a premium was not paid when due the policy should cease to be in force.

Held, affirming the judgment appealed from (38 N.S. Rep. 15) Davies and Maclennan JJ. dissenting, that the transactions that took place between the assured and the agent did not constitute a payment of the premium and that the policy had lapsed on default to meet the note when it became due. *The Manufacturers Accident Ins. Co.* v. *Pudsey* (27 Can. S.C.R. 374) distinguished; *London and Lancashire Life Assurance Co.* v. *Fleming* ([1897] A.C. 499) referred to.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1) which set aside the judgment

PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) 38 N.S. Rep. 15.

entered upon the findings of the jury and dismissed the plaintiff's action with costs.

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The action was brought by the beneficiary under a policy of life assurance and the only question raised upon the pleadings and to be tried was whether or not the renewal premium was paid in cash to the company's agent when it became due. The renewal premium was payable on the 15th of October, 1902, and on the expiration of the days of grace the assured gave the local agent of the company a note, for the amount of the premium with interest added, at sixty days, which the agent caused to be discounted and the proceeds were placed to the credit of his personal account in the bank. When the note fell due a partial payment was made on account and the assured gave the agent another note for the balance remaining due which he failed to pay, and he died on the 12th of March, 1903, without having paid the amount of the renewal note. The agent was in possession of a properly signed renewal receipt for the premium at the time these transactions took place, but he did not countersign it, as required by its conditions, nor did he remit the proceeds of the note discounted to the company. Later on, while the renewal note was current, he returned the renewal receipt to the company as unpaid, and the policy was noted as lapsed. At the trial the jury found that the premium had been paid in cash to the company at the time when the local agent discounted the first note and received the proceeds and, upon this finding, judgment was entered in favour of the plaintiff. The judgment now appealed from set aside the verdict as being against the evidence and dismissed the plaintiff's action with costs.

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Mellish K.C. for the appellant. We submit that the findings of the jury and the judgment thereon should be restored, or in the alternative a new trial ordered. Under the facts the jury could have come to no other conclusion than that the premium was paid in cash to the company's agent. It was received to be discounted, and the discount charge was added to the face of the note; the agent used the note for the purpose for which it was given, not to pay the premium with the note, but to get the money in payment of the premium by discounting the note. The agent got the money in that way and held it for his company, but subsequently changed his mind, as he found he had made a mistake in lending his own credit to the assured who was in financial difficulties. The note was not payable till sixty days after its date (15th Oct., 1902). The agent was not authorized to take a note in payment of the premium, and the policy would have been avoided thirty days after that date (the grace allowed), and the assured could not have revived it even by paying the note at maturity. See opinions by Sir Henry Strong in *London and Lancashire Life Assurance Co.* v. *Fleming*(1), in the Privy Council and by Burton and Osler and Maclennan JJ. in the same case in the Court of Appeal for Ontario(2), at pages 670-673; also by Meredith C.J. in the report of the judgment of the trial court(3); which clearly indicate that if such an agreement as that referred to had been proven, and the notes discounted, as they were by this agent, it would have amounted to a payment of the premium in cash. The condition and the stipulation in the application for insurance, made part of the contract, that if any note

(1) [1897] A.C. 499. (2) 23 Ont. App. R. 666.
(3) 27 O.R. 477.

given for a premium be not paid when due the policy will not be in force, refers only to such notes made directly to the company. See also *The Manufacturers' Accident Ins. Co.* v. *Pudsey*(1).

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W. B. A. Ritchie K.C. for the respondents. There was no evidence whatever of payment of the premium. and the learned trial judge should have withdrawn the case from the jury, as requested by counsel at the trial on the conclusion of the plaintiff's case. It was for the judge, alone, to decide whether or not any facts had been established by evidence, from which payment of the premium might be reasonably inferred, and if such facts had not been established by evidence then it was his duty to have withdrawn the case from the jury. *Metropolitan Railway Co.* v. *Jackson*(2), *per* Cairns L.J. at page 197; *Ryder* v. *Wombwell*(3), *per* Willis J. at page 38; *Bridges* v. *North London Railway Co.*(4), *per* Pollock B. at page 221. We also rely on *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery*(5), and particularly the observations of Lord Penzance at page 1175, Lord O'Hagan at pages 1181, 1182, and of Lord Coleridge, pages 1195-1197.

The fact that the renewal receipt had not been countersigned, as required by its conditions, is a fact strongly demonstrating that the premium had not been considered as having been paid. Moreover, it never reached the possession of assured. *Confederation Life Association* v. *O'Donnell*(6); *Busteed* v. *West England Fire and Life Ins. Co.*(7); Bunyon on Life Assurance (3 ed.) p. 83; *London and Lancashire*

(1) 27 Can. S.C.R. 374.
(2) 3 App. Cas. 193.
(3) L.R. 4 Ex. 32.
(4) L.R. 7 H.L. 213.
(5) 3 App. Cas. 1155.
(6) 10 Can. S.C.R. 92.
(7) 5 Ir. Ch. 553.

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Life Assurance Co. v. *Fleming*(1); *Torrop* v. *Imperial Fire Ins. Co.*(2).

The proceeds of the note were held by the agent merely as agent for assured. If he had agreed to apply these funds to the payment of the premium he never so applied them. The money was paid into his bank account as the agent of Hutchings to pay the premium and he never did pay the premium. He never paid out the money as instructed by his principal, but kept it in his personal account and used it for his own purposes. If assured gave the note to him as agent of the company his act, in taking the note, was not binding on the company, because it was beyond his authority as defined by the policy to take such a note.

It is submitted that the agent held the money as agent for Hutchings until the maturity of the note, when, if Hutchings paid it, he got the renewal receipt and the agent was to pay the company. This is shewn by the renewal receipt being attached to the note. Later on when it became evident that Hutchings could not pay the renewal note and re-pay the sum advanced by the agent on renewing it, it was agreed that the agent should treat the paper as for his own accommodation, to which Hutchings agreed.

The respondent relies on the following authorities: *Acey* v. *Fernie*(3), approved by the Privy Council in *London and Lancashire Life Assurance Co.* v. *Fleming*(1); *Bartlett* v. *Pentland* (4); *Baines* v. *Ewing* (5); Brice on Ultra Vires (3 ed.) p. 658; *Giblin* v. *McMullen*(6); *Hiddle* v. *National Fire and Marine*

(1) (1897) A.C. 499.
(2) 26 Can. S.C.R. 585.
(3) 7 M. & W. 151.
(4) 10 B. & C. 760.
(5) L.R. 1 Ex. 320.
(6) L.R. 2 P.C. 317.

Ins. Co. of New Zealand (1); *Hine Bros.* v. *Steamship Insurance Syndicate* (2); *Phillips* v. *Mayer* (3).

The fact of there being an express condition in the policy, limiting the authority of the agent, was notice to the assured that the agent was not possessed of power to take a renewal note. It was not, therefore, within his apparent authority, as it appeared otherwise from the policy. *Frank* v. *Sun Life Assur. Co.* (4); *McGeachie* v. *North American Life Ins. Co.* (5).

THE CHIEF JUSTICE and GIROUARD J. concurred in the judgment dismissing the appeal with costs.

DAVIES J. (dissenting).—My mind fluctuated a good deal during the course of the argument before us, but a careful reading of the evidence and judgments appealed from, and further consideration of the arguments of counsel have convinced me that there was sufficient evidence before the jury to enable them to find a payment in cash of the premium by the assured to the agent of the company. The agent held in his hands at the time the renewal receipt duly signed by the company's proper officers.

There is no term of the policy requiring this receipt to be countersigned or delivered by the agent. It merely requires, to enable the agent to receive payment, that he should have in his possession the receipt signed by the president, managing director and secretary of the company, or any two of them. On this evidence there was a finding in favour of the plaintiff and on that finding the trial judge directed judgment to be entered for her.

(1) [1896] A.C. 372.
(2) 72 L.T. 79.
(3) 7 Cal. 81.
(4) 23 Can. S.C.R. 152*n*; 20 Ont. App. R. 564.
(5) 23 S.C.R. 148.

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Davies J.

The question is one purely of fact. Both parties rely upon the case of *London and Lancashire Life Assur. Co.* v. *Fleming* (1). Applying the principles of law determined in that case to the facts proved in this the question is reduced entirely to one of fact: Did or did not Harrington receive the premium in cash? And the proper tribunal to determine it, once there was evidence to submit to them, was the jury.

On the 15th day of October, 1902, the agent of the company, Mr. Arthur E. Harrington, went to the insured and arranged with him to raise the money by a note which Harrington was to discount. The premium was $49.27, and the note was for $50.27—the difference being to pay the charge of discounting. Harrington discounted the note with the bank and got the proceeds, $49.27, to remit to the company, but failed to remit, as he heard very shortly after taking the note that the assured was in financial difficulties. The note was payable sixty days after date.

It was argued that because Harrington had the proceeds of the note put to his credit in his account in the bank where he discounted the note that, in some way or another, he could not be said to have received it in cash.

I am unable to appreciate or accept that argument or to discern the substantial difference between Hutchings taking the note, having it discounted and handing over the proceeds to Harrington or the latter discounting it and putting the cash to his own credit. In either case he would have received the cash.

It matters not what Harrington did with the cash after he received it or how long afterwards he heard assured was in financial difficulties and determined

(1) (1897) A.C. 499.

upon protecting himself by retaining the money he had received as the proceeds of the note.

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All the subsequent acts and conversations of the agent and the assured may have been good evidence to thrown light upon what was the real transaction at the time of the discount of the note.

But it was all admitted, and went to the jury and the finding of the jury, which in my opinion was justified, should not be disturbed.

I would allow the appeal with costs.

IDINGTON J.—This case is clearly distinguishable from that of the *Manufacturers' Accident Ins. Co.* v. *Pudsey*(1), upon which appellant relies. There the renewal receipt which was a badge of authority in the hands of the agent was found by the jury to have been delivered over to the assured upon his payment of part of the premium and giving his note for the balance, and the court held correctly that there was evidence to go to the jury on that and other points in dispute.

The failure of the assured here to get the receipt for the premium or perhaps even to have seen it and the peculiar circumstances connected with the retention of it by the agent tell against the assured having relied upon the agent having authority, or the company by any act of theirs inducing him to rely on the authority of the agent for doing as he did.

The principles upon which the decision in the case of *London & Lancashire Life Assurance Co.* v. *Fleming*(2) rests are decisively against the case of the appellant here.

I think, therefore, that the appeal ought to be dismissed with costs.

(1) 27 Can. S.C.R. 374.

(2) [1897] A.C. 499.

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MACLENNAN J. (dissenting).—I am of opinion that this appeal should be allowed and that the judgment at the trial should be restored.

The life policy sued on provides that the premiums, after the first, shall be paid at the head office of the company. But by a privilege or proviso indorsed upon the policy and made part thereof it is declared that premiums may be paid to any officer or agent who has in his possession a printed receipt therefor issued by the company and signed by the president, managing director and secretary or any two of them. Such a receipt duly signed in accordance with that privilege or proviso was in the hands of the agent of the company, Mr. A. E. Harrington, at the time of the transactions between him and the deceased which are in question.

I think, in the first place, it is clear that if the assured had paid the premium to Harrington that was all he was required to do. It was not necessary that Harrington should deliver the receipt to him or that he should request or demand that to be done. The payment of the money was the essential and only thing required to be done and the sole question is whether or not the assured did in fact pay his premium to Harrington.

What took place was this: The premium, $49.27, was due on the fifteenth of October, 1902, and the assured had not the money, so the company's agent, Mr. Harrington, took a note at sixty days for the sum of $50.27, the excess over the amount of the premium being for the discount charged by the bank. Mr. Harrington says that he discounted the note and the proceeds, $49.27, were placed to his credit, and that he had, at that time, in his possession the company's re-

ceipt duly signed according to the privilege or proviso.

I think the effect of that transaction was a payment by the assured to the company's agent of the premium on his policy, that is, a payment in money according to the terms of the policy.

It appears that Harrington did not send the money to the company, nor did he deliver the receipt to the assured, but attached it to the note. I think that makes no difference and that the premium was paid according to the terms of the policy.

I think the appeal should be allowed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Henry C. Borden.*

Solicitor for the respondents: *A. Cluney.*

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*Dec. 12, 13.
*Dec. 22.

THE INVERNESS RAILWAY AND COAL COMPANY (DEFENDANTS) } APPELLANTS;

AND

ANGUS McISAAC AND MURDOCH McISAAC (PLAINTIFFS).......... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Expropriation of land—Arbitration—Authority for submission—Trespass—2 Edw. VII. c. 104 *(N.S.)*

By statute in Nova Scotia if land is taken for railway purposes the compensation therefor, and for earth, gravel, etc., removed shall be fixed by arbitrators, one chosen by each party and the third, if required, by those two. A railway company intending to expropriate, their engineer wrote to M., who had acted for the company in other cases, instructing him to ascertain whether the owners had arranged their title so that the arbitration could proceed and, if so, to ask them to nominate their man who, with M., could appoint a third if they could not agree. The engineer added, "I will send an agreement of arbitration which each one can subscribe to or, if they have one already drafted, you can forward it here for approval." No such agreement was sent by, or forwarded to, the engineer, but the three arbitrators were appointed and made an award on which the owners of the land brought an action.

Held, reversing the judgment appealed from (38 N.S. Rep. 80), that as the company had not taken the preliminary steps required by the statute which, therefore, did not govern the arbitration proceedings, the award was void for want of a proper submission.

The company entered upon land and cut down trees and removed gravel therefrom without giving the owners the notice required by statute of their intention to take their property. The owners, by their action above mentioned, claimed damages for trespass as well as the amount of the award.

Held, that as the act of the company was not authorized by statute the owners could sue for trespass and as, at the trial, the action on this claim was dismissed on the ground that such action was prohibited there should be a new trial.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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

The facts of the case are sufficiently set out in the above head note.

Newcombe K.C. and *Mellish K.C.* for the appellants.

Daniel McNeil and *A. A. MacKay*, for the respondents.

THE CHIEF JUSTICE and GIROUARD J. concurred in the judgment allowing the appeal and ordering a new trial.

DAVIES J.—I agree with the judgment of Russell J. and would allow the appeal and order a new trial.

The appellant company entered upon the plaintiffs' lands, cut down and carried away trees, excavated a gravel pit, and otherwise damaged the property.

They had a legal right to do all this provided they had proceeded under the statute authorizing the construction of the road and given the plaintiff the statutory notices of their intention to take his property.

They did not, however, do this and, therefore, in all that they did with respect to plaintiffs' lands they were trespassers only.

If they had given the necessary notices defining what property they intended to take and had entered and taken the property in assertion of that right I should have been inclined to hold that the letter of the railway company's engineer to Mr. Sinclair might be

(1) 38 N.S. Rep. 80.

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construed as a sufficient and complete appointment of the company's valuator or arbitrator. In that case the arbitration would have been under the statute which in connection with the notice would contain a complete submission, and define not only what the arbitrators were to value, but the method of procedure.

I agree with Meagher J. that in such a case the latter words of the letter might be read as authorizing Mr. McKeen to

manage all the appraisal proceedings for them as well as to act as appraiser

because there could not be then any doubt as to what property or damages the arbitrators were appraising.

But as the defendants had not given the necessary notices and the statute did not apply, and no submission of any kind was executed defining what the arbitrators were to value, whether the plaintiffs' lands taken by the company, if any were taken, or merely the damages caused by digging the gravel pit referred to in Sinclair's letter or the latter damages plus those caused by the trees cut down and destroyed, I cannot agree that there was any legal or binding arbitration or award; or that the letter could be construed as in itself an authority to act until there had been an agreement defining what the arbitrators were to value. But I have no doubt whatever of the plaintiffs' right to recover for all the damages they have sustained at the company's hands against the defendants as trespassers and which damages, I think, should have been assessed under the alternative claim of the plaintiff at the trial.

While the appeal must be allowed with costs in this court our judgment should be the one which the court appealed from should have given, namely, that

proposed by Russell J., the costs of the appeal to the Supreme Court of Nova Scotia to be paid by the defendants and the costs of the first trial to be costs in the cause.

IDINGTON J.—The appellants are a railway company, that by the law of Nova Scotia at the times in question had a right, upon giving of notice under the statute, to have done all that was done by them, and in question here.

They without such notice and without any other authority had entered upon respondents' lands and committed trespasses in the way of taking timber and gravel.

Some talk took place, after some of these trespasses, between one of the respondents and the agent of the company, that indicates an intention to have an arbitration in respect of these trespasses and of further appropriations by the company of the respondents' property of both land and gravel, but nothing definite was arrived at.

There was nothing from which either party could not in law have receded. The respondents could have sued for the trespasses.

There was no express license for the continuation of such trespasses.

There was nothing passed between the parties that could in any way be said to have defined the extent to which the company had a right to go, or expected and intended to go.

About a year later, on the 20th day of July, 1901, the appellants filed a plan by which they indicated an intention to expropriate the land in question, but the extent of their intended expropriation thereby dis-

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closed did not cover all the land over which they had trespassed.

There were thus existing in law at the time when the alleged submission to an arbitration, which resulted in the award sued upon, was written, at least three distinctly separate claims, relative to which disputes might arise, and for settlement of which one or more arbitrations might furnish appropriate remedies; one for the trespasses done before anything passed between the parties, another for those done after the talk between them, for which there might be said to have been given, by one of the respondents, an assent that might possibly be held to have been as to him a license, to do what was done thereafter, but did not constitute a bargain between all the parties.

The damages, arising from these later acts thus assented to, could not be measured upon any principle of vindictive damages, though what arose from the earlier acts might, by reason of the high-handed methods adopted, well have such measure applied in regard to them.

Then there was a third claim, for the price of, or compensation for the acquisition desired by the company, of the fee simple in the land, in respect of which the plan was filed.

There may not have been any such power of expropriating the fee simple as the company thought there was. There is no doubt a provision under which the company might have entered for the purposes of taking gravel, without seeking to acquire the fee simple in the land from which the gravel was to be taken.

It does not become necessary in the way this case strikes me to decide whether or not there was such a

power of expropriation as the company believed there was.

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It is sufficient for my present purpose to point out that this company, clearly in good faith, believed that they had such power of expropriation, and that it was in light of that belief that their agent carried on his negotiations with the respondents and proceeded to consider the business of the proposed arbitration when he wrote the letter I am about to quote.

If ever there existed need for a clear, comprehensive and well considered submission defining exactly what arbitrators were expected to pass upon, this remarkable jumble of a variety of causes of action, resulting from illegal and unbusinesslike acts of the company together with intentions to acquire property by virtue of such a proceeding, resting upon statute or agreement, seemed to demand it.

Yet we have an attempt made by this suit to rest an award, said to relate to some or all of these matters against the appellants, upon nothing but the following letter, written by an agent of appellants:

Toronto, Canada, March 31st, 1902.

Lewis McKeen, Esq., Mabou, C.B.:

Dear Sir,—Will you please ascertain if the McIsaacs of Strathlorne have arranged their title to the ballast pit at Loch Ban in such a way that the arbitrators can get to work. If they have please let them know that you are prepared to act, and ask them to appoint their man so that you two if you cannot agree as to the valuation may select a third.

Do nothing in the case of Dr. Gunn at present. I want to get the McIsaac's matter out of the way first, and then we can take up his claim afterwards. I will send an agreement of arbitration which each one can subscribe to, or if they have one already drafted, you can forward it here for approval. I expect to get away every week, but something turns up to keep me here, and you had better take the case up without me. Yours truly,

Dict. A.S. ANGUS SINCLAIR.

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It seems that the man to whom the letter was addressed never answered it, but proceeded without further authority, with some one named by respondents, to nominate a third man. And the three, thus constituted so-called arbitrators, without notice to the company or hearing evidence or counsel or agent on behalf of the parties except the respondents, awarded that the appellants pay the respondents $957 together with $1.00 each to said arbitrators. The award is not before us. What it covers or purports to cover is left for us to guess until produced.

There is not the slightest doubt but that the company's agent who talked over the matter with the respondent Murdoch McIsaac intended to acquire the land, and that the arbitration he suggested was to cover that acquisition.

His evidence shews that, and is not contradicted.

The plan filed would indicate that also.

The pleadings indicate that the award was in relation to what had been taken from the land, or injury to the land, but not the value of the land itself.

There is no means of being certain from the evidence whether the arbitrators considered land, or gravel and damage to land, as combined in submission and award.

It seems abundantly clear from the letter quoted that the title to the land had been in question and was present to the writer's mind.

The terms of the letter itself, and the facts, may indicate that land as well as gravel were to have been considered.

It seems hopeless to try and support any such award upon a submission so clearly indicating that it was not a final document, but that if the respond-

ents would name a man a proper submission would be drawn up and signed.

It is useless to try, as was urged, to reject the latter part of the letter or to impute it only to matters concerning Dr. Gunn and his claim.

This latter part of the letter refers to the possibility that "*they* have one already drafted" and if they had "you can *forward it here for approval.*"

But as the proposal on the writer's part, to send an agreement of arbitration, comes after the interjected sentence, "Do nothing in the case of Dr. Gunn at present," we are asked to attribute these later remarks to Dr. Gunn's business and not to that of the respondents.

I strongly dissent from that proposed method of interpreting a document.

But for this argument, and what appears in the court below, I would not have thought it possible to claim any but the one meaning for this letter, and that clearly to be, as I certainly never have doubted it meant, to have proper articles of agreement settled before proceeding at all with arbitration.

Surely the consideration the parties had in mind, those the so-called arbitrators bore in mind, and the numerous legal difficulties surrounding the relations of the parties in regard to this property, ought to have been thought of by all concerned before adopting this kind of authority for the disposal of such matters in difference as had arisen between those parties.

I am quite sure a moment's consideration of all those things would have stayed those arbitrators. Such methods of arbitration as they adopted ought not to be encouraged.

The judgment on this award ought to be set aside and judgment be entered for plaintiffs in respect of

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the trespasses and the case go back for assessment of the damages arising from such trespasses with costs of appeal to the company here and possibly in the court below, and costs of the action and of the reference to be in the discretion of the judge who assesses the damages.

I do not, however, dissent from the disposition made of the costs.

MACLENNAN J. concurred in the judgment allowing the appeal and ordering a new trial.

Appeal allowed with costs.

Solicitor for the appellants: *W. H. Fulton.*

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

ALEXANDER C. McISAAC (PLAINTIFF) .... } APPELLANT;

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*Dec. 13.
*Dec. 22.

AND

JOHN E. BEATON AND OTHERS (DEFENDANTS) .... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Trust—Conditional devise.

The property was devised by will as follows:—

"I give and bequeath to my beloved wife, Margaret McIsaac, all and singular the property of which I am at present possessed, whether real or personal or wherever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them, and also order that all my just and lawful debts be paid out of the same. And I do hereby appoint my brother, Donald McIsaac, and my brother-in-law, Donald McIsaac, tailor, my executors to carry out this my last will and testament."

Held, affirming the judgment appealed from (38 N.S. Rep. 60), that the widow took the real estate in fee with power to dispose of it and the personalty whenever she deemed it was for the benefit of herself and her children, to do so.

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

The only question to be decided by this appeal was as to the construction of the will set out in the head note. The plaintiff was a son of the testator who claimed that the widow only took a life estate in the realty and defendant's title derived from her was

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) 38 N.S. Rep. 60.

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defective. The Statute of Limitations was pleaded as to which plaintiff claimed that it began to run only from the date of his mother's death, at which time he was residing out of the province and only returned shortly before his action was commenced.

A. A. MacKay for the appellant. We contend that Margaret McIsaac took only an estate for life in the property, with a power of appointment among the children, and that all she conveyed to Donald Beaton was this estate for life. The words "to be by her disposed of amongst my beloved children as she may judge most beneficial to herself and them" create what is known as a power in the nature of a trust. It is a power of appointment among the children. Though testator is providing that his estate shall go to his children, there is no gift to them, except in or by means of the power; there is no gift to the children in express terms, and no estate vests in them until the power is exercised. In default of the exercise of the power the estate vests in all the children equally, on the death of the donee of the power. Smith's Principles of Equity, pp. 42, 43 and 44; Jarman on Wills, p. 372; *Crockett* v. *Crockett* (1); *Godfrey* v. *Godfrey* (2); *Bibby* v. *Thompson* (3); *Hart* v. *Tribe* (4); *Newill* v. *Newill* (5); *Booth* v. *Booth* (6); Theobald on Wills (4 ed.), pp. 475-6, 384-387. The words are apt and imperative; she has no discretion except that allowed her by the will. "To be paid" in an agreement creates a covenant to pay. *Bower* v. *Hodges* (7). "To be settled," creates an executory trust. *Ballance* v. *Lanphier* (8).

(1) 2 Phillips 553.
(2) 11 W.R. 554.
(3) 32 Beav. 646.
(4) 32 Beav. 279.
(5) 7 Ch. App. 253.
(6) [1894] 2 Ch. 282.
(7) 13 C.B. 765.
(8) 42 Ch. D. 62.

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The objects of the disposition are limited and not within her control; "amongst my children." She has a discretion as to the time and manner of the disposition, and takes an interest herself, and it follows that as she may postpone that disposition until it is impossible to make it, that is at her death, she takes an estate for life. *Lambe* v. *Eames* (1); and cases of that class are clearly distinguishable as there the words were "to be at her disposal in any way she may think it best for the benefit of herself and family." Her discretion was unlimited in every direction, and she, therefore, took the fee simple. *Curnick* v. *Tucker* (2); *LeMarchant* v. *LeMarchant* (3).

This case is not that of an executor exercising an implied power of sale, nor is it the case of a devisee exercising an implied power of sale for the payment of debts. *Robinson* v. *Lowater* (4); Theobald on Wills (6 ed.), p. 433; Dart on Vendors and Purchasers (7 ed.), p. 635.

Under the direction to pay debts the personalty should have been exhausted before recourse could be had to the real estate. Williams on Executors (10 ed.) 1315 *et seq.* The direction, if a charge, only charges the real estate when the personal property is insufficient to pay the debts. At the time of this sale the statute in relation to such sales, R.S.N.S. (2 ser.), ch. 139, secs. 13-18, provided that undevised real estate should be sold first under license from the Court of Probate, unless it appeared that a different arrangement was intended by the testator, in which case the provisions of the will were to be complied with. There is no evidence that there were any debts rendering a sale necessary. The testator left personal property,

(1) 6 Ch. App. 597.
(2) L.R. 17 Eq. 320.
(3) L.R. 18 Eq. 414.
(4) 5 DeG. M. & G. 272.

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and seems to have been a well-to-do farmer, in those days.

Section 19, ch. 167, R.S.N.S., 1900, does not bar the plaintiff's right to recover. The right of entry accrued in 1882, the plaintiff was then out of the province and only returned about 1902, and he had ten years from the time of his return in which to bring the action. Darby & Bosanquet, Statutes of Limitations (2 ed.) 322. We also rely upon *Evans* v. *Evans* (1); *Talbot* v. *O'Sullivan* (2); *Combe* v. *Hughes* (3); *Ramsden* v. *Hassard* (4); and Elphinstone on Deeds, p. 40, Rule IX. and notes.

Mellish K.C. and *Jamieson* for the respondents. The plaintiff's claim is barred by the Statute of Limitations, R.S.N.S. 1900, secs. 10, 18, 19 and 27. The respondent contends that the appellant's right of action first accrued either under section 10 (*b*), on the death of the testator when his children were entitled to have the property divided, or under section 27, when the widow sold the lands in 1860. In either case the plaintiff cannot recover under section 19.

The property is charged with the testator's debts and devised to the widow *so charged* "to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them." This devise conferred upon the widow a power of sale to pay the debts. Theobald on Wills (6 ed.), p. 432, and cases there cited; *Marshall* v. *Gingell* (5); *Brooke* v. *Brooke* (6). The widow presumably sold the lands in exercise of that power and there is some evidence that the proceeds were used to pay testator's debts. It is,

(1) 12 W.R. 508.
(2) 6 L.R. Ir. 302.
(3) L.R. 14 Eq. 415.
(4) 3 Bro. C.C. 236.
(5) 21 Ch. D. 790.
(6) [1894] 1 Ch. 43.

however, for the plaintiff to shew that the sale by the widow was wrongful to the knowledge of the purchaser. *Colyer* v. *Finch* (1).

The words of the will by which the lands are devised "to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them" taken alone either create the widow merely a trustee for the children; *Blakeney* v. *Blakeney* (2); Theobald on Wills (6 ed.), p. 476; in which case the plaintiff's right of action would have first accrued when the widow conveyed the land to Donald Beaton (section 27), or the words merely mean that the lands are to be disposed of by the widow as she may judge most beneficial for herself and children—in which case she would have a clear power of sale. There is no authority for the proposition that the widow took a life interest under the will.

The plaintiff is neither in possession nor in constructive possession of the lands sought to be partitioned herein and cannot maintain this action. An action by partition is not a substitute for an action in ejectment. *Bennetto* v. *Bennetto* (3).

THE CHIEF JUSTICE and GIROUARD J. were of opinion that the appeal should be dismissed with costs.

DAVIES J.—The question in this appeal is as to the construction of a will made by Archibald McIsaac who died in 1858, which will was in the following words:

I give and bequeath to my beloved wife, Margaret McIsaac, all and singular the property of which I am possessed, whether real or personal, or wheresoever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial to her and

(1) 5 H.L. Cas. 905. (2) 6 Sim. 52.
(3) 6 Ont. P.R. 145.

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them, and also order that all my just and lawful debts shall be paid out of the same.

McIsaac was a poor farmer living in Cape Breton and at the time of his death owned a farm of 100 acres worth about $600 and a very small stock of cattle together with a few other chattels. He left a widow and nine children in very poor circumstances, and owed some debts, the amount of which was unproved.

The contention on the part of the appellant was that under this will the widow only took a life estate with a trust in favour of the children, and his counsel admitted that unless that construction prevailed the appeal must fail.

The trial judge held in favour of appellant's contention, and gave judgment in his favour. The Supreme Court of Nova Scotia, on appeal, reversed this judgment, Townshend and Meagher JJ. holding that the widow took an estate in fee simple under the will and in any case had power to sell the land in consequence of the charge upon it of the testator's debts, while Russell J. agreed in the result, but based his judgment upon the implied power to sell arising out of the charge of the debts.

The case is one by no means free from difficulty and I have entertained a good deal of doubt as to the true meaning of the will. As was said by Chief Justice May in *Talbot* v. *O'Sullivan* (1), at p. 308:

The authorities upon the construction of wills of this class are extremely numerous and not probably capable of being reconciled, and the decisions properly depend in each case upon the particular language used in the will to be interpreted.

I have, after an examination of the authorities and much reflection upon the language of this will, reached the conclusion that the reasoning of Town-

(1) 6 L.R. Ir. 302.

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shend J. concurred in by Meagher J. as to its true meaning, should prevail.

The two leading authorities, *Lambe* v. *Eames,* in appeal(1), and *Howorth* v. *Dewell*(2), relied on by the learned judge in support of his position are, I think, very applicable, and difficult, if not impossible, to distinguish. I only desire to add a few words as to the intention which ought to be drawn from the somewhat enigmatical language of the will in question. It must be admitted that where the will begins with an absolute gift in order to cut it down, the latter part of the will must shew as clear an intention to cut down the absolute gift as the first part does to make it. Now here, the words of the will in the first part are absolute and unqualified, and if the will had stopped at the words "wherever situated," it would not be open to any argument that the widow took an estate in fee simple of the lands and the personal property absolutely. Now what are the words which can satisfy us that this estate was cut down? They are attempted to be discovered in the words

to be disposed of amongst my children as she may judge most beneficial to her and them.

But the courts would not and could not undertake to execute any trust arising out of words such as these. They were the expression of his personal and absolute confidence in his wife. How could the court declare any disposition amongst the children which they might think proper to be such a disposition as the testator had in mind when he said "as she might judge most beneficial to her and them." She alone and not the court was to make the determination.

(1) 6 Ch. App. 597.
(2) 29 Beav. 18.

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Whether circumstances might arise in which she could be called to account for a breach of trust we have not now to decide. But I cannot find in the words quoted any justifying a conclusion that the estate devised in the first part of the will was cut down in the latter part, much less that a specific and limited estate for life was created.

Perhaps a good way to test the question is to apply it to the personalty. The same language is used in the will with respect to the personal property as with respect to the real estate. If that language creates an estate for life in the widow in the land it also limits her rights in the personal property to its user for life and prevents any sale of it. The widow could not sell, but must divide the property in specie amongst the children. Would such an argument applied to the personal property be reasonable? Would it not be destructive of the very object the testator had in mind? Not a horse or a cart or farm implement could be sold. They might be used by the widow, but must at her death be divided amongst the children in specie. She could not sell and apply the proceeds for their maintenance and support if she deemed that method "most beneficial to her and them," as specified in the will.

The application of the rule contended for to the personalty seems to me to illustrate its weakness more forcibly than when applied to the realty. But I quite concur that it was the full intention of the testator, and that he has sufficiently expressed it, to give his widow the absolute right to sell all or any part of the property devised and to apply the proceeds

amongst the children as she thought most beneficial to herself and them.

In the view I take of this will, that the absolute estate granted to the widow in the first part of the devise is not cut down by the subsequent words, and that these words do not, under the authorities above referred to, constitute a trust which a court of equity either should or would administer, in this view I say it is not necessary for me to consider either the Statute of Limitations or the point on which Russell J. relied in his judgment. That point was, and it was also adopted and relied on by Townshend and Meagher JJ., that the direction or order of the testator for the payment of his debts out of the real and personal property devised constituted a charge upon the lands and gave the devisee a power of sale over them. If it was necessary for me to consider this point I should require further time, because the two leading cases in the House of Lords relied on as authority for the proposition are cases in which the devisee of the lands charged was also executor of the will. In the latest case in the House of Lords of *Corser* v. *Cartwright* (1) Lord Cairns said at page 737:

> My Lords, for the sake of caution I ought to observe that in *Coyler* v. *Finch*(2), as in the case before your Lordships, the devisee of the real estate charged with the payment of debts was also an executor; and I desire not to apply any observation which I am now addressing to your Lordships to the case of a stranger, that is to say a person who is not an executor, being devisee of estates charged with the payment of debts.

In the case at bar the widow was such stranger, being devisee of the lands, but not executor of the will.

The late case of *Re Bailey*(3) shews that the power of sale is not necessarily implied even when lands are devised to executors and his testator directs that his debts shall be paid by them, but that it is a

(1) L.R. 7 H.L. 731. (2) 5 H.L. Cas. 905.
(3) 12 Ch. D. 268.

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question of intention to be collected from the whole will.

The appeal should be dismissed.

IDINGTON J.—It is, I admit, possible to distinguish the words, or literal meaning of the phrase, used in the devise in the will in question here from that in the case of *Lambe* v. *Eames*(1).

If one does not feel bound, as he might, in regard to what was known to be a carefully drawn document, to adhere to the literal meaning, of every word, but rather seeks to ascertain the intention of the testator by observing the general scope and purpose of the will, in light of the surrounding facts and circumstances, I think this case is not distinguishable from that just cited.

It is quite possible, by the same method of interpretation, to accept the alternative adopted by Mr. Justice Russell, and there may possibly be open, though I am not inclined to think so, the other alterntive, to read it as a devise so charged that the person accepting it became bound to satisfy the charge and incidentally thereto be empowered to sell. In any of these alternatives the result here would be the same.

Every effort made, during the ingenious argument presented to us, to extract some meaning from the words in question other than one of these alternatives, when tested by the supreme test of the intention of the testator sought out in the way I indicate above, seems to me to fail to produce anything that one could seriously think was like unto what it was possible the testator could have intended.

Every case relied upon to support each of these

(1) 6 Ch. App. 597.

other interpretations, so proposed by counsel, is easily and clearly distinguishable from this case.

The appeal should be dismissed with costs.

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

The question is whether the gift by the testator's will to his wife of his real and personal estate enabled her to sell and make a good title to his farm; or whether, if that be doubtful, the plaintiff, one of the children of the testator, can recover the farm after forty-four years' uninterrupted possession by the purchaser and his assigns.

The gift is as follows:

> I give and bequeath to my beloved wife Margaret McIsaac, all and singular the property of which I am possessed whether real or personal or wheresoever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial to her and them, and also order that all my just and lawful debts shall be paid out of the same.

In and by the same will he appointed his brother and brother-in-law his executors, "to carry out this my last will and testament," but he assigned to them no other duty.

The testator was a farmer, owner of a farm of 100 acres, and was possessed of some farm stock and implements. He had a family of nine young children. The land was of no great value, and only brought $600 when sold sixteen months after his death. He owed some debts, and there is some evidence that while the family remained on the farm they were to some extent dependent on neighours for assistance.

The testator died in 1858, and in 1860 the widow sold and conveyed the land to a person under whom the defendant derives his title.

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The plaintiff is one of the children of the testator, and claims that under the will his mother was tenant for life, and her children tenants in remainder in fee, and that upon his mother's death on the 3rd of April, 1882, he became seized of an estate in possession in fee simple.

He avoids the defence of the Statute of Limitations by saying that when his right of action first accrued, at the death of his mother in 1882, he was resident without the province, and so continued until within a short time before he commenced his action.

Now the first thing to be observed is that beyond any question the legal title of the testator's farm vested in the widow under the will. She took the legal fee simple in the land, and whatever beneficial interest in the land was intended to be given, or was given, to the children was in the nature of a trust. The personal estate is given in the same terms, but other persons being named executors the property in the personal estate would not vest in the widow absolutely until the debts were paid. Subject to that, the legal property in the personal estate would be in her absolutely, upon the same trust as that resting upon the land. Now the trust of both kinds of property being the same, the court must put such a construction upon that trust as will best accord with its terms and with the nature of both kinds of property, and with the reasonable and probable intention of the testator having regard to the circumstances of his property and his family. The widow is given the title of both kinds of property in the most unqualified manner, and she is to dispose of it as she may judge most beneficial to her and them. But it is said she must dispose of it *amongst the children*. I attach importance to the word "dispose," which is a large word, larger than

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divide. Applying it to the personal estate, it is easy to say it means to sell and apply the proceeds as she might judge most beneficial to herself and her children. In short, she was to *dispose* of everything both real and personal, to see that all just debts were paid, and to apply what was left for the benefit of herself and her children according to her best judgment.

I think the reasoning of the court in *Lambe* v. *Eames*(1) entirely applicable to this case, and that the proper construction of the will is that it gave the widow not only the legal title in fee simple in this land, but also an absolute power to dispose of it, as well as of the personal estate, if and when, in her judgment, it was for the benefit of herself and her numerous helpless children to do so.

In the foregoing view of the case it is unnecessary to consider the defence of the Statute of Limitations. But it being, as I think it is, quite impossible to hold that the will gave the widow the beneficial interest for life and the children an interest only at her death; and on the contrary, it being plain that the children as well as the mother were intended to have an *immediate* beneficial interest in both lands and goods, it follaws that if the widow had no power to sell the wrong done to the children was done by the sale and conveyance.

It is impossible to contend upon the language of the will that the children were not to have any immediate benefit, or that their mother could turn them all adrift, and take all the use and benefit of the property both real and personal for her own exclusive use for life.

If that be so the plaintiff's cause of action arose when the sale and conveyance was made on the 5th

(1) 6 Ch. App. 597.

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of April, 1860, and is barred by section 19 of the Statute of Limitations.

Appeal dismissed with costs.

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

Solicitor for the respondents: *J. H. Jamieson.*

ANGUS D. McISAAC (DEFENDANT) ... APPELLANT;

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*Dec. 13.
*Dec. 22.

AND

DANIEL J. McDONALD (PLAINTIFF). RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Statute of Limitations—Possession of land—Constructive possession—Colourable title.

McI. by his will devised sixty acres of land to his son charged with the maintenance of his widow and daughter. Shortly afterwards the son with the widow and other heirs conveyed away four of the sixty acres and nearly thirty years later they were deeded to McD. Under a judgment against the executors of McI. the sixty acres were sold by the sheriff and fifty including the said four were conveyed by the purchaser to McI.'s son. The sheriff's sale was illegal under the Nova Scotia law. The son lived on the fifty acres for a time and then went to the United States, leaving his mother and sister in occupation until he returned twenty years later. During this time he occasionally cut hay on the four acres, which was only partly enclosed, and let his cattle pasture on it. In an action for a declaration of title to the four acres:

Held, that the occupation by the son under colour of title of the fifty acres was not constructive possession of the four which he had conveyed away and his alleged acts of ownership over which were merely intermittent acts of trespass.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the defendant.

The facts are sufficiently set out in the above head note.

Newcombe K.C. for the appellant.
Alexander McDonald, for the respondent.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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THE CHIEF JUSTICE and GIROUARD J. concurred in the judgment dismissing the appeal with costs.

DAVIES J.—But for the strong opinion expressed by Townshend J. as to the rights acquired by the defendant by the application of the principle of constructive possession I should not have entertained the slightest doubt upon this case.

In deference to that opinion I have carefully examined the evidence and weighed the arguments advanced for the defendant.

All the alleged general acts of possession on the block of land occupied by the defendant and his mother, brothers and sisters may well be held applicable alone to such part of the fifty acres as they admittedly own.

The isolated and intermittent entries upon the vacant and unenclosed four acres in dispute which they had sold and conveyed to the predecessor in title of the plaintiff cannot be held to be anything else than mere acts of trespass.

To apply the doctrine of constructive possession to such a case as this and to extend it to the four acres which the defendant, his mother, brothers and sisters had sold and conveyed for valuable consideration and by warranty deed to the plaintiff's grantor, and to do this under colour of a void deed which on its very face relates back to and professes to convey to defendant's vendor amongst other lands the very lands which the defendant, his mother, brothers and sisters had already sold and conveyed to the plaintiff's vendor and the title to which they had warranted, would, it seems to me, be not only introducing a novel and indefensible extension of the doctrine, but one destructive of the plainest principles of law and equity.

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I agree that the appeal should be dismissed with costs.

IDINGTON J.—The appellant seeks to establish title to four acres of land by virtue of the Statute of Limitations in force in Nova Scotia.

The evidence of actual and continuous possession entirely fails to support the appellant's contention unless he can rely, as he seeks to do, upon an alleged constructive possession he sets up.

His father devised to him certain lands and by virtue of such devise he entered into possession of the same, and whilst in such possession he sold and conveyed the part thereof, which comprises the four acres now in dispute, to the person through whom respondent claims.

In this conveyance dated 9th Oct., 1877, the heirs at law, and legatees given by the will certain interests charged by the will upon the said devise, joined as grantors. The appellant and these other grantors covenanted as follows, in said deed of conveyance, that they

> the said lot of land and premises against the lawful claims and demands of all and every person and persons whomsoever will warrant and forever defend.

A creditor of the testator recovered judgment against the executors of said will, and thereupon the sheriff, by virtue of an alleged writ of execution, pretended to sell and convey the whole of the lands of the testator to one Gillis, in 1880.

The appellant being in possession saw fit, rather than have any contest with Gillis, to take from him a deed purporting to convey fifty acres of said land. This land now in question was by the description in

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said last-mentioned deed comprised in the said fifty acres.

The sheriff's sale is now conceded to have been null and void and to have conveyed nothing, and the deed from Gillis to the appellant falls with it.

The rather startling proposition is put forward that the *original possession,* continued by the appellant, had the effect of giving such vitality to the deed as to enable the appellant to claim as law, that his *continuing* in undisturbed and undoubted possession of part of the land covered by this void deed must be held as giving him a constructive possession also of the four acres in question over which he occasionally exercised some sporadic acts of ownership, such as cutting marsh hay on it, and letting his cattle roam over it, as others might, and probably did, for it was only partially fenced about.

He says this constructive possession was such as to satisfy the possession required to acquire title by virtue of the Statute of Limitations.

Manifestly there are two complete answers to this pretension.

There must be shewn in every case of constructive possession something done by him claiming it, under and pursuant to the defective or void deed relied upon, to enable the grantee to ask the court to interpret his acts of possession as intended to extend to or have a relation to all the property comprised in such deed.

The *entry under* such a defective or void deed upon one part of the whole described as conveyed thereby has been taken as indicating a purpose to enter upon the whole and the acts of possession, following such an entry, need not extend to every part and corner of the lot thus dealt with, to shew such an

actual physical use thereof as when a trespasser enters and claims to have acquired title by length of possession.

The reason for this is obvious and need not be laboured with. How can anything of this sort ever be attributed to a void deed under which the grantee did nothing? He made no entry for he was already in as devisee and never in law and in fact held in any other character.

No matter however adroitly he may answer questions on the point, there is left nothing else to rely upon.

Again, how can he claim anything as arising from this deed? How could he who would, if the deed which rested on the title of the father had been valid, and cut out the grant he had made to the respondent's vendor, have been compellable, under his warranty covenant, to have reconveyed to the respondent or his grantor all he had got under such a deed, set up what if valid would have been in breach of his own covenant?

In the definition of constructive possession good faith is sometimes included, and in any event is one of the elements it must rest upon. This supposed violation of his covenant in the case I put does not seem to be a very sound basis upon which to rest a claim that must have good faith to support it.

It seems from the effect we are asked to give to this void deed as if it were to be held a case of nothing being more valuable than something.

I think the appeal should be dismissed with costs.

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

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Appeal dismissed with costs.

Solicitor for the appellant: *Frank A. McEchen.*
Solicitor for the respondent: *Alexander McDonald.*

ANTOINETTE CAIRNS AND OTHERS (PLAINTIFFS) .... APPELLANTS;

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*Dec. 4, 5, 6.
*Dec. 22.

AND

ROBERT MURRAY AND OTHERS (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Breach of trust—Accounts—Evidence—Nova Scotia "Trustee Act," 2 Edw. VII. c. 13—Liability of trustee—N.S. Order XXXII., r. 3—Judicial discretion—Statute of limitations.

By his last will N. bequeathed shares of his estate to his daughters A. and C. and appointed A. executrix and trustee. C. was weak-minded and infirm and her share was directed to be invested for her benefit and the revenue paid to her half-yearly. A. proved the will, assumed the management of both shares and also the support and care of C. at their common domicile, and applied their joint incomes to meet the general expenses. No detailed accounts were kept sufficient to comply with the terms of the trust nor to shew the amounts necessarily expended for the support, care and attendance of C., but A. kept books which shewed the general household expenses and consisted, principally, of admissions against her own interests. After the decease of both A. and C. the plaintiffs obtained a reference to a master to ascertain the amount of the residue of the estate coming to C. (who survived A.) and the receipts and expenditures by A. on account of C. On receiving the report the judge referred it back to be varied, with further instructions and a direction that the books kept by A. should be admitted as *primâ facie* evidence of the matters therein contained. (See 37 N.S. Rep. pp. 452-464). This order was affirmed by the Supreme Court of Nova Scotia *in banco*.

Held, affirming the judgment appealed from (37 N.S. Rep. 451) that the allowances for such expenditures need not be restricted to amounts actually shewn to have been so expended; that, under the Nova Scotia statute, 2 Edw. VII., ch. 13 and Order XXXII., rule 3, a judge may exercise judicial discretion towards reliev-

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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ing a trustee from liability for technical breaches of trust and, for that purpose, may direct the admission of any evidence which he may deem proper for the taking of accounts.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1) affirming the order of Mr. Justice Graham, which referred the master's report back to him for further inquiry and variation with directions as to how the accounts should be taken and as to the reception of certain books of account as *primâ facie* evidence of matters therein contained.

The material facts of the case and the questions at issue on the present appeal are sufficiently stated in the head note and judgment now reported.

Newcombe K.C. and *Mellish K.C.* for the appellants.

W. B. A. Ritchie K.C. for the respondents.

THE CHIEF JUSTICE and GIROUARD J. concurred in the judgment dismissing the appeal with costs for the reasons given in the court below.

DAVIES J.—I concur for the reasons stated by my brother Maclennan.

IDINGTON J.—Four points: (*a*) the additional allowance of $400.00 per annum for expenses out of income; (*b*) the commission allowances; (*c*) the statute of limitations and; (*d*) the admission of the account books as evidence, are taken on this appeal, which is from the Supreme Court of Nova Scotia, dismissing an appeal from Mr. Justice Graham's order referring back to the referee his report for amendment and reconsideration.

(1) 37 N.S. Rep. 451.

The order, as first made, was amended by the learned judge, and, as amended, is copied in full in the opinion judgment of Mr. Justice Townshend, who delivered the judgment of the court, and, hence, there cannot be any possible mistake in saying that this amended order was the order appealed from to the Supreme Court of Nova Scotia and fully considered by that court and upheld. And, as a result, the terms of that amended order thus adopted by the court below are all that is now before us to pass upon.

The first of the four points is the only important one. The master allowed only $500 a year for the support and maintenance by the late Antoinette Nordbeck of her late sister, Caroline Nordbeck, who had an income exceeding the amount of the $900.00 a year that Mr. Justice Graham has allowed.

She was kept, though of feeble mind, in the condition of affluence and comfort that she was entitled to be kept in, having such income.

The sister who did all this was the executrix, was a capable person, and doubtless used the incomes of herself and sister as if both held in common. She did not keep such accounts as a banker might have done, but kept such accounts as do shew a general annual expenditure in this way of living, and as may fairly be said to have benefited the feeble sister to the extent the learned judge has allowed.

The contention is set up that because Antoinette did not keep and exhibit an account in detail, and hence was unable to prove, item by item, the actual expenses (specifically so to say applicable, and applied to the direct benefit of Caroline) she must not be allowed beyond what she can shew items for.

I know of no such rule of law as will require any court to restrict the allowances for expenditure in

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such cases within what can be shewn in that way to have been expended.

If the law be so then we might go further, and say the very cheapest mode of living ought to be adopted in all such cases because the quasi ward is unable to have and express an opinion, and entitled to have all her money saved except what is needed for bare subsistence, and she is to be presumed as not having been capable of enjoying life better, by reason of the surrounding comforts that a spacious, well kept house and grounds might afford, and the corresponding equipment of such a house, and all that can be implied therein.

The lot of such trustees as this Antoinette Nordbeck had by fate given her, is always hard enough, without adding a new terror to the lives of those who have to bear such burthens.

She spent for the living of herself and her sister. She did not make money out of the incomes of both or either.

Her father, by his will, clearly indicated she was trusted by him to do almost as she pleased, and not to be charged in the way sought to charge her here.

I have not the slightest doubt she did in regard to the manner of expending the incomes just what her father would have approved of.

The court below used the evidence in the account books, kept by the executrix, and by that means was able to make an allowance that possibly the referee could not have made.

Unless and until the court or a judge directs a referee to make use of such account book he cannot, as in Ontario, for example, where the master has the power given him, which in Nova Scotia is only reposed in the court, or a judge.

The learned judge went further, and by use of that, with other evidence, fixed, as the learned judge had a right to fix, what he found all that evidence enabled him to find and fix.

I see no reason to interfere with that finding.

In all these cases the judge, who has had a chance of knowing the local conditions, is better able to appreciate properly such evidence as we have before us than we possibly can.

The learned judge may have allowed more even than I, if on the spot and acquainted with the local conditions, might have allowed on this evidence.

Even so, I would not reverse, unless satisfied that by no reasonable inference from the evidence, could the expenditure challenged have been imputed to the support and maintenance of the weak one, in such ways as would minister to her comfort and enjoyment of life; or that the income had been improperly exceeded or misapplied.

The use of the books as evidence was purely a matter of discretion and what I have written disposes of all that need be said in relation to its exercise.

Some commission seems clearly allowable and is so as far as directed; but the measure of it may on the facts be affected by what the evidence shews, and will, when fixed, be subject to review by the judge or court below.

The statute of limitations, of which we heard so much, is as yet not in this appeal. The referee may or may not find such facts as may render the statute operative.

When he does the judge and court below will no doubt deal properly in regard to it, for it was pleaded, but not passed upon, by the record of judgment, and

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would seem open in law for future disposition if need be.

The appellants have failed on all four points taken and the appeal must be dismissed with costs.

MACLENNAN J.—This is an appeal by the plaintiffs in an administration suit, from a judgment of the Supreme Court of Nova Scotia, dismissing an appeal from a judgment of Graham J. referring the case back to the referee to review and vary his report.

The action respects the estate of Peter Nordbeck, who died in January or February, 1861, having first made his will bearing date the 9th of October, 1860, of which he appointed his daughter Antoinette executrix. The testator left an estate estimated at about £15,000, Nova Scotia currency. He left him surviving besides Antoinette, two other daughters, Eleonora and Caroline, and these were his own children. Eleonora was then the wife of one Harley, and she and her husband are now dead. Four children and three grandchildren of Mrs. Harley are plaintiffs; and the defendants are the executors of Antoinette, who died in 1898, aged 84 years. One of the plaintiffs is administratrix of Mrs. Harley, and another is administratrix of Caroline, who died in January, 1902, aged 80 years.

After providing for his daughter, Mrs. Harley, the testator devised his dwelling house on Brunswick Street, with all the furniture and effects contained therein, to Antoinette for her own absolute use, but subject to the free and unrestricted use and occupation of the same by Caroline for life. He then gave his residue to Antoinette and Caroline equally, share and share alike, with a direction that Caroline's share should be invested by Antoinette, and that the income should be paid half-yearly to her for life, and at her

death to her children, if any, and if she died unmarried her share should be divided equally between Antoinette and Mrs. Harley. The will provides for the case of Antoinette or Caroline marrying and leaving children surviving them, but they both died without having been married. The judgment at the hearing determined that Mrs. Harley's children became entitled between them to one-fourth of the testator's residue upon the death of Caroline, and that determination is now acquiesced in. The judgment then directed certain accounts and inquiries to be taken and made. But, except as to the proportions or shares of the residue to which the plaintiffs were declared to be entitled, the judgment decided nothing whatever as to the rights or liabilities of the parties, nor was any authority given to the referee to decide or declare any such rights or liabilities.

Further directions were reserved, and also liberty to apply.

The referee made his report, with statements of the several accounts directed by the judgment, and finding the half of the residue, with interest computed thereon from the testator's death, including the value of existing securities, and the dividends paid thereon to amount to $49,653. He also found that a proper allowance for the maintenance of Caroline from the death of her father until her own death was the sum of $20,500. He also computed income and interest subsequent to her death at $1,092.

The plaintiffs moved before Mr. Justice Graham to confirm this report, and the defendants moved to vary it, and the learned judge delivered a very extended opinion in which he referred it back, with directions to vary it. An order to that effect was drawn up bearing date the 17th of December, 1904.

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The plaintiffs immediately appealed against this order to the Supreme Court, and while the appeal was pending Mr. Justice Graham re-cast the order of the 17th of December, varying it a good deal in form, and this amended order was duly drawn up and issued, bearing date the 27th of January, 1905.

A very earnest contention was made before us that the amended order was void, and that the learned judge had no power to make an alteration in his order after it had been issued.

I have carefully perused and considered the learned judge's written opinion, on which the orders were founded, and have also compared the substance of the two orders, and I am clearly of opinion that the second order more fully and completely follows and carries out the learned judge's written opinion than the first. The main difference is in the form. It is hard to say there is any difference of substance, except the direction, in the second order, of an inquiry whether the trustee acted honestly and reasonably within the Trustee Act and ought to be excused. But that is something to which, in his written opinion, the learned judge had made distinct reference and the omission of which from the first order drawn up was a good reason for having it re-drawn. Another difference may be noted, that while the first order enables the referee to determine whether to apply the Statute of Limitations, the amended order reserves that power to the court.

It was also argued that there was some inconsistency between the order under appeal and the order made by the learned judge at the trial. I do not think this is so. It was said that the order or judgment at the trial expressly excluded the application of the Statute of Limitations. It is true that in his written

opinion the learned judge had expressed himself so; but that is omitted from the order as issued, and in such cases the order as drawn up and issued must govern, unless and until corrected or amended. Besides, the judgments at the trial, as I have pointed out, did no more than direct certain accounts to be taken, without in any way deciding the rights or liabilities of the parties in respect to them, and reserved further directions and liberty to apply.

I am, therefore, of opinion that there is nothing in any of these objections.

The question then remains, whether on the merits the order was rightly affirmed by the Supreme Court, and I think it was.

I cannot imagine a case in which the modern remedial legislation with respect to the onerous, and often thankless, duties of trustees ought with more propriety to be applied, if that can fairly and justly be done. Here were two daughters, spinsters, the one thirty-eight and the other forty-six years old. Their father dying gives his dwelling and all its furniture and contents to the elder, absolutely, subject to the free and unrestricted use thereof by the younger for life. The father evidently contemplated and provided for just what has taken place, for they lived together for thirty-eight years afterwards until the elder died, aged eighty-four, the younger being then seventy-six. According to the evidence the younger sister was not a person of strong mind, and evidently required the care and protection of her sister, but she was by no means lunatic or *non compos*. That is manifest from her father's will in which he provided that the interest of her share should be paid to her, and also contemplated the possibility of her marriage. It is not suggested, nor is it possible to believe, that these sisters

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lived together, for those many years, otherwise than in mutual confidence and affection, and yet it is sought, without the means of knowing all that passed between them in relation to their business affairs, to settle accounts between their estates as if the elder had been defrauding her younger sister every day of her life.

A point which was strongly argued was the increase directed by the order of the learned judge of the annual allowance to be made for Caroline's maintenance from $500 to $900 a year. I think there is evidence which warrants that increase, and that the judgment on that point should not be disturbed.

I think there is nothing else in the judgments appealed from to which objection can be successfully urged and the judgment should, therefore, in my opinion, be maintained, and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Fulton.*

Solicitor for the respondents: *John A. McKinnon.*

IN THE MATTER OF

THE CUSHING SULPHITE FIBRE COMPANY.

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*Feb. 8.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Jurisdiction—Discretionary order—Stay of foreclosure proceedings—Final judgment—Controversy involved—"Winding-up Act"—R.S.C. c. 129, s. 76—R.S.C. c. 135, s. 28.

Leave to appeal to the Supreme Court of Canada under the seventy-sixth section of the "Winding-up Act" can be granted only where the judgment from which the appeal is sought is a final judgment and the amount involved exceeds two thousand dollars.

A judgment setting aside an order, made under the "Winding-up Act," for the postponement of foreclosure proceedings and directing that such proceedings should be continued is not a final judgment within the meaning of the Supreme Court Act, and does not involve any controversy as to a pecuniary amount.

APPLICATION for leave to appeal from the judgment of the Supreme Court of New Brunswick, rendered on the 5th of January, 1906, reversing the order of Mr. Justice McLeod, under the "Winding-up Act," which postponed the proceedings for the foreclosure and sale of certain mortgaged lands of the company.

The questions which arose on this application are stated in the judgment now reported.

Blair K.C., *Pugsley* K.C. and *Hazen* K.C., for the application.

R. G. Code and *C. S. Hanington*, contra.

DAVIES J.—This was an application made to me, in chambers, on behalf of the liquidators of the com-

*PRESENT:—Mr. Justice Davies in Chambers.

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pany for leave to appeal to the Supreme Court of Canada, from a judgment of the Supreme Court of New Brunswick of the 5th of January last, allowing an appeal of the Eastern Trust Company from an order made by Mr. Justice McLeod, who had charge of the winding-up proceedings of the company, postponing, for the second time and until the first day of May next, 1906, the sale of certain very valuable property of the Cushing Sulphite Fibre Company, Limited.

The sale was to have taken place under a decree of foreclosure made by the Court of Equity of the province prior to the granting of the winding-up order. The sale had been previously postponed by Mr. Justice McLeod, acting as the judge under the winding-up proceedings, to a date in November last and then again by the order made by him in November till May next, and it is from the judgment of the Supreme Court of New Brunswick setting aside this latter order and ordering, in lieu thereof, that the Eastern Trust Company, the mortgagee of the limited sulphite company's property, "have leave to proceed in their suit as they may be advised," that I am asked to grant leave to appeal to this court.

The section of "The Winding-up Act," under which it is contended that I have the power to grant the leave asked for is the seventy-sixth. It provides that

an appeal shall lie to the Supreme Court of Canada by leave of a judge of the said Supreme Court from the judgment of (*inter alia* the full court of New Brunswick), if the amount involved in the appeal exceeds two thousand dollars.

At the very threshold of the application, therefore, I must be satisfied that this condition, which alone gives this court power to hear an appeal, exists.

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It is not contended that it does directly or that any amount at all is directly involved. But it is argued that the property to be sold is a most valuable one, amounting to several hundreds of thousands of dollars, and that indirectly it is of great importance whether the liquidators under the "Winding-up Act" or the referee of the Court of Equity should have the control of the sale, and that the adverse and contending bondholders hold bonds for sums very much beyond this two thousand dollar limit, and that, consequently, more than that amount is involved in the appeal.

I am not able to appreciate this argument. I cannot see that any amount whatever would be involved in the appeal sought. All that would be involved would be the power and, conceding that, the judicial discretion of Mr. Justice McLeod in postponing the date on which the sale of the property was to take place. But with respect to neither the power to make the order nor the judicial discretion exercised in the making of it, if the power exists, have we been vested with jurisdiction.

Then again, I do not think the judgment sought to be appealed from a final judgment within the meaning of that phrase in the Supreme and Exchequer Courts Act. The twenty-eight section of that Act declares that

except as provided in this Act or in the Act providing for the appeal, an appeal shall lie only from *final* judgments, etc.

Mr. Blair and Mr. Hazen contended that it must be held to be "provided" in the section of the "Winding-up Act" cited by me above, that an appeal shall lie from all judgments involving more than two thousand dollars. I do not so construe the two sections. I

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think they must be read together and that, unless otherwise specifically or by reasonable inference "provided" in the Act allowing an appeal, it shall lie only from final judgments, and only from them in cases where the amount involved exceeds two thousand dollars.

The judgment of the Supreme Court of New Brunswick is not a final judgment within the meaning of those words as used in the Act. It is simply an interlocutory judgment setting aside an order postponing a sale and giving the plaintiff leave to proceed as he may be advised and it does not involve any amount whatever.

The application is refused with costs.

Application refused with costs.

MICHAILO POLUSHIE AND OTHERS (DEFENDANTS) .... APPELLANTS;

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* Oct. 28, 30, 31.
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* Feb. 21.

AND

THE REVEREND IWAN ZACKLYNSKI, PAVLO PASEMKO AND PETRO MELNYK, TRUSTEES OF THE CONGREGATION OF THE GREEK CATHOLIC CHURCH AT STAR, IN ALBERTA (PLAINTIFFS) .... RESPONDENTS;

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Title to land—Ambiguous description of grantee—"Greek Catholic Church"—Evidence—Construction of deed—Reversal of concurrent findings.

Where Crown lands were granted "in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake," N.W.T. and it appeared that this description was ambiguous and might mean either the Greek Orthodox Church or the Greek Church in communion with the Church of Rome, it was held that the construction of the grant should be determined by the facts and circumstances antecedent to and attending the issue of the grant and that, in view of the evidence adduced, the words did not mean a church united with the Roman Catholic Church and subject to the jurisdiction of the Pope.

Judgment appealed from reversed, the Chief Justice and Girouard J. dissenting, on the ground that the concurrent findings of the courts below upon matters of fact ought not to be disturbed.

APPEAL from the judgment of the Supreme Court of the North-West Territories, affirming the decision of the trial judge by which the plaintiffs' action was maintained with costs.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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The case is fully stated in the judgments now reported.

Ewart K.C. and *Short* for the appellants.
C. deW. Macdonald for the respondents.

THE CHIEF JUSTICE (dissenting).—This is an appeal upon a question of fact from the concurrent judgments of the two courts below. The case is a complicated one, but I would not feel justified in holding that the judgments in favour of the respondents are clearly wrong. The findings of the trial judge, after a careful and patient hearing of the numerous witnesses brought forward by both parties, should not be interfered with.

GIROUARD J. (dissenting).—This appeal involves no principle of law, but a mere question of fact, namely, whether a certain church built by Galicians in the North-West Territories was intended for a Russian Orthodox Church or a Greek Catholic Church in communion with the Church of Rome. After reading the evidence, I think that the least that can be said is, as found by the two courts below, that it is very contradictory. The trial judge, who saw the witnesses, found it not satisfactory, especially as to the change of religious faith or severance from the Church of Rome. His judgment shews that he believed the plaintiffs' witnesses rather than those of the defendants. He observes:

It is impossible for me to believe that they (the Galicians of Star) could have attended the services of fathers Dymytrow, Tymkiewicz and Zacklynski (Roman Catholic priests) extending over a period of four years and have remained during the whole of that period in ignorance of the fact that their services were those of the Uniate (that is Roman Catholic) church and not of the Orthodox (Russian) Church.

In appeal, Mr. Justice Wetmore says that the evidence is of a very contradictory character, and he adds:

> If I had been in his place (Scott J.) my findings would have been of a similar character. But whether they would or not, this is not a case where a court of appeal should, in view of the conflicting character of the testimony and of the conclusions of facts open to be inferred from it, interfere with the trial judge's findings.

When we read the letter dated 1st April, 1900, addressed to the Spiritual Father Zacklynski (one of the respondents, undoubtedly a Roman Catholic priest) in which two of the defendants and some twenty-two co-religionists who signed it declare that they are "Uniates," that is, in union with the Church of Rome, and expressed the following request:

> We require to have you, rev. father Zacklynski, permanently for our pastor, and we will pay you a yearly salary of two dollars per family. Each half year we will bring the money, besides the revenue from fees. We have a church finished. In the church we have an altar and symbolium and cross and two banners. Of church books we have the gospels and ritual for precentor and viaticum and further the collects. The presbytery is not yet finished, but we shall finish it in a short time, but for the meantime we have a suitable residence 100 paces from the church. We have a very good farm for the spiritual father, the same land on which the church is built;

when we read this and other evidence, it is almost impossible to come to the conclusion that the trial judge was wrong.

Two courts, undoubtedly more acquainted with the subject matter than we are, and knowing better the locality and the people interested, their customs, manners, education and intelligence, came to the conclusion that the plaintiffs must succeed. The appellants admit that the evidence is contradictory, in fact hardly one single fact of importance could be agreed to by counsel before us. Is this a case where the findings of two courts should be disturbed?

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If I were satisfied that it was wrongly decided I would not hesitate to reverse, but I am not satisfied that the courts below were wrong. The very title of the church, rightly or wrongly—that point is not before us, for we are not called upon to correct it—shews that it was in favour of the "Greek Catholic Church," that is the Roman Catholic Church, to which these people always belonged before coming to this country, and not to the Russian Orthodox Church. I recognize the right of every congregation or individual to change his religion, and adopt any one he chooses not prohibited by law, but that change must be made in no equivocal terms. Here we have no resolution of the congregation; the opinions or consents of individual members taken by one man hired to do so at so much per head cannot change the situation; he did not even obtain the consent of the majority of the congregation. Even if he did the minority is entitled to hold the property, as the nature of the trust cannot be changed or altered except by and with the consent of all parties interested, or an Act of Parliament. *The General Assembly of the Free Church of Scotland* v. *Overtoun*(1) is an authority in point.

The relinquishment by the Roman Catholic bishop, so much relied upon by the appellants, means nothing as far as the Roman Catholic creed is concerned. There is no law in the North-West Territories or in any part of the country or in the Catholic Church government which requires that the title of a Roman Catholic church should be in the name of its diocesan bishop; it is usually done in this manner, but there is no law which requires it should be so done. In the

(1) (1904) A.C. 515.

Province of Quebec it is not so held, and according to the common law prevailing anywhere in the Dominion, it may be held in the names of trustees (as in this case) for the benefit of any church designated. An ordinance passed in 1898 by the North-West Territorial legislature so provides in express terms. The Greek Catholic Church cannot mean the "Greek Orthodox Church" first mentioned in the requisition for the permit to build, and subsequently changed in the title to "Greek Catholic Church." The very fact that the two names are used shews that they cannot mean one and the same church and the evidence establishes that they constitute two different bodies. The letter of the Dominion lands agent to the Department, of the 25th May, 1898, cannot supersede the certificate of title.

For these reasons I have come to the conclusion that the appeal should be dismissed with costs.

DAVIES J.—This case arose out of a dispute between rival bodies of Galicians residing in a settlement called Star, N.W.T., as to the religious uses and purposes to which the church built by them in that settlement should be dedicated.

The plaintiffs, who sued on behalf of themselves and other members of the congregation of the church, claimed an injunction restraining the defendants in whose names, as trustees, the church premises stood, from using or permitting the church to be used for religious purposes and uses other than those in communion with and under the jurisdiction and control of the Roman Catholic Church.

The judgment or decree from which this appeal is taken adjudged the lands of the church erected thereon to be

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the property of that branch of the Greek Church and which is united with the Roman Catholic church and which may be properly designated as the United Greek Catholic Church.

The defendants contested the suit on the ground that the people who built the church and obtained the patent for the lands had, before or at the time they began to build the church and afterwards when they obtained their formal patent for the lands, severed any connection they may have had when in Galicia with the Roman Catholic Church, and repudiated being subject to the jurisdiction and authorities of that church, claiming to be united with and subject to the jurisdiction of the Greek Catholic Orthodox Church, the bishop of which, in North America, has his seat in San Francisco.

Although the question incidentally arises it is not necessary for us to decide whether the church and premises in dispute are subject to the jurisdiction of the Bishop of the Greek Catholic Orthodox Church or not. The sole question necessary for us to determine is whether or not they are united with and subject to the jurisdiction of the Roman Catholic Church.

If they are not the appeal must be allowed and the action dismissed.

The facts are very voluminous, and complicated, and rendered more difficult properly to appreciate and decide because of the singular and unique position in which the church to which these people belonged in Galicia stood towards the Roman Catholic Church in that country, and also because the witnesses with rare exceptions gave their evidence through interpreters, many of the witnesses understanding the English language very little, and most of them not at all; while the great bulk of them were almost totally illiterate and ignorant.

It is clear beyond any doubt that the Russo-Greek Catholic Orthodox Church as such was prohibited for political reasons in Galicia by the Austrian Government, and that the church which was permitted and did exist in Galicia and which may properly be called a branch or offshoot of that church, was subject to the jurisdiction and supremacy of the Pope of Rome, though having a heirarchy and bishop of its own and a "use" or form of worship and ritual with vestments similar to those of the Greek Church.

What the official or legal name or designation of that church in Galicia was, is difficult if not impossible to determine under the evidence.

The respondent in his factum and argument at bar insisted that it was the Greek Catholic Church, the same designated in the patent of the lands, but admited that it was known as and called by many different names according to the nationality or religion of the person who spoke of it.

> The Ruthenians themselves call it "The Ruthenian Church." The Poles call it "The Ruthenian Church." The Church of Rome also calls it the "Ruthenian Catholic Church." Catholics of the Greek rite "The Graeco-Ruthenian Church," and outsiders in order to give it a description properly describing its relation to the Greek Church and the (Roman) Catholic, call it "Uniate" or "Greek Uniate."

The Roman Catholic bishop Legal says of it:

> The Greek Church is the portion of the Christian Church not in communion with Rome which uses the Greek or oriental liturgy. The Greek Catholic Church of Galicia is a portion of the Roman Catholic Church using a liturgy in the Slavonic language. I have heard it called by the name of "The Uniate Greek Church." We also call it "The United Ruthenian Church" and "The United Greek Ruthenian Church." I would call them Catholics of the Ruthenian Rite to distinguish them from Catholics of the Latin or Roman Rite. The Greek Catholic Church of Galicia has exactly the same Creed as the Roman Catholic Church but I believe their liturgy is that of the Greek or Eastern Church, which is very different from that of the Roman Catholic Church.

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The testimony on the other hand of ecclesiastics called on behalf of the defendants was to the effect that the Greek Catholic Church meant the Greek Orthodox or Greek Catholic Orthodox or Eastern Church, as distinguished from the Roman Catholic or Western.

The court below in its form of judgment or decree says that it is that branch of the Greek Church which is united with the Roman Catholic Church and which may be properly designated as "The United Greek Catholic Church."

I am satisfied, however, from a careful perusal and comparison of the evidence of the different witnesses, that the phrase or terms used in the patent, as I gather from the certificate of title, to describe the church in dispute, namely, "The Greek Catholic Church," does not necessarily and legally imply the Roman Catholic Church or a church in union with and subject to its jurisdiction, and that the name and description being doubtful and ambiguous, we are necessarily driven to a consideration of all the facts and circumstances connected with the building of the church, and the patenting of the land, in order properly to determine the meaning of the terms of the trust.

As to the difference between the church indifferently called by the witnesses the "Uniate," or "Greek Uniate," or "Greek Catholic," or "Ruthenian Church," or "Greek Ruthenian," or more popularly "Ruska Church," as it existed in Galicia, and designated by the court below in their decree as "The United Greek Catholic Church," and "The Greek Orthodox Church of the East," they are formulated by agreement of parties in the appeal book.

The former affirms and the latter denies the following Roman Catholic dogmas or beliefs:

1. The infallibility and supremacy of the Pope.
2. The immaculate conception of the Virgin.
3. Purgatory, and
4. The double procession of the Holy Ghost.

The study I have given to the evidence convinces me that the trial judge, Scott, J., was right in his conclusion that these Galician peasants

> did not trouble themselves very much over the differences in creed between the two churches (Eastern and Western). Many of them do not understand what these differences are.

There is also little, if any, difference in the rites, ceremonies, vestments and ritual of the Orthodox Eastern Church or Greek Orthodox Church, and those of the Galician Church called "Uniate," "Ruthenian," "Greek Catholic," and "Ruska." To the ordinary ignorant Galician peasant such as those of this Star congregation, I would conclude from the evidence there would not be any.

The real vital difference present to the minds of these people, as I gather from their testimony, was the supremacy of the Pope and the authority and jurisdiction of the Roman Catholic bishop over them.

In their own country, Galicia, these people ecclesiastically and the church to which they belonged, though having bishops and a hierarchy of their own, were beyond doubt subject to the supremacy and jurisdiction of the Pope.

As bishop Legal says in his evidence:

> If Greek Catholics (by which term he meant these very people) go to a place where there is no Hierarchy or Bishop of their own rite they are enjoined to submit themselves to the Roman Catholic Hierarchy there, but they must return to their own rite as soon as an opportunity occurs.

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When these people emigrated to the North-West they were not only free to follow or accept any form of religion that they wished and determined on, but they *knew* that was so. Witness after witness testifies to this fact.

The question then arises: Did they remain in the church to which they belonged in Galicia owing obedience to the Pope of Rome, and subject to his supremacy or did they unequivocally change and throw off that allegiance?

I am of opinion that they did the latter, and that amid much conflict of testimony, hard, if not impossible, to reconcile on other points, the evidence on this one point is clear that these Galicians made up their minds on coming to the North-West Territories to repudiate and did repudiate the authority and jurisdiction over them of the Pope and of the Roman Catholic bishop of the diocese, and that the church they built was not intended to be, and was not in law, under such jurisdiction.

Evidence was given in order to shew why they did this. That it was owing to the taxation they had to bear for the church in Galicia and which they feared they would be subject to in Canada. That it was because their hearts were with the church of their brothers in blood in Russia and that they only had submitted in Galicia because the law prohibited there the Greek Orthodox Church. That they really believed the tenets and held the faith of the Eastern Church as distinguished from the Western. These reasons do not concern me. They may be true in whole or false in whole, true in part and false in part, as from the evidence I conclude. But what I am concerned with is the fact itself. Did they for any reason clearly repudiate the supremacy and jurisdiction of the

Roman Catholic Church, and erect a church building intended not to be in communion with it?

Whether or not they could without such repudiation, and if they had remained subject to the jurisdiction of the Church of Rome, have secured to themselves the right to worship in this country according to the forms, ceremonies, and rights of the Greek Orthodox Church which they seemed to have possessed by law in Galicia, including the right which they also possessed there to have married priests, is a question I do not propose to enter into, as it is not necessary for the decision of this appeal. I will assume for the purpose of my argument that they could. What then are the facts in evidence respecting the determination of these Galicians to establish a church not in communion with or subject to the jurisdiction of the Pope?

They are of several kinds. First oral evidence of their acts and declarations when preparing to build and while building their church and obtaining their patent; second, written evidence of their intentions, desires and determination; and third, evidence that the Roman Catholic bishop of the diocese appreciated and recognized the facts, accepted them doubtless reluctantly, but acquiesced to the extent hereafter referred to.

In 1892 the Galicians first began to come to the present settlement. In 1896, or the winter of 1897, there were about 18 families there, including both settlements, Star and Wostok, and they held a meeting together at Sowka's house and determined to write to the Greek Orthodox bishop Nicola, at San Francisco, for a priest. In April, 1897, reverend father Dymytrow, a Uniate priest in communion with the Church of Rome visited the settlements and held three

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services. In June, 1897, the reverend fathers Kamneff and Alexandroff, two priests of the Greek Orthodox Church, sent by bishop Nicola, came to the colony, held services, administered sacraments and, it is said, received the allegiance to the Orthodox Church of some 60 families to which numbers the colony was now increased. They set about organizing congregations, getting land, permits for logs, etc., the orthodox congregation of the settlement of Wostok being one result of their visit.

There is some doubt and dispute as to the number of the families of the Star settlement that took an active part in these proceedings, and I am not inclined to lay too much stress therefore upon these facts. But that many of the leaders of the Star settlement associated themselves with those of the adjoining settlement of Wostok in all that was done until the moment when the location for the church came to be decided on seems to me clear.

In September, 1897, father Dymytrow returned for a two weeks' visit holding services and administering the sacraments. At this time the project of building a church at Star settlement ripened towards completion. The land in question was procured, a cemetery upon it was consecrated by father Dymytrow and at one of the services held in a school house bishop Legal, co-adjutor of the Roman Catholic bishop of the diocese, was present and at the close of the service pronounced the benediction. The services were conducted in a language the bishop did not understand, and few if any of the people present understood him, but the bishop was then aware of the desire of the people not to remain in communion with his church, promised them assistance, and sought through an interpreter naturally and properly to retain them in that

communion. He afterwards no doubt in the most perfect good faith, but without the knowledge of any of the Galicians, had the necessary entry made for the land in the name of the Roman Catholic bishop of the diocese and it was not till some time afterwards they found out the fact.

The decision to erect a church having been reached in November, 1897, the three present trustees made application for a permit to cut timber on the Government lands for a church and the Government agent at Edmonton sent to them a form of requisition to be filled out and signed. Not being able to read or write they went to a Mr. Morrison who was accustomed to assist them in any writings they required, taking with them the form of requisition which was partly in blank. At its head in the agent's handwriting was a memo. as follows:

> I must know where the church is to be built, on what quarter section, and this requisition must be signed by the trustees for the Church or by the priest in charge.

Then followed the printed form with blanks for the quantity of timber required, the place where it was desired to cut the timber, and the quarter section where the church was to be built, all of which Morrison filled up. Then followed "remarks," written also by the agent, as follows:

> This timber is required and will be used in the erection of a church building for the mission of the   church and for no other purpose.

Morrison says he interrogated the three trustees as to the kind of church they required and ascertained it was for the "Greek Orthodox," which words he inserted in the blank by their instructions. These words are entitled to greater importance because in blue pencil beneath the blank left by the agent were writ-

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ten the words "State whether Catholic or Greek Orthodox." He therefore had to interrogate them on the very point we now have in dispute. Was the church proposed to be built to be a Catholic Church or a Greek Orthodox Church, as opposed to a catholic one, by catholic all parties understanding Roman Catholic? Having got their answer "Greek Orthodox," he wrote in the words and witnessed their marks being put to the requisition. As the document was put in evidence and comes up before us amongst the original records I find the words "Greek Catholic Church" written in blue pencil across the face of the requisition, but there is no evidence when or by whom they were written, and Morrison does not remember whether they were there or not when he filled up the document. I attach great importance to this document not only because of its contents, but because of the time when it was filled up, long before there was the slightest sign of any trouble between the members of the congregation. If these three trustees were at that time voicing the desires and intentions of their neighbours and friends by whom they had been appointed, there can be little doubt what kind of church was intended to be built.

This was in November, 1897. It was not till January, 1898, that bishop Legal made the entry for the land in the bishop's name.

The Galicians that winter went to work getting out the logs for the church, and in April had it partially erected when father Tymkiewicz arrived. Some of these Galicians worked for three winters getting out logs and lumber under this permit, and it was with these logs and this lumber the church edifice was built. The Rev. Father was sent to this country at the instance, as I understand, of the Roman Catholic

bishop. He was a "Uniate" churchman, in communion with and subject to the Church of Rome and remained with these Galicians as their priest from April till August, 1898. For some reason, doubtless good, his evidence was not given, but the defendants and other members of the congregation gave evidence which was not rebutted that he represented himself to the congregation as an orthodox priest, and told them they should not take anything from the French bishop, that, he, Tymkiewicz, did not belong to the French bishop and that if the people took anything from him he, the priest, would leave them. This it was said he told them every time he held Sunday services. It was during the time he was their priest, and with his full knowledge and concurrence, if not at his direct instance, that the people succeeded in getting the entry made by the co-adjutor bishop Legal for the land cancelled and a relinquishment signed by bishop Grandin or the proper officials of the diocese of the lands. This relinquishment was not in evidence either, but it was accepted as satisfactory by the department before issuing the patent to the trustees.

When in April or May the members of the congregation learned that the title to the church land had been applied for in the name of the coadjutor bishop Legal, meetings were held and it was determined to get the title back. Bishop Legal himself had gone to Europe, but several visits were made by the defendants and other leaders amongst the Galicians to bishop Grandin or the officials acting for him, with the result that the bishop finally executed the necessary relinquishment.

The formal application by the trustees for a patent was not in evidence, but the letter written by the agent of the department in Edmonton to the secretary

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of the Department of the Interior, Ottawa, was put in by consent, perhaps to avoid necessity of calling the agent. However, the letter is most important as shewing what the intentions, desires and determination of the people of the Star settlement were at its date, 25th May, 1898, when Tymkiewicz was their priest and before, as far as I can gather, there was the slightest dispute or variance between or amongst the members of the congregation. The letter reads:

EDMONTON, 25th May, 1898.

Sir:—

With reference to your file 438627, I beg to enclose herewith what purports to be an assignment from His Lordship Bishop Grandin of L.S. 1 of section 27, 56, 19 W. 4 M.

It appears to have been an error asking for a patent in His Lordship's name. This land is not intended to go to the Catholic Church, but to the members of the Greek Catholic Little Russian denomination who are settled in this vicinity.

The trustees for these people are Mikel Polischy, John Polopovisky and Mikel Melnyk.

They were very deeply concerned over the fact it was proposed to hand this land over absolutely to the Roman Catholic Church; they insist on having the entire control in their own hands, and as it is highly desirable to meet their wishes in this connection, I should be glad (if the relinquishment which I herewith enclose is inadequate) if you will be so good as to have an instrument prepared to meet the case.

I am, Sir, your obedient servant,

A. D. L.

The Secretary, Department Interior,
Ottawa, Ont.

It was in July following the receipt of this letter that the patent of the lands issued to the trustees, defendants

in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake in the said district.

Reverend father Zacklynski, who came to them as priest about the latter end of July, came, therefore, after the issue of the patent.

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I am of the opinion that the construction of the patent must be determined by the words themselves and if they are ambiguous by the facts and circumstances surrounding and preceding its issue, and that the great mass of testimony as to Zacklynski's engagement by these Galicians as their priest, and doings and sayings while with them, has little or no relevance to the real question to be decided. I hold the same with respect to the subsequent engagement and services of Korchinski, a priest of the Greek Orthodox Church, and who was made one of the defendants in this suit, but disclaimed any desire to enter or be forced into litigation.

The trusts existed when each of these priests came there. It only remains to determine what they were. That determination must rest upon preceding and contemporary facts and circumstances and not upon subsequent ones, more particularly those arising after the trouble in the congregation arose.

Reviewing, therefore, these preceding and contemporary facts and circumstances in the light of the declarations contained in the requisition for the timber limit and in the land agent's letter for the patent, enclosing the relinquishment of the lands from His Lordship bishop Grandin, I cannot entertain any doubt that the "Congregation of the Greek Catholic Church at Limestone Lake" did not mean a church united with and subject to the jurisdiction of the Pope of Rome, and the authorities of the Roman Catholic Church.

I think the plaintiffs have entirely failed to discharge the onus of proof which lay upon them and that the appeal should be allowed, the judgment of the court below reversed and the action dismissed with costs.

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IDINGTON J.—The appellants obtained from the Crown a grant of sub-division one of section twenty-seven, township fifty-six, range nineteen west of the fourth meridian,

> in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake in the district of Alberta.

This is evidenced by a certificate of title, dated 6th July, 1899, issued out of the Land Titles Office, for the North Alberta Land Registration District.

The grant was led up to by events I will refer to, which took place eighteen months, or more, prior to this date.

It is unnecessary, here, to determine the exact trusts upon which defendants hold the property in question.

It is only necessary to determine, whether or not that trust was and is, explicitly or impliedly, to serve the purposes of a church, and all that might be incidental to a church, for the uses of a congregation that recognized and recognizes the jurisdiction of the Pope.

If such was not the trust then the plaintiffs' action must fail.

Such is the legal issue. Let us not lose sight of it.

The learning imported into the case, as to the racial, or linguistic, or ecclesiastical origins of the people concerned, or of their forefathers, matters much less than such an ardent pursuit, as is presented, of that learning might imply. Still less does the name of the faith, or church organization or growth of either matter here. The name Greek Catholic is ambiguous. It has been used as properly designating entirely different bodies.

A few salient facts relating to the origin and status of that branch of the Roman Catholic Church,

that may be known here, in order to avoid any confusion, as Uniates, of Galicia, must be kept in view. As to these facts there is no room for controversy and in truth there is not any controversy.

The outcome of ancient strife, national and religious, has left in Galicia, a Province of Austria, three churches recognized by the State and each with a distinctly separate ecclesiastical head, responsible to, and recognizing, the jurisdiction of the Pope.

By reason of their original race and creed, which had disavowed the authority of the Pope, the ancestors of the people now in question, when they came to the recognition of the papal authority, were known to learned ecclesiastics as "Uniates."

It was an appropriate designation of them. It was so none the less, though it may have been a constrained recognition.

It was not, apparently, the name that the people generally called themselves. The very constraint, through which it was brought about, may have tended in the popular mind to the ignoring of the term Uniate. And as a result, they called and continued to call themselves as of the "Greek Catholic Church" up to the time now in question.

It is to be observed that there seems to have been, notwithstanding all this long recognition on the part of these people and their ancestors of the jurisdiction of the Pope, a tendency to revert to the ancient faith and practice.

This kind of atavism, if I may be permitted to use such a word in relation to church matters, is not without precedent or parallel.

I am quite prepared, therefore, to give credence to the mass of evidence, I may say overwhelming mass of evidence, in this case, that very many of the early

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Galician settlers in the North-West Territories were animated by a desire to assert, in the first place, what to them was an unwonted freedom of action, and in the next place to ignore the papal authority.

This was shewn by the first step that the defendants and others took when they moved in the matter of securing for themselves and others public religious services in the new settlement.

Now what did they do? Did they go to the Roman Catholic bishop in the North-West and ask him for guidance and assistance? If they had been loyal believers in the authority of the Pope, surely that would have been the first step they would have taken. Instead of doing so they write or one of them writes to the bishop of Alutzk and Alaska, to have him supply the settlement with a priest. Certainly this bishop was not a Roman Catholic bishop. His reply seems to indicate that he had the greatest antipathy to the Pope and papal authority. Yet this letter in reply was read in public meeting to the people whom the appellants represented and claim yet to represent.

We hear of nothing to indicate objections thereto on the part of any one.

This correspondence had its beginning in a meeting of these people in 1896. And it seems to me to have in it the root of the whole matter.

A second letter was received. Another place benefited by it and a church there arose out of it as well as this one in question.

A good many of the people, at first concerned in the movement, went off to this other church which was nearer to them I take it. They were all from Galicia, both those who went to this church and the other one. And many of them in the other church had the same origin as those who are now in question.

There is no doubt of the other church being one that does not recognize the papal authority.

There is only, in the fact I refer to of some going to that kind of church, this: that it shews the ferment amongst these people had begun and spread as the appellants assert.

The next important fact is the visit of the reverend father Dymytrow to the settlement in April, 1897, when he held three services there. He was in truth a Roman Catholic priest. Much stress has been laid upon this fact, and the further fact that some, if not all of the appellants and their friends attended these services. Why should they not have done so?

It is beyond my comprehension to conceive why they should, if religious men, feeling the needs of public worship, and of the aids of a priest, abstain from doing so because the priest, in accord with them in other respects, was one who recognized papal authority. He was nearest there, in faith, to what they believed.

On the occasion on which bishop Legal appeared, at one of such services, they were held in a school house, and not in this church. What were people like the appellants to do under such circumstances? Keep away, or go and make a nuisance of themselves? It is urged, if I understand the contention on this point, that they should have protested against the bishop's presence. I most decidedly say, decency forbade them doing so.

Father Dymytrow did not build, or initiate then the building of, the church in question. He said they were too poor to build then. Nothwithstanding that, within two or three months afterwards, they followed out what they had previously projected, and still desired, in regard to building this church. They met on more than one occasion to settle this matter of

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church building and the site thereof. And every appellant has sworn, and is abundantly corroborated by many other witnesses, that they determined to build a church for the uses of those who desired to worship in a Greek or Greek Catholic or Russian or Orthodox Church or church of any other name one pleases, but, most clearly and decidedly, not one over which the Pope would have jurisdiction.

They selected the appellants as trustees.

In June, 1897, two men, named respectively Kamneff and Alexandroff, came as missionaries and held services according to the rules of the Greek Orthodox, or from a Roman Catholic point of view, heterodox church. Reverend father Alexandroff was then, he says, only a deacon of that church.

The reverend father Kamnell, I take it, was a priest in that church.

They were sent by the "Bishop of North America and the Aleutian Islands," the same that under another title I have already referred to.

These two missionaries served, in the Limestone Lake District, for a considerable time, and chose a church site, and made entry in the land office therefor, and suggested to the people concerned in this to take another selected site. But its being too far away did not meet with approval.

There was no church built or started at the place now in question when Alexandroff came. He came in the summer, and the church building started in the fall of the same year. The site in question was selected whilst Alexandroff was there; some say by him or approved by him.

Wasyl Polushie says:

> We started to get out the logs shortly after father Alexandroff came the first time and were working at it when father Dymytrow came the second time.

It seems from some of the evidence that logs were got from private property and this may relate to such contribution.

But the next step taken to build was getting a permit from the Government to use timber from Crown lands.

This very important piece of evidence shews an application of 29th Nov., 1897, signed by Michailo Melnyk and Michailo Polushie, two of the defendants, and one Fedor Melnyk. All signed this by making their mark. It is a printed form filled up by one who had no interest in the matter, and beyond doubt wrote just what he was told to write.

In filling up there appears the following:

> This timber is required and will be used in the erection of a church building for the mission of the Greek Orthodox Church, and for no other purpose.

On this form appears a memo. in pencil "state whether Catholic or Greek Orthodox" and in pencil across a corner of the form appears words "Greek Catholic Church."

How this pencil marking, in handwriting of clerks or officers of Government came about is not explained, and I will not speculate. One thing is quite clear, that at least two of the appellants on the date of this document intended that the church should be built for the "Greek Orthodox Church" which, it is conceded on all sides, is not the church for which respondents claim it, but that for which the defendants now claim it.

Are we to suppose that these men deliberately at that time set about to perpetrate a fraud? Why should they? No doubt the bounty of the Crown was open to any church in that country. No need of fraud.

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This, it must be observed, was at or about the time father Dymytrow was in the neighbourhood for two weeks. Were they acting for him or with him? Can it be supposed that it was the result of anything suggested by him? If so it would, I infer, be more in accord with him as he is presented by the evidence for appellants, rather than what the respondents ask us to infer it was.

There is much evidence to shew that he told them not to accept anything from the French bishop or to recognize him. And that is uncontradicted.

Shortly after or about this time it seems bishop Legal, or some one in his name, applied for the lot in question for the purposes of a Roman Catholic Church. We are not enlightened on this point by his evidence. Though he was a witness for respondents, he was not asked as to how this came about, or the purpose of the surrender of claim to it which I am about to advert to.

It is quite clear, however, that when this entry was discovered by the appellants, and those they represented, that steps were at once taken to have it set aside.

The bishop, or those who represented him, after demurring yielded, and the claim the bishop had made was duly and properly assigned or surrendered to or for the appellants. Thereupon the entry was made in the names of the appellants, with the concurrence of the reverend father Tymkiewicz and a French priest, who, I take it, was there to represent the bishop.

Father Tymkiewicz is said to have been a Roman Catholic priest, sent from Galicia specially to minister to the wants of these Galicians. Why should he have taken this step? It may have been that he simply de-

sired to appease these people whose church property in Galicia had usually been held by their own archbishop, and where that could not be done lay trustees were to be entrusted instead, but yet to hold it for the Roman Catholic Church or those in the fullest sense holding the faith of that church.

Is the evidence consistent with that? Is it not rather consistent with an entire surrender of all claims of that kind in favour of the appellants and their friends, holding the well-known views they did hold, on the question of the supremacy of the Pope?

I cannot conceive how, under all the circumstances, father Tymkiewicz, knowing, as he must have known, the then attitude of these appellants on the point in question, could have intended they should be bound or expected to execute a trust so repugnant to them.

Nor can I understand why, if he did, no record was kept by him or some one else of what the trust was.

Again, it is said by many witnesses that father Tymkiewicz had been present at the meeting of the people moving to get the property out of the bishop's hands and, later, told them not to take a single thing from the French bishop. How can that be at all reconciled with the creating of a trust in favour of Roman Catholic authority or of those of the Roman Catholic faith?

Then we have before this surrender the proper remonstrance of the bishop with these people for leaving or wanting to leave their religion. We have also evidence of his promise, if they would abide by the old faith, to help them build the church. And we have the fact that he never contributed anything to the erection of the church.

All that seems to me quite inconsistent with any intention, on the part of those concerned, to impose

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upon the appellants any such trust as is sought to be enforced in this suit.

It seems quite consistent with a desire on the part of those having authority to speak for the Roman Catholic Church not to do anything that would, or might be, inconsistent with future pleasant relations with those who were so much akin to them in faith; that gentle methods would be much more likely to lead them, or some of them, in the desired way than any legal bond.

The conclusion seems to me irresistible that once and for all the bishop, on behalf of his church, abandoned all claim and thus ended the matter.

The respondents, though calling him as a witness, did not venture to question him on this point. This seems most significant.

As to all that followed if the trust was not impressed at the outset it goes for nothing.

I cannot see why so much has been made of the later occurrences. The evidence as to reverend father Zacklynski is overwhelming that he was telling these people to have nothing to do with the supremacy of the Pope or with his church, and it is not denied. Moreover he ended, as he practicably admits he began, by asking (if Spaczinski is rightly reported) this congregation to abjure both Russian and Roman and keep their own church.

This latter incident is reported differently by other witnesses. Who is correct? Why was the plaintiff, Zacklynski, the author, it would seem, of all this disturbance, not brought as a witness to this wonderful thirty-five days' trial?

Surely he was informed during that time of what was being said about him.

It is a remarkable thing that of those who testified for the respondents the lay plaintiff, Petro Melnyk, seems to be the only one of the settlers who had lived there from the time of the earlier meetings to organize a church. Then came in March, 1897, Mr. Spaczinski, the leading witness for respondents. He is sworn never to have contributed anything to building this church, and does not deny it. He is sworn to have recanted with the others, but denies it.

He, however, accepted the books of father Alexandroff to act as lay reader, apparently in accord with the recantation. He was recalled in reply and states that reverend father Zacklynski asked them, at the rupture with him at his last meeting, to swear that they would stick to their own religion, not go over to the Orthodox Russian Church, nor to the Roman Catholic Church. Other witnesses differ from this version entirely.

He produces a book of which a part is translated. It indicates that "on the 4th day, 6th month of *1898* subscribers to finishing the church" appear as follows, etc. The first name, of ten, given is Pavlo Pasempko $15. In the evidence Pasempko states that he came to Alberta in May, *1899*. Which date, 1898 or 1899, is correct? Who is to blame for the inaccuracy? Or are there two Pavlo or Paulo Pasempkos? I think not. I refer to this trifling incident as illustrative of the difficulties in this case and doubt one may have as to the accuracy of Mr. Spaczinski. I refer to these matters, relating to him, because upon his accuracy depends the weight to be given to the signing of what I may designate "the call" to father Zacklynski, which, though subsequent to the creation of the trust now in question, is a piece of evidence that if the signers perfectly understood

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when signing, tends to reflect upon their evidence a light leading to discredit them.

He testifies that when the appellants and others signed the call to father Zacklynski it was signed by all but four of those who did sign it, in a house he names, and that the paper was read by one Karetz to them. First he said it was written by Peter Stephura and then by Alexander Karetz and explains by saying Stephura had written one just like it. It contains the statement that the signers "are all Uniates." Zacklynski came six months after this was sent by Stephura. This witness, however, tells of one Petro Zwanycz writing Zacklynski to come, but does not say whether before or after signing this paper.

None of these alleged writers appear as witnesses.

A number of the signers deny the reading or hearing it read.

The original shews twelve out of twenty signers to have signed by means of a mark. It is difficult to fix the attention of illiterate and even many literate people, though apparently listening, so that they can catch the meaning of what is read, unless sentence by sentence is explained. No one ventures to suggest such a thing was done.

I would be slow to bind such people by the expression Uniate in such a document as meaning something that in the face of other facts is most improbable as having been at all present to their minds.

They had gone for six months without a priest. Why? Simply because they would not recognize the proper authorities of the Roman Catholic Church, at hand. And why not? We are not offered any explanation.

We are told that many of them had in the time of the reverend father Alexandroff formally repudiated

the head of that church. And they had just after that objected to the land being in the name of the bishop.

When father Zacklynski, who was found through the channels of a newspaper advertisement by him, and not through any application to the bishop, came, he, if the evidence of a great many church members is to be believed, was loud in proclaiming himself as an Orthodox Greek Catholic and not a Roman Catholic. And whenever he proposed borrowing from the bishop to pay a debt for the building of the priest's house those people were up in arms.

I think one cannot help, in reading the evidence in this case, being impressed with the want of support plaintiffs' case got from those who were there before the building of the church, and how strongly and distinctly those older settlers, who were there, and knew what happened, and who were the most active in promoting it, and the chief contributors to the building, speak on the subject.

The circumstances, and the evidence, seem to point nearly all one way, and that way against the establishment of a church that acknowledged the jurisdiction of the Pope.

It is not a case of conflict of evidence so much as a case needing to properly appreciate the evidence given and then to disregard the trifling unimportant incidents and matters subsequent to the creation of the trust, when the general scope and purpose of the parties in relation to that trust had already been made clear, and to apply that properly appreciated evidence to the interpretation of the ambiguous phrase in this certificate of title.

With every respect I think this evidence was not properly appreciated in the court below, and weight

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given to the subsequent events that should have been discarded.

I concur in the brief judgment of the Chief Justice of the court below.

I would, but for the zeal with which the case has been pressed and the importance attached to it by those interested, have contented myself with that expression of opinion.

I think the appeal should be allowed with costs.

MACLENNAN J.—A very careful perusal and consideration of the evidence in this case have led me to the clear conclusion that we ought to allow the appeal.

It is clear that at and prior to the 29th of November, 1897, active proceedings had been taken among the Galicians in the vicinity of Limestone Lake for the building of a church. For this purpose land for a site and materials for the building had to be procured. The people were very poor, and it was thought that land might be obtained, and lumber also, from the Government without payment. When a question of site came to be discussed there was a difference of opinion depending upon distances and convenience. The ultimate result of this difference was that two churches were built, I think about six miles apart; one of these was at Wostok, and it is admitted that the Wostok congregation is an undoubted Greek orthodox congregation. I think that is an important fact, seeing that one section of those who were in the first place acting together on the project of building a church, and who had no differences among themselves, have built and are enjoying their property without dispute as orthodox, while the other congregation, without any difference of circumstances, have on hand the present unfortunate dispute.

On the date above mentioned, the 29th of November, 1897, a requisition was made to the land office for a permit to cut timber for the church. The requisition specifies the land on which the church was to be built, and declares with special emphasis that the timber was to be used in the erection of a church building for *the* mission of *the* Greek Orthodox Church, and for no other purpose. That requisition is signed by three persons, two of them being two of the present defendants. The land specified in this application consists of forty acres of Government land, and it is upon that land the church was built and now stands.

In pursuance of this application a permit was duly granted. It has not been produced, but it will be presumed to have accorded with the application. The people immediately proceeded to cut the timber and to erect the church, and it was completed some time in the following year. Now, pausing here, what is the effect of what has been done? They have asked the Crown for a site for the purpose of building thereon a church of a specified character and denomination. They have also asked for a gift of timber for the same purpose. The gift both of the land and the timber is made and the church is built. The object and the purpose of the gifts are in writing. I think it plain that the church when built became and was under those circumstances impressed with the trust stated in the permit, namely, a trust for the Greek Orthodox Church, and for no other, and that if there were nothing else in the case, the appellants would be entitled to succeed.

But that is not all. The congregation appointed the three lay defendants trustees to receive and hold the title to the property—in pursuance of the ordin-

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ance, N.W.T. Cons. Ord. 1898, ch. 28, and after the church was completed, or about completed, those defendants applied to the land agent for a patent. The agent then on the 25th May, 1898, wrote to the Department of the Interior, at Ottawa, in effect asking for the issue of the patent to those trustees. The agent refers to the fact that an application had been previously made by or in the name of the Roman Catholic bishop Grandin for the land, but that he had assigned or relinquished all claim, and that

this land is not intended to go to the Catholic Church, but to the members of the Greek Catholic Little Russian denomination who are settled in this vicinity.

It is not disputed that these words correctly describe the Greek Orthodox Church, described in the permit for land and timber above mentioned.

The patent was issued in pursuance of this request. It does not appear what its date was nor what were its precise contents. All that has been proved is that a certificate of title was obtained by the trustees under the Land Titles Act for the forty acres in question, expressed to be

in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake.

The words Greek Catholic Church are ambiguous. There is much testimony that such words might mean either the Roman catholic or the orthodox church. We must gather which is meant by evidence, and the letter of the agent applying for the grant would be sufficient to shew that it was the orthodox church which meant. But if that were not sufficient, the fact that the Crown had previously, by its permit to build an orthodox church on this very land, with logs also granted for the same purpose, to my mind make it

clear to a demonstration that the land and church in question have from the beginning been held, as was expressly intended by the donor, the Crown, as a Greek Orthodox Church.

For these reasons, as well as for the reasons much more fully expressed in the opinions of my brothers Davies and Idington, which I have had the opportunity of perusing, and also for the reasons expressed in the dissenting judgment of the Chief Justice of the Supreme Court of the Territories, I am of opinion that the appeal should be allowed, and that the action should be dismissed with costs both here and below.

Appeal allowed with costs.

Solicitors for the appellants: *Short, Cross, Biggar & Ewing.*

Solicitor for the respondents: *C. DeW. MacDonald.*

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THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) .... APPELLANTS;

AND

THE CITY OF TORONTO (PLAINTIFFS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Highway—Dedication—Acceptance by public—User.

An action was brought by the City of Toronto against the G. T. Ry. Co., to determine whether or not a street crossed by the railway was a public highway prior to 1857, when the company obtained its right of way. It appeared on the hearing that, in 1850, the Trustees of the General Hospital conveyed land adjoining the street describing it in the deed as the western boundary of allowance for road, and in another conveyance, made in 1853, they mention in the description a street running south along said lot. Subsequent conveyances of the said land prior to 1857 also recognized the allowance for a road.

Held, Idington J. dissenting, that the said conveyances were acts of dedication of the street as a public highway.

The first deed executed by the Hospital Trustees, and a plan produced at the hearing, shewed that the street extended across the railway track and down to the River Don, but at the time the portion between the track and the river was a marsh. Evidence was given of use by the public of the street down to the edge of the marsh.

Held, Idington J. dissenting, that the use of such portion was applicable to the whole dedicated road down to the river, and the evidence of user was sufficient to shew an acceptance by the public of the highway.

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

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, and Idington JJ.

This action was brought by the respondents pursuant to a direction or suggestion of the Railway Committee of the Privy Council. The respondents had applied to them for protection at the existing crossing of Cherry Street by the appellant company, and the question of priority became of importance in connection therewith. The action asked to have it declared that Cherry Street:

(1) Exists across and beyond the right of way of the appellants.

(2) Was dedicated as and for, and became, a public highway prior to the acquisition and use by the appellants of the said right of way.

The first proposition is no longer contested, having been conceded in the Court of Appeal. The second called for the determination of two points, namely: Was the highway dedicated, and if so was it accepted by the public before the right of way was acquired?

In giving judgment in the Court of Appeal Mr. Justice Maclennan deals with the question of dedication as follows:—

"The acts or evidence of dedication relied upon by the city are two conveyances made by the hospital trustees, the one made on the 19th, and registered on the 31st of October, 1850, of three lots lying to the west of the street in question, to one Jones, and the other made on the 14th October, and registered on the 2nd November, 1853, of the lots on the east side of the same street to one Jackson; and it is alleged that from and after the making of these deeds, if not before, that part of the street was used as a street by the public, and became in law by dedication a public street or highway.

"The description of the land conveyed to Jones is as follows: 'All and singular that certain parcel or tract

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of land situate in the City of Toronto in the Home District, being part of the late Government Park Reserve, and described on the plan of lots laid out by the trustees of the Toronto Hospital Endowment, as lots Nos. 10, 11 and 12 on the south side of Front Street, and which may be otherwise known and described as follows, that is to say: Commencing on the south side of Front Street at the northwest corner of said lot No. 10 on the limit between lots Nos. 9 and 10 on the south side of Front Street; thence south 16 degrees west, six chains eighty links, more or less, to the southern limit of said lot No. 10; thence about south 75 degrees east to the water's edge of the river known as the Little Don; thence along the water's edge of said River Don in an easterly direction to the eastern limit of said lot No. 12, being the western boundary of allowance for road, as described on the plan aforesaid; thence along said boundary north 16 degrees west seven chains 30 links, more or less, to the southern boundary of Front Street; thence along Front Street south 74 degrees west four chains 50 links, more or less, to the place of beginning.'

"This is an unequivocal declaration by the hospital trustees, the owners in fee of the land, that there was then on the east boundary of lot 12 and adjacent thereto, extending from the River Don to the south side of Front Street, a distance of 7.30 chains, or 495 feet, an allowance for road, as described in the plan of lots laid out by them. No particular plan or copy of plan is specified. The declaration is that upon the plan of lots laid out by them there is a description of an allowance for road lying along the east side of lot 12. Now, at that time, apparently, the original plan was not in existence; it was worn out; but there was one plan, the McDonald plan,

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which did not unequivocally shew such allowance, while there were two others, the Chewett and the Howard plans, which did so. They were all copies, and I think the proper conclusion from the language of the deed is that the original plan exhibited the allowance as described therein. This is made, as I think, irresistibly probable by the fact that even the McDonald plan shews a sufficient width for a street and a lot, both of the regulation width, at the east side of lot 12. It is also to be noted that the allowance is declared to extend to the River Don, and not merely to the marsh.

"The description in the deed to Jackson is as follows:—

'All that certain parcel or tract of land situate in the City of Toronto, being composed of part of the late Government Park Reserve and described on the plan of lots laid out by the trustees of the Toronto General Hospital endowment as lots Nos. 13, 14, 15, 16, 17, 18 and 19 on the south side of Front Street, and which may be otherwise known and described as follows, that is to say: Commencing on Front Street at the north-west angle of said lot No. 13, being at the junction of the southern boundary of Front Street and a street running south of said lot; thence south sixteen east to the water's edge of the River Don; thence along the edge of said River Don in an easterly and northerly direction to a line which would be formed by the continuation of the western boundary of East Street; thence along said line north 16 degrees west to the southern boundary of Front Street; thence along Front Street south 74 degrees west, 10 chains, 50 links, more or less, to the place of beginning.'

"By this deed the trustees convey seven lots de-

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scribed on the plan of lots laid out by them on the south side of Front Street, and the description commences at the north-west angle of lot 13, being at the junction of the southern boundary of Front Street and a street running south of said lot. There could be no street running south of said lot, for that would be at the Don, but the description refers to a street forming the southern boundary of Front Street and running south, and there is no difficulty in construing it as meaning a street running south, not of, but along said lot. The width of the seven lots, 10.50 chains, would make each lot 1.50 chains, and would leave an allowance for a street west of 13 of the same width as the declared and admitted width of Cherry Street, on the north side of Front Street.

"I think this deed, like the deed to Jones, is a declaration that according to the plan there was an allowance for a road on the south side of Front Street, extending to the River Don, over the site in question. I think that even if the McDonald plan was shewn to be a true copy of the original plan, reading the plan with the deeds, the latter must be regarded as declaring that a sufficient part of the lot marked on the plan lying east of lot 12 was allowed, that is declared to be, for a road, and that such is the meaning of the plan. I think these two deeds were solemn declarations by the trustees of an intention that the land in question was then an allowance for a road and, dedication being always a matter of intention, were acts of dedication.

"The trustees have never since that time done any act to revoke or qualify the declarations contained in those deeds, and it is admitted that the land in question is now, and has been for many years, an undoubted highway, and it is clear it can only have be-

come so by dedication. The sole question is whether the dedication had become irrevocable before the railway company laid their track across it.

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"It is in evidence that about the date of Jones' deed he was in occupation and built upon lot 12, and that between that date and the 29th December, 1855, the land was conveyed by and to successive owners six different times, besides as many mortgagees, in all of which deeds the allowance for road is referred to in the same terms as in the deed to Jones, and on the last mentioned date the then owner conveyed to the defendants a strip across 10, 11 and 12, thirty feet wide, lying 441 feet south of Front Street along the west side of Cherry Street. There was a plan attached to this deed and referred to in the description, which, however, has not been produced; and on the same day, by another deed referring to the west side of Cherry Street as its eastern boundary, Hutchinson conveyed to the defendants the remainder of the said lots.

"By another deed made the 22nd October, 1856, Dennis and Julia Riordan conveyed to the defendants a part of lot 9, fifty links in width, according to a plan annexed thereto, for their track, and this plan shews Cherry Street extending across the railway to the River Don.

"In like manner by a deed dated the 12th of February, 1858, made by Thomas Galt to the defendants, the seven lots conveyed by the trustees to Jackson were conveyed to the company by the same description as that contained in Jackson's deed.

"It thus appears that all parties interested in the adjacent lands, from and after the 19th of October, 1850, including the defendants, in their dealing therewith expressly recognized the existence of the allow-

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ance for a road or street extending to the Don, and across what is now the right of way of the defendants."

His Lordship then dealt with the question of acceptance and decided that the evidence shewed user by the public sufficient to establish it.

W. Cassels K.C. for the appellants, referred to *London & Canadian Loan & Agency Co.* v. *Warin* (1).

Fullerton K.C. and *Johnston* for the respondents, cited *Gooderham* v. *City of Toronto* (2); *Mytton* v. *Duck* (3); *Rowe* v. *Sinclair* (4).

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

GIROUARD J.—This case involves no principle of law, but merely a question of fact. The City of Toronto asked to have it declared:

(*a*) That Cherry Street extends across and beyond the right of way acquired by the defendants;

(*b*) That Cherry Street was dedicated and used as and for and became a public highway prior to the acquisition and use by defendants of the said right of way.

The trial judge, MacMahon J., decided in favour of the railway company, but on appeal this judgment was reversed with costs (Osler, Maclennan and Maclaren JJ.).

I have gone over the reasons for judgment pro and con, and the numerous plans, maps and papers form-

(1) 14 Can. S.C.R. 232.
(2) 21 O.R. 120; 19 Ont. App. R. 641; 25 Can. S.C.R. 246.
(3) 26 U.C.Q.B. 61.
(4) 26 U.C.C.P. 233.

ing the case, and I do not see why the judgment of the Court of Appeal should be disturbed. The appeal should, therefore, be dismissed with costs, for the reasons given by Mr. Justice Maclennan.

DAVIES J.—For the reasons given by Mr. Justice Maclennan in delivering the judgment of the Court of Appeal for Ontario I am of the opinion that this appeal should be dismissed and the judgment of the Court of Appeal confirmed.

I would add a few words only because I understand there is a difference of opinion in this court.

I think the evidence sufficient to shew that there was a dedication of Cherry Street as a public highway from Front Street south to the edge of the River Don in the grants given by the hospital trustees, the then owners in fee, to their several grantees of the lots on the east and west sides of this dedicated highway and in the plans referred to in the deeds.

I was in doubt during the argument whether there was sufficient evidence given of an acceptance by the public of this dedication.

A careful perusal of the evidence and of the several plans produced and a consideration of the arguments pro and con have convinced me that the evidence of acceptance by the public was ample. This evidence would, of course, have been ludicrously insufficient from which to presume a dedication of the highway. It was ample to prove acceptance of a highway dedicated by the owner to the public. It was, no doubt, the misunderstanding on the part of the trial judge as to the description in the deeds and plans shewing the dedication which led him to the conclusion that there was no highway there and on the assumption on which he proceeded of the absence of an

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express dedication I think his conclusion was right. While the evidence was insufficient to shew an acceptance by the municipality as such it was ample as shewing an acceptance by the public.

It would, in my judgment, be absurd to hold that all the evidence given by Barnes and others of a user by the public of the dedicated road from Front Street down to the edge of the marsh prior and up to the construction of the Grand Trunk Railway should be limited to an acceptance of that part of the dedicated road only and should not extend to that small piece of the highway dedicated which crossed the marsh.

I think the evidence of the user applicable to the entire road dedicated, and that it could not be successfully contended that the public by their user intended to accept a kind of *cul de sac* excluding them from access to the river. I think, also, however, that there was evidence of such user of the road across the few feet of marsh as the nature of the conditions admitted.

When the Grand Trunk Railway purchased their right of way across this marsh bordering the Don, they knew well that the highway dedicated ran to the edge of the river.

The plan on Riordan's deed to them and the description in the deed from Galt to them in 1857 shews this beyond any doubt. They did not get nor attempt to get any deed of the land where the highway is contended to be from the hospital trustees or any one else, nor did the trustees attempt to obtain any compensation from the Grand Trunk Railway Co. for the taking of the lands, all of which is consistent with the understanding of all the parties as to the dedication and inconsistent with any other idea.

Some doubt existed at the argument arising out of a discrepancy between the copies of the two plans produced (13 and 16) as to whether the plan in the possession of the hospital trustees and by which they sold the property to purchasers shewed the prolongation of Cherry Street by dotted lines to the edge of the Don. That doubt has been removed by a statement since submitted to us as arranged at the argument, and I have dealt with the case on the assumption that the plan referred to does shew these dotted lines.

IDINGTON J. (dissenting).—Was that part of Cherry Street in Toronto, running from the northerly line of the appellants' right of way, to the south thereof, in 1857, a public highway?

Such is the issue we have to decide. It is of the utmost importance, in order that we may properly answer this question, that all happenings since 1857 be discarded.

In some cases the conduct of the litigants in relation to the issues raised has great weight.

One peculiarity of this case, and the issue it raises, is that the conduct of either party to the suit is unimportant.

The question is reduced to one, resting on the common law, in relation to dedication and acceptance thereof by the public.

We have to find a dedication by the hospital trustees who were owners of the fee and an acceptance by the public prior to the railway crossing in 1857, or not at all.

The respondents' council did nothing that can be held to have constituted, by or through their authority, an acceptance by the public.

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The evidence of dedication by the trustees, who were the owners, rests entirely upon the grants by them of the parcels of land, of which one was granted to one Jones on the 19th October, 1850, the other granted to one Jackson on the 14th October, 1853. Each of the deeds evidencing these grants describes the parcels thereby respectively conveyed, first by numbers of lots

according to a plan of lots laid out by the trustees of the Toronto hospital endowment,

on the south side of Front Street, and then proceeds to further describe the same by metes and bounds. In the first of such descriptions by metes and bounds reference is made to an "allowance for road," and in the other and later one to "a street" which in either case can only refer to the land now in question.

I put aside for the present possible inferences from descriptions by metes and bounds, instead of resting on the numbers of the lots on an alleged plan, and the observations to which this dual description is here open, and also the difficulties in the description in one deed, and in the meaning to attach to the words "allowance for road" in the other.

Such grants, with such descriptions, are not necessarily to be taken as an unequivocal dedication. If there were nothing more two such grants, together, might be cogent evidence of and capable of shewing an intention to dedicate. Under the circumstances I am about to advert to, I am unable to find them in in that regard quite unambiguous.

The land conveyed to Jones in 1850 had, within the time from that to 1858, a building erected upon it and business carried on therein. But there is no evidence of the parties occupying the same or those doing

business with them entering the premises from the alleged Cherry Street side. Obviously there would be no necessity for using this alleged Cherry Street as the front of the lot faced on Front Street, which led to the business part of the city.

No fence was shewn to have been erected on the east side of this Jones property until the railway had crossed.

There seems to have been an erroneous impression in this regard in the Court of Appeal.

So far from a fence being on that side, the witnesses refer to this land as an open field. Of course in later times there was a fence on both sides of the land now claimed to have been a street.

This conveyance of land on the west side of the supposed street was, in itself, certainly no dedication. And nothing having been done by those claiming under this grant (save reconveying by the same words of description), to shew a claim to the street as such, we must take it that, at all events until the trustees made on the 14th October, 1853, the grant to Jackson of land on the east side of the land now in question, there could hardly be said to be the vestige of evidence of a dedication.

This grantee, Jackson, by deed of 13th March, 1857, conveyed with other lands

lots Thirteen (13), Fourteen (14), Fifteen (15) Sixteen (16), Seventeen (17), Eighteen (18), Nineteen (19) on the south side of Front Street in the said City of Toronto

to Mr. Galt. There is no reference in this to the alleged street, no description by metes and bounds, and in short nothing to indicate a desire of preserving any right of way there.

That conveyance, without more, terminated all right of user of such a way as incidental to the

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ownership of lot thirteen. It is not pretended that Mr. Galt or his clients, the appellants, were concerned in the use of, or used this way till after the construction of the railroad.

That, and what I have related, reduces the question of dedication and acceptance to the happenings between 14th October, 1853, and 13th March, 1857, a period of three years and seven months.

But within this period what do we find the alleged dedicators doing in relation to this land?

In June of the year 1846 the Registration Act, 9 Vict. ch. 34, sec. 33, was passed and enacted as follows:

That any person, corporation or company of persons, who have heretofore, or shall hereafter survey and subdivide any land into town or village lots, differing from the manner in which, such lands were described as granted by the Crown, it shall and may be lawful for such person, corporation or company to lodge with the register of the county a plan or map of such town or village lots, shewing the numbers and ranges of such *lots, and the names, sites and boundaries of the streets or lanes by which such lots may be in whole or in part bounded, together with a declaration to be signed by such person, or by the lawful officer, agent or attorney of such corporation or company, that the said plan contains a true description of the lots and streets* laid out and appropriated by such person, corporation or company, and thenceforth it shall be lawful for the register to keep an index of the land described on such map or plan as a town or village, or part of a town or village, by the name by which such person, corporation or company shall designate the same.

We find that the trustees had a plan prepared for them, in the next year, 1847, by Donald McDonald. It is not explained why they delayed to register it. The later Act of 12 Vict. ch. 35, sec. 42, for the wider and more pressing purposes of surveyors and surveyings and assessment was enacted with a penalty for each year's default in registration of plans, shewing subdivisions. Probably this in time wakened up the

trustees. They from whatever cause acted, and registered in January, 1855, the plan prepared in 1847, which does not shew any extension of Cherry Street south of Front Street.

The presumption of law is that this was regularly done, and that the registrar did not, improperly, register it without the required declaration, but required that, and saw that it was properly registered.

Unfortunately, as this requirement of the statute escaped the attention of solicitors and counsel in this case, we are left to proceed upon the legal presumption only.

It is to be observed, that the plan shews, upon the face of it, a certificate of its correctness, signed by the chairman and secretary-treasurer of the trustees.

What weight should we give solemn acts, such as this declaration, this certifying, and this registration; which, if improperly done, and without a declaration, could not be said to have constituted a compliance with either Act, and would have left the trustees open to prosecution for penalties, and possibly worse if they had made a false declaration?

These solemn acts were done within about a year and three months from the execution of the deed which completed that upon which dedication is relied upon in the court below.

Should we infer these acts were done with criminal recklessness? Or should we not rather infer, that the deeds never were intended by the grantors to have the effect now given them?

Or in face of all this, and the peculiarity of the dual description, should we not rather infer, that there was an error on the part of the clerks preparing the deeds, or that something tentative or possibly conditional, binding only between the parties to the deed,

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was what led to their containing those perplexing descriptions above referred to?

The least result of any possible answers to these questions must be to reduce this assumed unequivocal dedication to a something rather ambiguous, when we have to find and pass upon it, at this distance of time, in relation to the intention of gentlemen of education and respectability.

Need I go further? It seems to be clear law that before the public can take a man's property it must be clearly made out that his intention was to give it. Or at all events, the public acts claiming it must be of that open and well-known character that it is fair to infer he in truth and in fact assents to the taking.

In considering this question or purpose it has been well said, in the passage quoted by Mr. Justice Maclennan in his judgment herein,

> that a single act of interruption by the owner is of much more weight

than user by the public.

It seems these acts I advert to, as done by the trustees, ought to be held to have more than outweighed all, if anything, they have done before; and also the evidence of public user.

What is the evidence of public user that can be relied upon here either to support a dedication or an acceptance by the public of one?

Could the respondents have asked successfully, in 1857, for an injunction to restrain the trustees from withdrawing anything they had done, and enclosing the ground now in question; or could a trespasser have been indicted had he at any time up to the end of 1857 dug a hole in this alleged highway where the waters of the lake or river flowed over it?

Could any court have been got to listen and en-

join or convict on the evidence of such acceptance by the public as we have here?

These would seem to be not only fair tests, but the true tests open to any one then complaining of such supposed improper conduct.

The person digging could, perhaps, if this supposed dedication was incomplete by reason of non-acceptance, have been sued by the trustees for trespass.

Imagine such an application for injunction then, or such a prosecution by way of indictment then, and it seems to me, that the evidence of Cadieux, with his garrulous tales of hauling marsh hay and ice from the bay, and of Ward as to his going to school with his little boat, and his infirm and confused memory in regard to incidental details thereof as the only evidence of user of this part of the street, would not have supported either case.

It strikes me that such a case could hardly be listened to.

I have read, out of respect to the court that relied upon this evidence, these witnesses' testimony several times. I quit it each time wondering whether the memory of the old man or the younger one had furnished the most evidence of unreliability.

Both witnesses confuse, in several places, the happenings of before and after the making of the railroad crossing, and when one discards that which is not clearly referable to the times before the appellants' track was built there is little left, and that unimportant indeed. What signifies people hauling hay in ancient times before this street could have had any formation or appearance thereof? Who believes that this Cherry Street was, when an open field or com-

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mon along with all the land there, sacredly followed by people hauling hay, or ice either?

They doubtless went and came by the line of least resistance.

I refuse to believe that, without fences, marks, or stakes defining it, there was any divinity hedging about this swampy piece of land as that to be chosen for driving over. I could believe it if a man told me he found the creek frozen over and better sleighing on the ice than over the thicket formed by rushes and probably bushes that grow in a marsh. And if the plan is reliable such driving as is alleged would be along the very edges of the frozen marsh and creek, probably the most treacherous (by reason of rising and falling of stream breaking the ice) and dangerous part of the whole place.

Not until Barnes came there was there any fence on either side. The reference to the docks and other features of later times destroys much of these witnesses' evidence. It shews that their memories had not clearly retained what they saw before, but confused it with what happened after, the railway crossing.

I do not wish to cast any reflections upon either witness. Ward repeated time and again from beginning to end his want of confidence in his memory as to the exact time. And the old man Cadieux also says much the same, in places, of his own memory. When some witnesses are led by counsel, even if the process be checked, it weakens the confidence we might otherwise place in frail memories of long past events, in their relation to time and exact place in which they had no interest.

But what of the further evidence of James Barnes whose father is said to have owned and had a brick-yard on this lot thirteen? I confess this is a puzzle.

I have shewn that Jackson's title passed to Mr. Galt. Where did Barnes' title come in? I can find no deed to him or from him. No evidence is given of his ever having had any title but that which his son gives of his father's occupation.

There is also written across the plan Exhibit 16 the name Michael Barnes, but there is nothing to indicate what it means.

In most of the other cases, when the names are written on this plan across a lot or lots, the date of the deed is given.

It might be inferred from that sort of marking that the parties so named had become owners. But here that is not a safe inference and in this case it is precluded by the facts, already given, of the title having passed from the trustees to Jackson and from Jackson to Galt.

Can it be that Barnes was a lessee of the trustees or had enjoyed under them some temporary title such as a proposed purchaser?

Whatever it may mean I take it that on these facts his dealings with the lot all go for nothing as of any consequence in deciding truly the issue presented to us.

In all probability he was one of the hospital trust's lessees, who had the right to dig for clay and form brick there or thereabout.

And in the course of his business he possibly used a piece of this alleged Cherry Street extension, for ingress and egress, as part of his rights as lessee.

If that surmise be correct of course all that appears in his evidence to support a public user of this road, and that is attributable to such a purpose, is worthless. And it seems to me without any surmise, but without explanation, the same result must follow.

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I need not, therefore, deal with the son's evidence. Even if his father had been in Jackson's place in relation to the title it would be of little value.

Have we, in the surmise I make, an explanation of the allusion to a road allowance in one of the deeds and a street in the other?

I return to the main question of dedication to point out that the registered plan makes Cherry Street end at Front Street, whilst in the case of other streets such as East Street on one side and Mill Street on the other running parallel with the northern part of Cherry Street they run by this plan to the water.

As Mr. Justice MacMahon points out in his judgment the nature of the plan, by reason of the windings of the Don encroaching upon what would have been the further extension of Cherry Street, forbade the use of it as a street. It would seem also as if the creek or marsh, at least of the east side, was such as to forbid hope of making or preserving the extension of a street to serve usefully the rear end of the lots, in the condition of things at that early day.

And, as the judge I refer to has also pointed out, the width of the stream was such as to take up as much land as a street and then leave only enough of good land for one lot. I may add it was marked on the plan No. 13 by a marking No. 13 in the centre of the entire whole width of what is now presented as thirteen and a street.

Why should there be a street there? It was by reason of the Crown owning the land at the extreme south end, and that covered by water not deep enough to be navigable, a sort of *cul de sac.*

The authorities point out that in the case of a *cul de sac* the inference from acts of travel is not so clear as when over a thoroughfare.

Indeed the inference of such a dedication, by user, was held not legally possible, according to very high authority.

The later rule is to limit it to cases of clearer intention than requisite in relation to a thoroughfare.

In the view that there may have been user, by those owning the lots on either side, coupled with the form of deeds and description therein such as to create a dedication in itself, I would point out that to infer such a user is not open, and if it be open, that it clearly was a right exerciseable only by virtue of the easement that the deeds may have created in favour of those grantees and their assigns who chose to assert it.

That was something the public had nothing to do with. It did not rest necessarily upon a dedication to or for the public. It was not necessarily, standing alone, any evidence of dedication.

Such right as flowed or might flow from such a state of things could have been extinguished at any moment.

Street plans are daily set aside and the statute permitting and regulating that is but what existed before the statute.

Until the public has acquired a right by clear acceptance of a proferred dedication it can be withdrawn.

All that could have, by any possibility, supervened here in favour of the public to prevent such a withdrawal, must have taken place between the 14th of October, 1853, and such time in 1857 as the appellants' railway crossing was built.

When one takes into consideration the swampy nature of the ground, the encroachment of the creek, the absence of any need of such a street extension,

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the enormous expense that, with such a creek covering in parts most of the alleged allowance, it would have cost to make a road of it, we are (unless we attribute it to the owner's folly or mockery), I think I am bound to say, with the greatest respect, however, forbidden to believe that they must be held by doing and submitting to all that appears in evidence, to have had the intention of dedicating a street here.

It is to be observed that what I just expressed as to the nature of the ground may not have been applicable to the small part at the north end. If there had been any room for finding, otherwise than as I view the case, a dedication from evidence of the user *alone* it would have, even if possible, only extended to the part so used as to give such a right.

Then as to the plan on the back of the deed the appellants and their omission to expropriate this street in the course of getting right of way, why should we attribute to that any weight?

We must test it, if worth anything, by the excellent test of its admissibility as a piece of evidence in the event of a suit or prosecution (with which appellants had nothing to do) such as I have supposed to have been possible to have taken place in 1857.

It could not, I think, have been admitted in such a case, and being inadmissible there, for such a purpose, is of no avail now.

I repeat we are trying not these litigants, but the possible rights of possible litigants in 1857 when the public right as it existed then must be the test. The exact date of the crossing is doubtful and counsel left it to be taken as in 1857.

On the whole I am unable to find that evidence here existed up to 1857, that would, within the cases, constitute such dedication and acceptance of the intended

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dedication, if such there were, as would in law constitute all or any part of the land in question, from the northerly line of the appellants' road allowance to the water, a public highway. The inexpediency of having highways for whose repair no one can be held responsible, should in this country prevent any further recognition of the creation of highways by way of dedication than can be avoided, where the municipal councils have not recognized them. See Angell on Highways, pp. 178 to 183.

The cases of *Wimbledon & Putney Commons Conservators* v. *Dixon* (1); *Cowling* v. *Higginson* (2); and *Selby* v. *Crystal Palace District Gas Co.* (3), illustrate the principles that must be kept in view in weighing acts of user; especially such as may have resulted from occupations like those of Barnes and others, and what user, resting on covenants or provisions in deeds, may be implied as standing for.

In my opinion this appeal should be allowed, and the judgment of the trial judge be restored, with costs here and in all the courts below.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Biggar.*

Solicitor for the respondents: *Thomas Caswell.*

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(1) 1 Ch. D. 362.
(2) 4 M. & W. 245.
(3) 30 Beav. 606.

1905
*Nov. 15.
1906
*Feb. 21.

THE CITY OF TORONTO (DEFENDANTS) .... APPELLANTS;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (PLAINTIFFS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Constitutional law — Parliament — Power to legislate — Railways — Railway Act, 1888, *ss.* 187, 188—*Protection of crossings—Party interested—Railway committee.*

Secs. 187 and 188 of The Railway Act, 1888, empowering the Railway Committee of the Privy Council to order any crossing over a highway of a railway subject to its jurisdiction to be protected by gates or otherwise, are *intra vires* of the Parliament of Canada, Idington J. dissenting. (Secs. 186 and 187 of The Railway Act, 1903, confer similar powers on the Board of Railway Commissioners.)

These sections also authorize the committee to apportion the cost of providing and maintaining such protection between the railway company and "any person interested."

Held, Idington J. dissenting, that the municipality in which the highway crossed by the railway is situate is a "person interested" under said sections.

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

Sections 187 and 188 of "The Railway Act, 1888," read as follows:

"187. Whenever any portion of a railway is constructed, or authorized or proposed to be constructed

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies and Idington JJ.

upon or along or across any street or other public highway at rail level or otherwise, the company, before constructing or using the same, or, in the case of railways already constructed, within such time as the Railway Committee directs, shall submit a plan and profile of such portion of railway for the approval of the Railway Committee; and the Railway Committee, if it appears to it expedient or necessary for the public safety, may, from time to time, with the sanction of the Governor in Council, authorize or require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman or by a watchman and gates or other protection—or to carry such street or highway either over or under the said railway by means of a bridge or arch, instead of crossing the same at rail level—or to divert such street or highway either temporarily or permanently—or to execute such other works and take such other measures as under the circumstances of the case appear to the Railway Committee best adapted for removing or diminishing the danger arising from the then position of the railway; and all the provisions of law at any such time applicable to the taking of land by such company, and to its valuation and conveyance to the company, and to the compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the Railway Committee under this section.

"188. The Railway Committee may make such orders, and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof and of any such measures of protection, between the said company and any person

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interested therein, as appear to the Railway Committee just and reasonable."

In the year 1890 the appellants applied for protection at the crossing of Bloor Street, in the City of Toronto, by the Grand Trunk Railway Company, and also at the crossings of Pape Avenue, Logan Avenue and Jones Avenue, by the said Grand Trunk Railway Company, in the said City of Toronto, and the committee made an order dated the 8th day of January, 1891, directing that the crossing of Bloor Street, by the Grand Trunk Railway Company, and the crossing of Pape Avenue, Logan Avenue, and Jones Avenue, by the Grand Trunk Railway Company, be protected by being provided with gates and watchmen, and that the cost attending the placing and maintenance of the gates and watchmen at the said crossings be borne, one-half by the City of Toronto, and one-half by the Grand Trunk Railway Company of Canada, which said order of the Railway Committee of the Privy Council was made an order of the High Court of Justice for Ontario, on the 4th day of December, 1903.

On the 21st day of April, 1899, the appellants applied to the Railway Committee for an order for the protection of the crossings of the Grand Trunk Railway Company at Dunn Avenue, in the City of Toronto, and on the 9th day of June, 1899, the appellants applied to the Railway Committee for an order for the protection of the crossing of the Grand Trunk Railway Company at Dowling Avenue, in the City of Toronto, and the committee directed that the crossings at Dunn Avenue and Dowling Avenue in the City of Toronto be provided with protection and that watchmen be placed at the said crossings, the wages of the said watchmen to be borne and paid solely by the City of Toronto as appears by an order of the Privy Coun-

cil dated the 11th day of March, 1902, which order was made a rule of the High Court of Justice for Ontario on the 4th day of December, 1903.

In pursuance of the orders of the Railway Committee of the Privy Council the crossings in question have been protected in the manner directed by the said orders and an account has been kept of the expense of the installation and maintenance of the said gates and watchmen by the said respondents who have from time to time demanded payment of the appellants' shares of the same, but so far payment has been refused.

The appellants at the trial contended that the Parliament of Canada had no power to direct or enable the Railway Committee to charge the costs of the works which are part of a railway, though declared to be for the general advantage of Canada, against a municipality, and they further contended that the Railway Committee had not the power to make the orders in question, charging the cost of the work against the appellants under the statute upon which the Railway Committee purported to act.

The appellants further contended that they were not consenting parties to such order and that the orders in question were not made upon their application, but by the Railway Committee in pursuance of its ordinary procedure.

The Chancellor, who presided at the trial, gave judgment as follows:

"The questions of law argued in this case are settled by authority to which I defer and follow:

"1. Whether the sections of the 'Railway Act,' (1888) ch. 29, sections 187, 188, are *ultra vires?*

"2. Whether the city is a party interested, if the Act is not *ultra vires?*

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"3. Whether there was jurisdiction on the part of the Railway Committee of the Privy Council to interfere in this case and direct the apportionment of cost, and as to the different crossings, because of the city making application for different relief.

"These were all expressly or by fair implication involved in the decision of the majority of the Court of Appeal in *Re Canadian Pacific Railway Co. and York* (1), and I just follow that authority in directing the proper orders to be made for collecting what is due by the city.

"The law as settled by the above case was recognized by Burbidge J. *In re Grand Trunk Railway and City of Kingston* (2).

"Costs follow result."

The Court of Appeal affirmed this judgment holding that the case referred to by the Chancellor decided the questions in dispute.

Fullerton K.C. and *Johnston*, for the appellants. A municipality can only be authorized to expend money by the legislature: *Municipality of Pictou* v. *Geldert* (3), and neither Parliament nor the Railway Committee can order protection for a municipal purpose. See *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* (4); *Grand Trunk Railway Co.* v. *Therrien* (5).

The municipality is not a "person interested" within the meaning of section 188 of "The Railway Act, 1888," and as to this *In re Canadian Pacific Railway Co. and the County of York* (1), is wrongly decided.

(1) 25 Ont. App. R. 65.
(2) 8 Ex. C.R. 349.
(3) [1893] A.C. 524.
(4) [1899] A.C. 367.
(5) 30 Can. S.C.R. 485.

H. S. Osler K.C., for the respondents.

Shepley K.C. for the Dominion of Canada.

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

GIROUARD J.—The questions involved in this appeal have been thus summarized by Chancellor Boyd, in the trial court:

(1) Whether the sections of the Railway Act (1888), ch. 29, sections 187, 188 are *intra vires?*

(2) Whether the city is a party interested, if the Act is not *ultra vires?*

(3) Whether there was jurisdiction on the part of the Railway Committee of the Privy Council to interfere in this case and direct the apportionment of costs, and as to the different crossings, because of the city making application for different relief?

The learned Chancellor and the judges of the Court of Appeal unanimously answered the above questions in the affirmative. I entirely agree with them. They refer to a decision in *Re Canadian Pacific Railway Co. and the County of York*(1), followed by Burbidge J. in *Re Grand Trunk Railway Co. and the City of Kingston*(2). Mr. Justice Osler has so correctly expressed my own views on these points of law at pp. 72-73 of the former case that I cannot do better than quote his own language:

On the question whether these provisions of the Railway Act are *ultra vires* of Parliament, in relation to the three municipalities or otherwise, I have little to add to what I said on the general question in *McArthur* v. *The Northern and Pacific Junction Ry. Co.* (3) at pages 124, 125 (1890). As provisions relating to the safety of the public in connection with the management of a great Dominion undertaking they would appear to be eminently germane, if not absolutely necessary, to legislation on such a subject, and cannot be

(1) 25 Ont. App. R. 65. (2) 8 Ex. C.R. 349.
(3) 17 Ont. App. R. 86.

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held to be invalid merely because in the mode in which Parliament has declared they shall be carried out, they, to some extent, affect property and civil rights. It cannot but be considered reasonable and right that the public, as represented by the municipalities through which the road passes, sharing in the advantages conferred by it and directly benefited by the measure of protection imposed and required, should share also in the cost of maintaining them. Legislation by which such liability may be imposed seems to me not essentially different—regarded as legislation relating to the railway—from that under which the road is created, and the compulsory acquisition of land, and the ascertainment of its price or value, provided for, *e.g.*, the cases of fencing and subtracting benefit derived from increased value of remaining land. It is not, in my opinion, *ultra vires* and, if not, I agree that the court cannot review the decision of the Railway Committee and declare that those whom they have decided to be interested in and liable to contribute to the cost of maintenance are not interested and liable. It was argued that if the county or township could be treated as interested the Railway Committee might as well declare that any other municipality in the Province, even the most distant, might also be so held, but I do not think that questions of *ultra vires* can be tested or decided by unreasonable or extravagant suppositions of that kind. It must be assumed that the Railway Committee will exercise the judicial powers which have been entrusted to it in a just and reasonable manner, and there is no reason to say that even as regards the county it has here acted otherwise. Many of the matters urged on the appeal, relating to the status of municipalities, their powers of taxation, etc., are really mere assertions in various forms of the principal objection, for if the legislation is *intra vires* municipal corporations are in no different position from natural persons, and there is no more difficulty in enforcing compliance with the order of the Railway Committee than in enforcing a judgment obtained against them in an ordinary action.

A long array of decisions has been quoted by the Attorney General for Canada in support of this judgment and, until our recent decision in *Re Railway Act*(1), be reversed, we are bound to hold that, in a case like this, the Dominion Parliament may interfere with property and civil rights and impose obligations upon municipalities as being incidents to the subject matter assigned to its jurisdiction.

An attempt has been made to distinguish cases in

(1) 36 Can. S.C.R. 136.

which a railway is constructed across a pre-existing highway. I fail to conceive how this fact can affect the jurisdiction of the Railway Committee. It may be of importance to apportion and determine the burden of keeping gates. But this has nothing to do with the jurisdiction of the Railway Committee; it is a matter left entirely with the Railway Committee, who may deal with it as in its wisdom it may deem just and in the public interest, without being subject to review by any court of justice.

I would, therefore, dismiss the appeal with costs.

DAVIES J.—The questions to be determined on this appeal are two. First: Had the Parliament of Canada when legislating with respect to railways within its jurisdiction the right to give to the Railway Committee power to apportion amongst parties interested the cost of the carrying out of such protective measures as was by the committee deemed necessary at the crossings of the railway and public highways? Secondly: If so, was the City of Toronto a "person interested" within the meaning of those words in section 188 of the "Railway Act of 1888," with respect to the crossings within the limits as to which an order had been made?

No question as to the reasonableness or justice of the orders impeached was or could be raised provided the Railway Committee had jurisdiction to make them.

It was suggested and argued, however, that the power of Parliament to legislate on the subject matter in dispute might depend upon the priority in existence of the railway or the highway and that while in a case where the railway crossed an existing highway such right might not exist, it might with respect to an ap-

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plication made by a municipality for leave to cross an existing railway by a contemplated highway.

Of course such leave might be given upon conditions which if accepted would be binding upon all parties, but apart from that special point I think the statutory powers conferred upon the Railway Committee to apportion the cost of the works ordered cannot, if *intra vires* at all, be limited or controlled by any question of the priority of the roads crossing each other.

I agree with Meredith J. in *Re Canadian Pacific Railway Co. and the County of York*(1), (from the judgment in which case this is practically an appeal) when he says:

> Complete legislative power admittedly exists somewhere. Nothing turns upon the wisdom or unwisdom, or the reasonableness or unreasonableness of the thing, or whether it is precedented or unprecedented; those are matters for legislative, not judicial, consideration.

The exclusive power to make laws for the construction and efficient operation, management and control, of such railways as have been by the British North America Act, 1867, assigned to the jurisdiction of the Parliament of Canada being vested in that Parliament, the sole question is whether this section 188 is not necessarily incidental and ancillary, or as put by Osler J. in the case above referred to "eminently germane if not absolutely necessary," to give full effect to the ample powers given and intended to be given to the Railway Committee for the safety of the travelling public alike by rail or highway.

Looking at the question in the large and as applicable to the conditions existing in Canada, we find three great transcontinental railways built or being

(1) 25 Ont. A.R. 65, at p. 79.

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built across our Dominion connecting one ocean with the other. These roads necessarily cross hundreds of highways where there is little if any traffic. As population increases the traffic grows until a railway crossing of a highway on a level which one year required no special protection, in a few years might require watchmen and gates, and in a few years more either an overhead bridge or an expensive subway.

The increasing traffic demanding these prudent "measures of protection" may be due largely to the operation of the railway, or causes quite foreign to it, or to a combination of both. If Parliament is not justified by the necessity of the case in dealing with this traffic and doing so effectively, what authority can do so?

The power to deal, and to do so effectively, with the special conditions arising from a rapidly increasing traffic at a railway crossing of a highway must necessarily be dealt with by some paramount authority.

The power which the local legislature possesses of legislating with respect to property and civil rights would be manifestly inefficient and limited. The subject is not one admitting of dual legislation.

The only power capable of dealing fully and effectively with such a condition is that of the Parliament of Canada.

That in dealing with it property and civil rights are effected is a matter of course, but all interested parties may be dealt with and all interests affected legislated for. It seems to me in the very nature of things this must be so or the legislation would fail to fulfil its object, the public safety.

But it is said all this can be accomplished at the expense of the railway, and without assigning any

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portion of that expense to the municipality. Just so. It can be so. But Parliament having authority over the premises has chosen to say, we think a more equitable plan will be to invest a competent tribunal with the power of apportioning between the railway and interested parties the share of the cost of the protective measures each should bear.

The only question then remaining would be whether the municipality was a "person interested" within the meaning of these words in the section.

In the first place by R.S.C. ch. 1, sec. 7, sub-sec. 22, the word "person" includes any body corporate and politic so that if Parliament had power to do so it has declared municipalities interested as being within the classes liable to contribute to the expenses of the protective measures ordered.

By the "Consolidated Municipal Act of Ontario, 1892," ch. 44, sec. 3, the inhabitants of every city, etc., are declared to continue as a body corporate.

While there may be some doubt as to the complete title of the municipality to the soil or freehold of and in the public roads and streets within its bounds, there is none that such roads and streets are vested in it and under its jurisdiction and that it is the virtual owner of the public roads and streets within its bounds and liable to keep them in repair.

The practical interest, therefore, of the municipality in the road, and in the manner in which the Railway Committee deals with it whether by deflecting it or carrying it under or over the railway or merely causing gates to be placed across it with watchmen, seems to be indisputable. The municipality in this respect represents its entire population.

If its title is only in the surface and another person owns the soil below the surface that may be a

good reason for insisting that the varied titles and interests affected should be considered by the tribunal. But that is all.

Once you reach the point that the subject matter is one for Parliament to deal with, then it is for Parliament exclusively. There cannot be two conflicting tribunals legislating at the same time upon such a vital subject as the public safety at railway crossings. If for Parliament exclusively the legislation may cover all the ground necessary to make it effective and may in order to do so extend to branches eminently germane and ancillary even if not absolutely essential in the sense in which the appellant contends this legislation is not. And so it may not only affect and embrace interests other than those of the railway, but may do so in such a way as to compel them to contribute to carry out what is deemed necessary and adequate protection to the public under the circumstances in each case, the tribunal vested with the power of so determining being unfettered in the exercise of its judgment within its statutory powers and not liable to supervision or control by the courts.

The City of Toronto in its corporate capacity represents all of the inhabitants of the municipality in which the railway crossing is situate at which the protection works were ordered. As such it properly applied to have these protection works carried out. I do not think the mere fact of its application necessarily involved it in liability to pay any part of the cost of these works. But being the virtual and actual owner of substantial interests in the street or highway at and on both sides of the railway crossing and which interests were directly affected by the works asked for and ordered and at the same time the corporate representative of the residents and people directly interested

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in these works, I am of opinion that it is a municipality or "person interested" within the meaning of the section of the "Railway Act" under discussion and amenable for the purposes of the order made by the Railway Committee to its jurisdiction.

I am not able to appreciate the argument that because the municipality is one with powers and rights defined and limited by the provincial legislature it can therefore escape the responsibility which attaches to it as a person or municipality interested under the Act.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—The respondents sued in this action to recover moneys spent in guarding their railway crossings of streets in the City of Toronto, alleging as the basis of such right of action certain orders made by the Railway Committee of the Privy Council, directing said appellants to repay to said respondents moneys spent by them in guarding such crossings.

The courts below following the result of a similar case, which is reported in 25 Ont. A.R. 65, gave judgment for these claims, and from that this appeal is taken by the said city.

The respondents' railway was built after the streets crossed had, except in the cases of two of the crossings now in question, been in use for some years.

These two exceptions are crossings of Dunn Avenue and Dowling Avenue effected by virtue of the passing of a by-law of the Village of Parkdale, now forming part of Toronto, assented to by the Great Western Railway Company, who were predecessors in title of the respondents, in respect of that part of their

road crossing the two streets thus opened across the railway tracks.

These two crossings seem to have been the result of a bargain whereby the railway company got rid of a liability to maintain several farm crossings.

These railways were built before the "British North America Act," 1867, was passed, and some thirty to forty years before the "Railway Act" we have to consider was passed.

No provision was made, so far as appears from the cases before us, at the time when any of these crossings, which are all level crossings, were constructed, looking beyond the immediate necessities of construction either as to future reconstruction or maintenance.

No provision was made in any of them, or likely ever thought of, for the future guarding of these crossings, for the purpose of protecting the travelling public on either highway or railroad.

As travel on both increased, and trains became multiplied and by reason of double tracking and increased rate of speed, doubly dangerous, some of these railway crossings, from time to time, became scenes of sad accidents which stirred the appellant's council to ask the Railway Committee of the Privy Council for some remedy for such a state of things.

This resulted in the said committee directing, by orders of 8th January, 1891, that gates and watchmen be provided within two months, and thereafter maintained by the respondents and the Canadian Pacific Railway companies respectively, as the case might require, at four of the crossings in question here. Then the order continued as follows:

> Where two railway companies use the same crossing each railway company to contribute one-third, and the municipality or municipalities interested, the other third of the said cost.

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Where one railway company only uses the crossing, the railway company to contribute one-half and the municipality or municipalities interested, the other half of the said cost.

Thenceforward nothing more seems to have been done, until the appellants again applied to the Railway Committee, on the 4th December, 1903, in regard to the above-named Dowling Avenue and Dunn Avenue crossings and the following order was made by said committee on 11th March, 1902:

The said committee, on the 21st day of December, 1900, heard counsel for the railway company and the said corporation respectively, and having duly considered the evidence submitted, hereby orders and directs, subject to the sanction of the Governor in Council, that the said railway company shall provide and keep day and night watchman at the said crossings, the wages of said watchman to be borne and paid by the Corporation of the City of Toronto.

It is upon these orders that respondents sue for the expenses of keeping such watchmen.

I do not think, as argued for respondents, that the applications by the appellants were, or that any one of them was, of such a character as to bind them to abide by any such orders as those so made.

All the municipal authorities did was to present to the power that possibly had the remedying of such a grievance as existed the facts relative to a public evil, from which some of the inhabitants of the city and others suffered.

It is said, however, that these orders were such as the committee, independently of any submission, had power to make by virtue of the following sections of the "Railway Act":

187. Whenever any portion of a railway is constructed, or authorrized or proposed to be constructed upon or along or across any street or other public highway at rail level or otherwise, the company, before constructing or using the same, or in the case of railways already constructed, within such time as the Railway Committee directs,

shall submit a plan and profile of such portion of railway for the approval of the Railway Committee; and the Railway Committee, if it appears to it expedient or necessary for the public safety, may, from time to time, with the sanction of the Governor in Council, authorize or require the company to which such railway belongs within such time as the said committee directs, to protect such street or highway by a watchman or by a watchman and gates or other protection,—*or to carry such street or highway either over or under the said railway by means of a bridge or arch instead of crossing the same at rail level,—or to divert such street or highway either temporarily or permanently,—or to execute such other works and take such other measures as under the circumstances of the case appear to the Railway Committee best adapted for removing or diminishing the danger arising from the then position of the railway;* and all the provisions of law at any such time applicable to the taking of land by such company, and to its valuation and conveyance to the company, and to the compensation thereof, shall apply to the case of any land required for the proper carrying out of the requirements of the Railway Committee under this section.

188. The Railway Committee may make such orders and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof and of any such measures of protection, between the said company and any person interested therein, as appears to the Railway Committee just and reasonable.

I express no opinion upon the proper interpretation to be given to these sections 187 and 188, in the adjustment of the relations between a railway company and a municipality, arising out of the construction or reconstruction of a railway at its intersection with a highway.

But everything necessarily incidental to the execution of the powers of Parliament in relation to the building or reconstruction of a railway I assume is provided for, and all that might be raised in such case is thus out of the question before us.

All that concerns us here is whether these sections authorize orders such as sued upon; and if so, whether or not the Dominion Parliament had power to so enact.

The use of the words "persons interested" in section 188, is what the respondents rest their case upon.

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The word "person" by virtue of the "Interpretation Act" can undoubtedly include a subject corporate and politic to whom the context can lawfully apply.

But does the word "person" necessarily cover the cases of taxation for expenses of watchmen?

It appears to me that there may fall within the range of such a comprehensive section as 187 many cases of "persons interested" whereby an operative effect may be given to that phrase "any person interested" in section 188, without extending the meaning so far as to cover the meaning presented here for our acceptance. Is it not enough to say that full effect may be given to every word of these sections without making them cover pretensions for which *primâ facie* there is no foundation?

May not full and proper effect be given to the use here of the words "person interested" by its restriction to what is incidental to the cases of building or reconstruction? In either such case an effect is given to it. Individuals and corporations (municipal or otherwise) owning adjacent or adjoining property may need, in regard to building or reconstruction, to be so dealt with in the cases of arches, subways or diversions as to require the exercise of the power of directing costs to be shared according as their respective properties may be benefited. And in that class of cases effect would be given the words. Even the future hiring of watchmen might become a feature of the adjustment of the proprietary rights of such parties, one necessarily invading the other for purposes of construction.

That might give effect to every line and every letter of sections 187 and 188, but yet fall far short of supporting the pretensions needed to support these orders.

Let us analyze section 187 and its several relations to section 188, and see if it clearly expresses anything more than these possible incidents of construction.

The company crossing

shall submit a plan and profile, etc., and the Railway Committee if it appears to it expedient or necessary for the public safety may from time to time * * * require the company to which such railway belongs to protect such street or highway by a watchman and gates or other protection.

This is the first alternative for the protection of the street. In directing it the committee are pointed to the company alone, as the parties to supply watchmen and gates or other protection. It is a separate subject matter and is kept apart and dealt with as entirely different from what follows.

In that the section is only dealing with a crossing "at rail level or otherwise." The word "otherwise" might possibly cover a departure from exact level by grade up or down, yet be within the same general meaning of a level crossing which may need a watchman.

There is nothing in this which indicates a duty on the part of any one else than the railway company, but rather the reverse.

There are following this subject matter others of an entirely different nature, and three other alternatives, one to carry the highway over or under the railway; another to divert the highway; and a third to execute *such other works* and take *such other measures* as appear to the committee best adapted

for removing or diminishing the danger arising from the then position of the railway.

Then we come to section 188 and the committee is empowered

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to give such directions respecting *such works* and the execution thereof, and the apportionment of the *costs thereof* and of any *such* measures of protection.

What work? Surely not a gate. Clearly, I would say, some of the *works* contemplated by the three other alternatives. And what "measures of protection?" "*Any* such" must surely be of the same class as has immediately before these words been specified; that is in the last of the three alternatives, or possibly each or any of all three.

Obviously the phrase does not grammatically relate to any measures of protection other than "such" as are "*works*" and the execution thereof.

Excluding, as I suggest, gates from "such works" as being of too trifling a nature to so designate, and as a subject apart from manifestly important works contemplated in the latter part of the section, this would be clearly so.

It is not necessary to go so far as to hold that this analysis makes it absolutely impossible to apply the words "any such measures of protection" solely to the preceding "such other works and," etc., and "such other measures as under the circumstances of the case," etc., "appear," etc., and exclude the possibility of them relating to all that had gone before. It would, however, violate no canon of construction to adopt the restricted interpretation of these words, "any such measures of protection" in the way I suggest. And if that be done there is an end of the respondents' case.

I am concerned, however, only to shew this, that privileges given by statute to private corporations must be restricted to what is clearly expressed, and that the remarkable concessions given by these orders, especially the last one, do not rest upon any such

clear expression in this statute as the legal principle I invoke requires.

It is well we should clearly apprehend what is implied in the maintenance of this last order. To begin with; the statute contemplates only an "apportionment of the costs," but this order directs the whole to be ultimately borne by the municipality. It takes out of the hands of the municipality the police business of protecting travellers on the streets, transfers that to a railway company, and orders the municipality to recoup the railway company thus substituted in control. In the case of this particular order no gates or works of any kind are in question.

The crossings in question in this order are the result of a compact between the Village of Parkdale and others concerned and the railway company.

This compact relieved the Great Western Railway Company of other burthensome crossings, and it does not seem as if ordinary good faith had been kept in thus shifting the consequent burthen upon the city.

It was necessary that the public should be protected. It undoubtedly would be within the power of Parliament to enact anything binding the railway, to take such steps as would furnish such protection. That was done by these orders in directing the erection of gates and the keeping of watchmen at the crossings.

But when that was done the imposition of the expenses thereof, upon the municipality, was something unnecessary and in the last analysis is but an assertion of the power of taxation not for the general public benefit, but in one of its most offensive forms, purely for the amelioration of the finances of the railway company.

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In the carrying on of any business there comes with increased business increased burthens in the way of discharging duties to others. It is in the way of carrying on a highly dangerous business, such as that of the respondents', natural that the increase renders the carrying of it on more and more dangerous and demands greater care and more expensive machinery to avert these necessary dangers.

In every other dangerous business the burthen of protecting the neighbour is cast upon those carrying on the business, and not upon the neighbour. Why should railway companies be exempted from this general rule?

The municipality even if it owned the adjacent property, as it probably does not, would by following this general rule be protected but not burthened.

But when we reflect that the municipality, in the exercise of its jurisdiction over this adjacent soil, is, amongst other things, only serving the purpose of enabling the customers of this railway company to reach its stations, to do business with it, we see less reason to create or impose upon the municipality a new duty in this regard.

By statute the municipality has a duty to keep in repair the road, and see that its physical condition is such that it can be travelled over.

No one ever dreamt of this statutory obligation extending to the extraneous dangers such as steam whistles in factories alongside of it, or the result of a train lawfully crossing it or running along it.

No one has ever had the temerity to invoke the law to give a remedy for losses caused by the exercise of such powers as those enjoyed by the railway or others.

The negligence, if any has ever been found to exist,

leading to accidents, has been that of the railway company, and not of the municipality.

I entirely dissent from the proposition put forth in argument that the fee simple of the land over which a highway has been established necessarily becomes vested in the municipality.

Indeed, except where the municipality has expressly acquired the fee simple, which it may or may not according to the facts of each case, as incidental to the execution of its powers for opening, assuming, or in any way acquiring, a road for public use, and the cases, if any, covered by section 601 of "The Municipal Act," I think the fee simple is not vested in the municipality.

I am unable to see how, even if it were, it could as in this case, as urged, aid respondents' position. See Mr. Biggar's valuable Municipal Manual, pp. 818 and 819, for references that settle presumptions of, and kind of, ownership of highways such as may exist in a municipality.

Again the appellant being a municipal corporation possesses only such powers as the "Municipal Act of Ontario" has given and is subject to such liabilities as that Act expressly or impliedly imposes.

There is no power that I can conceive of in the Dominion Parliament to *directly* add to or take away from the powers of the municipality.

Indirectly Dominion legislation, as for example, making the omission to observe a duty already existent a crime, may so operate on municipal or other corporations as apparently to conflict with this statement. On consideration there is clearly only apparent conflict.

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The cases of *Valin* v. *Langlois*(1) and *Attorney-General* v. *Flint*(2), at first blush suggest an analogous case under the "British North America Act, 1867," conflicting with this proposition—clearly distinguishable, however, I say.

But the courts are for the administration of justice generally, and that ought to include dealing with what flows from legislation within the proper competence of the Dominion Parliament. And in the latter case I cite the then Mr. Justice, now Sir Henry Strong, was careful to say that the court might not be compellable to act though it could if Parliament chose to authorize it.

Can it be said that the protection of the public in relation to the running of a railway rendered it necessary or reasonably necessary to make such orders as those now in question? Necessity may in any case warrant Parliament going far to execute its powers.

But I cannot find such necessity, either reasonable or unreasonable, for the part of the order requiring the municipality to refund the railway company expenses incurred in the course of its business.

Public convenience or expediency in themselves, without necessity, cannot justify Parliament stretching its supposed authority.

And clearly, where it would as here be quite competent for the legislature to so reduce or abolish the taxing power of any municipality that in no way could Parliament reach them pecuniarily, it is difficult to support a proposal for Parliament to direct levying of rates on such a body.

The province has always paid part of the municipal expenses and might if its revenue sufficed go a step further and pay all.

(1) 5 App. Cas. 115. (2) 16 Can. S.C.R. 707.

To illustrate, further, turn to the plenary powers of Parliament in relation to banks and banking; navigation and shipping; beacons, buoys and light houses; and we can, without difficulty, find as good, if not better, reasons for protecting, in one case by police protection, the banking institutions or, in the others, the travelling public by directing a guarding of the harbour, so as to make it safe for ingress and egress of vessels, and in giving facilities for landing passengers and freight; and by keeping the lights burning to shew the way to the traveller or passing ship.

Would it be competent for Parliament to cast the burthen of these expenses, or any of them in any one of those several cases, upon the municipality most concerned?

It seems to me as if there would be no greater stretch of authority in doing so than we have now under consideration, whenever we go in any one of them, beyond the boundary line of reasonable necessity.

Such I conceive the way in which we must approach the consideration of such a question, when, if ever, it becomes necessary to determine as I do not presume to do the limits in this regard of the power of Parliament.

What I am concerned with here is to point out the probably grave consequence of raising such extreme pretensions of power, and the improbability that such an issue was ever intended to be raised, or is raised by the words of the sections I have quoted.

I think when we get thus to the very root and essence of the matter we are impelled to say Parliament can never have intended, and ought not to be held to have intended, by any such enactment as section 188 of the "Railway Act," to have conferred on a

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body constituted for other purposes than imposing local taxation, or enacting police protection, the power to do so, in a case quite unnecessary for the full execution of the powers conferred by the "British North America Act."

Would Parliament ever have ventured, by virtue of the powers it is given by that Act, to have enacted by express words that each municipality through which a railway runs, and therein crosses streets or roads of the municipality, should protect and pay for the protection of the crossings by an annual rate sufficient for the purpose?

If it could do this, why not enact that the railway should be free from taxation?

We have had a case presented to this court (I refer to the cases of the *Municipality of North Cypress* v. *Canadian Pacific Railway Co.*(1)), which raised the issue in a different form. That such a question as raised in the last mentioned cases should be thought arguable shews how far beyond Parliament the power of exempting from taxation is generally held to be in the older provinces, that did not get their powers from the Dominion.

The converse power to impose a tax is just as far and none the less because indirect.

Conceding to the full, that the proprietary rights and all other powers or rights of a municipality must bend before the proper execution of the will of Parliament within its powers, does not uphold the pretension to add to the taxing power of the municipality beyond what the legislature has defined or may define. The possession or the right of the municipality may be invaded, but its limits of the power of taxation cannot be increased by Parliament.

(1) 35 Can. S.C.R. 550.

Public convenience or protection would, if any basis to rest upon, which I deny, enable the extension of such powers as here asserted to the erection of railway stations and their lighting and policing as within the power.

The provisions in the statutes that preceded that now under consideration are, on this point of the relation of the municipal and railway authorities, instructive, both as to the condition of things at the time of confederation, and to see how before that time railway corporations, including respondents, were supposed to be the servants of the public, but since then their growth in wealth has been accompanied apparently (if we contrast these orders with penalizing power on same subject formerly in power of municipality) by a progressive and aggressive attitude compared with that of the ancient times. See 14 & 15 Vict. ch. 51, secs. 12 and 13; "The Consolidated Statutes of Canada," 22 Vict. ch. 66, secs. 12 and 141; 31 Vict. ch. 68, secs. 10, 36 and 37; 42 Vict. ch. 9, secs. 15, 48 and 49; 47 Vict. ch. 11, secs. 3 and 10; 49 Vict. ch. 109, secs. 12 and 48, 183 to 186.

We should not lose sight of these former times, as the standard of thought prevailing when the "British North America Act" was passed, and in the light of which we ought to interpret that legislation, which though in form the work of the Imperial Parliament, was but the reflection of what Canadians desired. That habit of thought must be considered if correct interpretation is to be had.

I am of the opinion that the municipal corporation is not a "person interested" in the sense necessary to support these orders for repayment to the company of the expenses indicated.

And if none of the interpretations I have suggested

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in regard to these words be tenable I am, for the reasons already indicated, of opinion that (in the sense required to uphold these orders) they are *ultra vires* of Parliament.

I think the appeal should be allowed and the action be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. C. Chisholm.*

Solicitor for the respondents: *W. H. Biggar.*

MAHLON FORD BEACH (SUPPLIANT) .... APPELLANT;

AND

HIS MAJESTY THE KING (RESPONDENT) .... RESPONDENT.

1905 *Nov. 27.

1906 *Feb. 21.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Lease—Canal—Water-power — Improvements on canal—Temporary stoppage of power—Compensation—Total stoppage—Measure of damages—Loss of profits.

A mill was operated by water-power taken from the surplus water of the Galops Canal under a lease from the Crown. The lease provided that in case of a temporary stoppage in the supply caused by repairs or alterations in the canal system the lessee would not be entitled to compensation unless the same continued for six months, and then only to an abatement of rent.

Held, Idington J. *dubitante*, that a stoppage of the supply for two whole seasons necessarily and *bonâ fide* caused by alterations in the system was a temporary stoppage under this provision.

The lease also provided that, in case the flow of surplus water should at any time be required for the use of the canal or any public purpose whatever, the Crown could, on giving notice to the lessee, cancel the lease in which case the lessee should be entitled to be paid the value of all the buildings and fixtures thereon belonging to him with ten per cent. added thereto. The Crown unwatered the canal in order to execute works for its enlargement and improvement, contemplating at the time only a temporary stoppage of the supply of water to the lessee, but later changes were made in the proposed work which caused a total stoppage and the lessee, by petition of right, claimed damages.

Held, Girouard J. dissenting, that as the Crown had not given notice of its intention to cancel the lease the lessee was not entitled to the damages provided for in case of cancellation.

Held, also, that the lessee was not entitled to damages for loss of profits during the time his mill was idle owing to the water being out of the canal.

Judgment of the Exchequer Court (9 Ex. C.R. 287) affirmed, Girouard and Idington JJ. dissenting.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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APPEAL from a judgment of the Exchequer Court of Canada (1) allowing the suppliant $20,000 damages for loss of water-power formerly supplied under lease from the Crown.

The suppliant was the assignee of a lease of land near the canal known as the "Galops Canal." The lease is dated the 16th December, 1871, and was assigned to the suppliant in 1883. It was made for a term of twenty-one years, renewable in perpetuity for like terms, subject, at the termination of each term, to a revision of the yearly rent, and constituted a demise of a portion of the canal reserve on which the suppliant erected a flour mill. With the lands demised was granted the use and enjoyment of so much of the surplus water of the canal as should be sufficient to drive and propel, by means of the most approved description of wheel, four runs or ordinary mill-stones equal to ten horse-power for each run. The water was supplied from the canal at a point above what was known as Lock number 25, and was carried to the mill by a flume or raceway constructed by the lessee at his own expense.

Provision was made by the lease for interruption to the supply as follows:

"Secondly.—That in the event of the temporary stoppage of the flow or supply of surplus water, or a portion thereof, hereby leased, by reason of the same being required for the navigation of the said canal, or by reason of repairs, improvements, or alterations being, by the said minister or his successors in office, or his officers in that behalf, deemed necessary or desirable to be made to the same, or for the purpose of preventing damage to the said canal, by means of

(1) 9 Ex. C.R. 287.

extreme high water, or by frost or ice, or any other uncontrollable cause or accident, no abatement of rent shall be claimed or allowed, nor the said lessees, their heirs, executors, administrators or assigns, have or pretend to have any right to any compensation whatever, on account of the injury or damage that such stoppage of the flow or supply of surplus water may occasion—save and except only in the event of the total stoppage of the said flow or supply of surplus water for and during an uninterrupted period of six calendar months, during the usual navigation season, in which case the said lessees, their heirs, executors, administrators, and assigns, shall be allowed and obtain, in full compensation for the same, and for any loss or damage that they may thereby sustain, an abatement of six calendar months' rent accruing for any and every such period of continuous interruption in the flow or supply of surplus water hereby leased as aforesaid."

Power was also reserved by the said lease to the Minister of Public Works, on behalf of the Crown, to determine the lease of the said lot and flow of surplus water, or any part thereof, on reasonable notice, namely:

"Provided always, that if at any time hereafter it shall be determined by the said Minister of Public Works, or his successors in office, that the said lot and flow of surplus water, or any part thereof, are or is required for the use of the said canal, or for any public purpose whatever, thereupon, on reasonable notice (of not less than three calendar months) being given to the said lessees, their heirs, executors, administrators or assigns, by the said minister or his successors, to that effect, this lease or the lease for the term then current, and all matters herein or therein contained,

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shall cease and be void, and the said minister, or his successors in office, shall pay or cause to be paid unto the said lessees, their heirs, executors, administrators or assigns, the then value (with an addition of ten per cent. thereon), of all the buildings and fixtures that shall be thereon erected and belonging to the said lessees, their heirs, executors, administrators and assigns, according to a valuation thereof to be made by arbitrators, one of whom to be chosen by the said minister or his successors as aforesaid, another by the said lessees, their heirs, executors, administrators or assigns, and the third by the said arbitrators so nominated as aforesaid before entering on their said arbitration, and the decision of the said arbitrators, or of a majority of them, shall be final."

In 1898 the Minister of Railways and Canals projected certain works for the enlargement and improvement of the canal upon which the appellant's mill was situated, and these works involved, in the immediate vicinity of the appellant's mill, the construction of what was practically a new canal prism, replacing a portion of the old canal prism from which the power from the surplus water had been supplied under the lease of 1871.

On the 12th December, 1898, the old canal, at the point from which the power of the appellant's mill was taken by his flume from the canal to his mill premises, was unwatered to facilitate the construction of the projected works, the unwatering being done by the contractors employed by the minister for the construction of the projected works. The result of the unwatering was, of course, to shut off completely the power from the appellant's mill.

It was not immediately apparent that the stoppage was to be permanent, and it would seem likely that

the old supply might have been resumed, after the completion of the projected works, but for an alteration in the character and scope of these works determined upon after the date of the unwatering. In the result the works as constructed were quite incompatible with a continuance of the supply of power, subject of the demise, the appellant's flume and raceway being destroyed and his mill being completely deprived of the supply of water granted by the lease of 1871.

Much negotiation took place between the appellant and the minister and those representing him during the progress of the work, the appellant being desirous, from the time when it became apparent that the construction of the new works would take away his old supply of power, of obtaining from the Crown a lease or grant of such power as might be developed from the new works, having in view the establishment of an electric power plant for commercial purposes, as an incident of which his mill might have been supplied with electric power.

As the result of these negotiations the appellant finally obtained a lease of power from the surplus water passing through the new works to the extent of 200 horse power, this lease, however, as has been determined by the learned judge, not affecting in any way the assertion of his rights under the old lease.

The petition of right presented by the appellant was based upon the obligation of the Crown created by the demise of 1871, in respect of the supply of water, subject to that demise. It was not disputed on behalf of the Crown that the appellant was entitled to damages, but the measure and extent of those damages was contested.

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Chrysler K.C. for the respondent.

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

GIROUARD J. (dissenting).—I think that the last paragraph of clause 6 of the lease disposes of this case. It says:

> Provided always, that if at any time hereafter it shall be determined by the said Minister of Public Works or his successors in office, that the said lot and flow of surplus water, or any part thereof, are or is required for the use of the said canal, or for any public purpose whatever, thereupon, on reasonable notice (of not less than three calendar months), being given to the said lessees, their heirs, executors, administrators or assigns, by the said minister or his successors to that effect, this lease, or the lease for the term then current, and all matters herein or therein contained, shall cease and be void, and the said minister or his successors in office shall pay or cause to be paid unto the said lessees, their heirs, executors, administrators or assigns, the then value (with an addition of ten per cent. thereon) of all the buildings and fixtures that shall be thereon erected and belonging to the said lessees, their heirs, executors, administrators or assigns, according to a valuation thereof to be made by arbitrators one of whom to be chosen by the said minister or his successors as aforesaid, another by the said lessees, their heirs, executors, administrators or assigns, and the third by the said arbitrators so nominated as aforesaid before entering on their said arbitration, and the decision of the said arbitrators, or of a majority of them, shall be final.

It is contended that this clause was introduced into the lease in the interest of the Crown to secure the right to resume possession of the leased premises on giving notice to the tenant. This is true, but only in a limited sense. Suppose the Crown resumes possession of the whole property leased without giving notice. Undoubtedly in such a case the tenant would be entitled to full indemnity as provided in that clause, the notice required being presumed to have

been waived. How a different rule can be applied in the case of only partial possession is more than I can understand, as the clause puts partial eviction upon the basis of a total one. The clause is in the interest of both parties.

It is admitted that the minister determined that the flow of surplus water in question in this cause was required for the use of the canal, or at least for a public purpose. Then, if I understand the case well, the above clause of the lease comes in and provides for the termination of the same and for the payment of the indemnity due to the lessee. I cannot understand how the Crown by its own default can avoid this consequence, namely, by not giving the notice of three months mentioned in the clause, a notice which evidently was required more in the interest of the lessee than of the lessor. I cannot see how the Crown can prevent the lessee from recovering the value of his buildings and fixtures. Mr. Chrysler K.C. has conceded that that value was about $45,000, and I am not prepared to say that the estimation of $50,000 made by the appellant is exaggerated. I am, therefore, of opinion that the appellant should get this value, plus 10 per cent. and interest thereon since the supply of water was stopped, namely, since the 12th December, 1898, and all costs, and that this action should be dismissed as to any other claims or damages.

It has been objected that the action as brought does not justify this conclusion. To avoid future litigation and render full justice to both parties I would permit an amendment, if necessary, to the statement of claim in the terms of the reply of the suppliant. The respondent cannot allege that he is taken by surprise, or even that he is injured. In his statement of defence

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he sets up the above paragraph of the lease and prays

> that the damage should be determined on the provisions of the said lease above recited in reference to the determination of the lease, and that the said lease should be cancelled.

I think this prayer of the statement of defence should be granted on payment of the damages as stipulated in the lease, and established in the case, namely, the value of the buildings and fixtures, plus 10 per cent. thereon. I have the less hesitation in coming to this conclusion, which seems to me to be fair and just between the parties, that the suppliant in his reply to the statement of defence finally says,

> that he has always been and still is ready and willing, and he hereby offers to agree that, without prejudice to his claim for recovery of damages herein and not in any way waiving the same, the said lease be now cancelled on the suppliant being paid the value of the said buildings and fixtures to be ascertained by arbitration in accordance with the provisions of the said instrument.

As to the above reservation made by the appellant of his claim for recovery of damages beyond the value of the said buildings and fixtures and 10 per cent., I believe that he cannot set up any such claim. The question is not what profits the suppliant has lost, but whether he has been permanently deprived of his water-power. There is no doubt as to this and he can claim no larger indemnity than is provided for in the contract, that is the value of his expenditure and 10 per cent. thereon in addition. This 10 per cent. represents all the profits and other damages which he may have suffered, but he cannot claim more.

I would, therefore, allow the appeal with costs, cancel the lease, order a valuation of the said buildings and fixtures by arbitration in accordance with the said provisions of the lease, and condemn the

respondent to pay the amount found by the arbitrators, and ten per cent. in addition, unless both parties agree to accept $50,000, plus ten per cent., that is altogether $55,000, in full of all claims, with interest in either case from the 12th December, 1898, and all costs.

DAVIES J.—This was an action brought by the suppliant in the Exchequer Court against the Crown for damages because of the permanent withdrawal from his mill of certain water-power which the suppliant claimed to be entitled to under a lease from the Crown. The lease was made in 1871 for a term of years renewable in perpetuity for like terms subject at the termination of each term to a revision of the yearly rent, and demised a portion of the canal reserve on which the suppliant had erected a flour mill. With the lands demised was granted the use and enjoyment of so much of the *surplus water* of the canal as should be sufficient to drive four runs of ordinary mill-stones equal to ten horse-power for each run.

The lease contained several important clauses, providing for the stoppage of the supply of surplus water under specified circumstances relating to the navigation, repair, alteration or improvement of the canal by the Government, and that in such cases, if the stoppage was temporary, the lessee was neither to be entitled to abatement of his rent or compensation in damages, but that if the stoppage was total for

an uninterrupted period of six calendar months during the usual navigation season (the lessees were to be allowed) in full compensation for the same and for any loss or damage they may thereby sustain an abatement of six calendar months rent accruing *for any and every such period of continuous interruption.*

The lease contained another most important pro-

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vision stipulating that if at any time the Minister of Public Works determined that the leased lot of land and the surplus water or any part thereof were required for the use of the canal he could upon giving the lessee reasonable notice cancel the lease and pay the lessee the then value, with 10 per cent. added, of the buildings and fixtures thereon according to a value to be fixed by arbitration as provided.

No notice ever was given by the minister under this proviso and I agree with the judgment of the learned judge of the Exchequer Court that it cannot be invoked in this case.

The Government having determined upon some important changes and alterations in the canal system it became necessary to unwater that part of the canal from which the suppliant's mill received its supply of the surplus water.

As a consequence such supply ceased and was totally stopped for one or more seasons.

Under the terms of the lease this stoppage of water-power, though it resulted also in the stoppage of the mill and of suppliant's business there, was perfectly legal being in accordance with the express terms of the lease. Whether the total stoppage of surplus water lasted one entire season of navigation or several did not matter so long as it occurred *bonâ fide* and fairly from any of the causes or for any of the purposes and objects stipulated. It gave rise to no claim on suppliant's part for damages, but it entitled him to an abatement of his rent.

There came a time, however, when, as admitted by the counsel for the Crown, the total stoppage of water ceased to be justified under the provisions of the lease and the Crown became liable to the lessee for damages.

The trial judge awarded the suppliant $20,000 dam-

ages and in this judgment the Crown acquiesced by not appealing. The suppliant alone appealed and the question here is limited to the adequacy of the damages awarded. The contention on the part of the suppliant was that the judgment appealed from was wrong in excluding from the assessment of damages the claim made by the suppliant for the loss of profits in his business from the time of the unwatering till the time when he ought properly to have provided other means than the water provided, and also in allowing inadequate damages on the two other grounds of his claim, namely, the cost of installing new methods and providing the 40 horse-power and the excess in the cost of maintaining such new power.

I am of the opinion, for the reasons given by Burbidge J., that he was right under the circumstances in excluding the claim for profit submitted by the suppliant, and I am further of the opinion that there was an entire absence of any proper evidence on which damages under this head could have been assessed.

On the other two grounds I think the damages allowed were not only ample, but generous. The Crown has not appealed and I, therefore, say nothing more on that head.

I am of the opinion that where lands are injuriously affected by a public work or undertaking the proper measure of damages is the difference between the value of the lands or property affected before and after and as the result of the injury.

The difficulties of applying such a rule to the facts of this case are obvious. The supply of water granted by the lease was only the *surplus* water not required for canal purposes and the express stipulation for its total stoppage for entire seasons consecutive or otherwise, when improvements, alterations or repairs were

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being made in the canal system, without any right to damages and compensated for entirely by abatement in rent, rendered the application of the simple rule suggested by no means easy, and necessarily would leave very much to the discretionary judgment of the trial judge. The rule adopted by him was obviously one entirely in favour of the suppliant as it seemed to ignore the contingent nature of his right to the surplus water and treated such right as an absolute one, allowing him as damages what it would cost to install electric power equivalent to the horse-power which he was entitled to from the surplus water, and as if the later right was an absolute right.

At any rate the rule for measuring the damages adopted by the trial judge had not been objected to by the Crown, and as it was entirely in the suppliant's favour he did not object.

His objections were limited to the exclusion of the alleged business profits and to the inadequacy of the damages awarded on the other heads. His appeal is based upon these objections alone, and as I have shewn should fail on both.

The Crown not having appealed must be taken to be satisfied alike with the rules for measuring the damages adopted and with the result considering most probably that the learned judge in applying the rule be adopted did take into his consideration the contingent character of the suppliant's right to the surplus water.

Being of the opinion that the damages awarded were, to say the least, fully adequate, I think the appeal should be dismissed with costs.

IDINGTON J. (dissenting).—The appellant is assignee of a lease, renewable in perpetuity, from the

Crown, of certain land adjacent to the Williamsburg Canal. On this land there was and still is erected a flour-mill, which was driven by surplus water from the canal, and the lease gave the lessees the use of such water-power for that purpose.

The respondent, by his minister, for the purposes of improving the canal made such alterations as to deprive the appellant of the use of this water in the manner specified in the lease, and provided by the appliances, giving effective use of said water.

By the lease, as I interpret the same, it was provided that the Minister of Public Works could for the temporary purposes of repairs, improvements or alterations, enter and make same, without the lessee becoming entitled to abatement of rent, or compensation unless there should ensue a

total stoppage of the said flow or supply of surplus water for and during an uninterrupted period of six calendar months during the usual navigation season.

In such event the lessee was to become entitled to be allowed in full compensation for such stoppage an abatement of

six months' rent accruing for any and every such period of continuous interruption, in the flow or supply of surplus water.

In the course of the making of the alterations now in question, there was a change of plans that involved, in carrying the same into execution, a somewhat longer continuous total stoppage of water supply than this lease provided for, or made compensation for, in respect of the same.

There was a time, however, when it became quite apparent to every one concerned that the execution of the works, according to the plans finally adopted,

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would deprive the lessee for all time of the use of such water.

There was contained in the lease a provision anticipating some such event as a possible necessity. That provision gave the Minister of Public Works the right, upon reasonable notice (not less than three months) to the lessee, to determine the lease, and thereupon pay the lessee the then value (with an addition of ten per cent. thereon) of all the buildings and fixtures that should be on said lands erected and belong to the lessee, according to a valuation to be made by arbitrators.

As the minister never availed himself of this power, that provision is out of the questions now to be considered.

It was contended that the minister's acts in the premises were each and all such as the "Expropriation Act" (52 Vict. ch. 13) entitled him to do, and gave a means of providing compensation for those damnified by such acts.

The express reservation in this lease of the right to determine the lease, and compensate the lessee, may have been intended to be in substitution of any such methods, and as the only means the Crown should have in the event of any such expropriation becoming necessary in the public interest.

Unless the case of *Saunby* v. *The Water Commissioners of the City of London*(1) is applicable to the "Expropriation Act," which I think doubtful, or the provision in question takes the case out of the Act, the case of *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson*(2) would seem to indicate that the lessor and lessee here are in the same position as the parties there. It was sought there to raise an action

(1) [1906] A.C. 110.
(2) [1898] 2 Ch. 394.

on the covenant for quiet enjoyment, and it failed because, though the covenant existed and but for the Act there relied on would have been broken, the company were within the power of the Act to expropriate, and compensation had to rest upon the Act.

The appellant from whatever causes seems to have yielded, so far, to the desires of the minister and his officers, and so far acquiesced therein, as to render their acts of such a character as probably to make the measure of damages substantially the same (save possibly in regard to the question of interest), whether assessed under the Act or for breach of the demise, and all implied therein.

The learned trial judge indicates his opinion to be that the "Expropriation Act" is applicable, but expressly says that he considers the result must be the same in treating the case as resting upon that Act or on breach of contract save as to interest and he allows that.

There can, therefore, be no reason to complain of any ill results from his holding, in this regard.

In suggesting these several questions, and pointing out the considerations they give rise to, I desire to be held as coming to no absolute conclusion on any of them. It is unnecessary just now. It may become necessary yet to consider them in different light from that now presented here.

When, however, the learned trial judge comes to assess the damages, he disposes of the matter as follows:

I do not pretend to think that such damages can in any case be measured with any great precision or exactness. There is always room for considerable difference of opinion. But taking all the circumstances of the case into consideration, the change that was made from the first design of the work in question, the way that change came to be made, the object aimed at in making it, and the

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giving of a new lease of power to the suppliant for the purpose of manufacturing and selling electric power, the fair way to ascertain the damages would be, it seems to me, to take the cost of developing in that way two hundred horse-power and add thereto a reasonable profit, and then see at what annual cost the suppliant's mill might in that way be supplied with forty horse-power for the purpose of operating it. Then there should also be added an allowance sufficient to indemnify the suppliant for the cost of making any necessary changes in the machinery at his mill, and to cover the increased annual cost of operating the mill by electricity instead of by water-power. From the best consideration I have been able to give to the matter I have come to the conclusion that the sum of twenty thousand dollars ($20,000.00) paid to the suppliant in May, 1901, when the water in the basin above the weir was available for developing power, would have been a full indemnity and compensation for all damages to which he is in any way entitled in the premises.

It is to be observed that the parties had agreed that the learned trial judge should dispose of the entire damages and save future actions, if by any chance such might have existed in law, and that such possible actions would be barred thereby.

The consent appears on pages 215 and 216 of the case as follows:

With reference to some statements made in the opening of the case as to the assessment of damages down to the date of the filing of the petition, and a declaration of the rights of the parties, counsel for both parties are now agreed that the damages should be assessed once and for all, you can add at the same time, not being agreed upon, the principle upon which they should be assessed, but that they are agreed that the damages should be assessed once and for all, and to be an end of the litigation in regard to the matter. That is what I understand to be the position of both parties now, and that is to be entered at the conclusion of the case. Then I think all we have said here need not be extended upon the notes unless you wish.

Keeping in view this consent and giving to it the widest operation, I am unable to adopt, as elements for consideration in assessing damages here, several factors which obviously enter into the consideration of the learned trial judge in arriving at the result I have just quoted.

The change that was made from the first design, the way the change came to be made, the object aimed at in making it, the giving of a new lease of power to the suppliant for the purpose of manufacturing and selling electric power, are all things that should have been left aside. The suppliant may or may not have acquiesced in and been a party to these changes of design and all else that I thus object to, and his acquiescence therein may be a fair matter for consideration when the court comes to deal with the delay in operating the mill and loss of profits by reason of such delay. It cannot enter into, and ought not have been made to appear as having entered into, the contemplation of the learned trial judge when assessing damages for the total deprivation of the forty horse-power the suppliant had a right under the lease to enjoy.

The giving of a new lease stands entirely as a separate transaction. It was conceded in argument that it could not be taken by operation of law to have superseded the rights under the old lease or to have created a surrender in law of the old lease.

Once it is conceded that these leases are independent transactions, each in force, I cannot comprehend how in law the giving or withholding, if it had been withheld, the second lease, could have anything to do with the assessment of damages for some invasion of the suppliant's rights under the first lease.

Having regard to what the learned judge had said, immediately before what I have quoted, it may be that these objectionable elements in truth did not enter into the results he arrived at in assessing the damages, further than to remove any impression of a high-handed wrong having been committed which might have under other circumstances been considered in the way of inflating the damages. However that may

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be it is unfortunate to have all these factors blended together in the unlimited way in which they are expressed in the paragraph I have just quoted.

Passing by these possible elements of error in the judgment appealed from, is the proper measure of damages for such a case as this

> to take the cost of developing, in the way the second lease provides, two hundred horse-power and adding thereto a reasonable profit, and then, etc.,

as above expressed?

If I am right in thinking that the two leases and the rights under each lease must be kept for the purpose of assessing damages on anything arising out of the old lease separate and entirely free from anything arising out of the granting of the second lease, the accidental or incidental result of the business relations of the parties concerned, apart from and having no relation to the first lease, ought, I submit with great respect, to have been rigorously excluded from any consideration.

I say ought to have been rigorously excluded, because in law and in fact they were entirely independent and separate transactions, and by reason of their proximity in point of time and place one is apt to allow the mind improperly to be affected in considering the one by considerations arising from what has taken place under the other, which in law must be excluded. But has there not been an entire misapprehension, not only on the part of the learned trial judge but also on the part of the litigants, in regard to the principles to be applied to measure the damages naturally flowing from the act of the respondent in depriving the suppliant permanently of the necessary water-power to drive his mill?

Is it not a case where the proper 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?

It seems to me obviously pregnant with error to lay down any other rule. For, follow up the principle that has been applied, where are we to stop?

Some of the speculations of future possibilities were wide of the mark, but were in line of the principle contended for by the suppliant as the proper measure of his damages and in great part have been acceded to by the court below.

I may not, therefore, be right in giving him such consideration as I do in holding that an award of damages, based upon erroneous principles ought to be set aside.

There was no obligation on the part of the Crown to restore this mill or this water-power.

The water-power was destroyed, necessarily destroyed, as an accident in carrying out a public work. The execution of the work led to the deprivation, and in light of this lease the wrongful deprivation, of the plaintiff of his property, and the Crown was and is bound to answer for such damages as are the result of a diminution of the value of the property and just to the extent of that diminution in value. See *Jones* v. *Gooday*(1); *Hosking* v. *Phillips*(2); *Whitham* v. *Kershaw*(3); *Rolph* v. *Crouch*(4); *Child* v. *Stenning* (5).

So many misleading elements, leading to great misapprehensions of the actual damage done, are likely to arise from approaching the question on the basis of

(1) 8 M. & W. 146.
(2) 3 Ex. 168.
(3) 16 Q.B.D. 613.
(4) 37 L.J. Ex. 8.
(5) 11 Ch. D. 82.

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a restoration of power, that I think it ought to be discarded, and the simple question of the diminution of value be alone kept in view; however that may by the valuers be arrived at, but *never necessarily,* upon the basis of a new acquisition of power, equal to that lost by what has been done.

Those valuing should value as of the date when it became known to the appellant that he had lost forever the supply of power granted by the lease.

Of course, if the valuators think new power an element worth considering, the time to be taken for acquiring that will affect the valuation they place upon the property as it was at the time the power was off forever.

If the claim for damages should rest upon the "Expropriation Act," how the market value would be affected would be the test. See *Metropolitan Board of Works* v. *McCarthy*(1), at p. 253.

As to the time lost during the negotiations, it would seem as if the appellant had not pressed his claim in such a way as to indicate he had much right to complain.

It seems to me that this phase of the case has been so grouped with the other that it is quite impossible satisfactorily to indicate on this appeal what should be done in relation to any claim the appellant may have.

I am quite sure the provision in the lease for compensation for periods of six months' total stoppage may, indeed must, apply to successive periods of navigation seasons.

But when these come to be so joined together as to make one continuous period far exceeding the

(1) L.R. 7 H.L. 243.

period provided for, I doubt whether such a case has been covered by the provision.

The trouble I see here is that much of what was done and much of the time lost in running the mill was or may have been the result of agreement between the parties; as when the suppliant assented, relying upon what one of the officers of the department told him, and thereby an agreement was arrived at; or at another time the result of acquiescence, based upon the hopes, possibly founded upon the acts of such officers, or on the bare desires of the suppliant to acquire the other lease, and such desire restraining him from complaint, to such an extent as to justify the representatives of the Crown in assuming that he was satisfied, and so acquiescent as to forbid him making in future any claim for damages. In each of these cases there would be no damages allowed.

Then, was there ever a continuous period of total stoppage exceeding six months that was wholly free from complication with either of these two causes I have just adverted to?

If such there be found, and purely *in invitum* of the suppliant, on the part of the officers of the Crown, then so much of such a period as exceeded any such six months as I indicate, ought, I think, to be considered as giving a right to damages.

As to the measure of those, needless to say they must be based on what would be reasonable, and not on some of the extreme views put forward by the suppliant, based on what may have been an accidental run for forty lucky days.

I think the appeal should be allowed and the case go back for re-trial, or re-consideration.

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MACLENNAN J.—This is an appeal by the suppliant in a petition of right from a judgment of the Exchequer Court, and the ground of appeal is that the judgment fails to award him adequate damages for land injuriously affected by certain public works constructed by the Government of Canada.

Some question was made as to the nature of the claim, whether it rested upon covenant, or upon the statutory liability to compensation for land injuriously affected. I think it is clear that the claim must be rested upon the statutory liability. The lease contains a demise of a parcel of land and also of an easement of a certain supply of water, from a canal which is Crown property.

The Crown has taken no part of the demised land and has made no entry upon it. What it has done has been done upon the Crown's own land, the effect of which has been to destroy the easement which was demised. In such a case no notice or other formality is prescribed by the statutes in order to make the injurious act lawful, as was required in *Saunby* v. *The Water Commissioners of London*(1) lately before the Judicial Committee. If the destruction of the suppliant's easement had been wanton or unnecessary, or done otherwise than in the execution of a public work, or for the public use, or without statutory authority, then an action would have lain on the covenant for quiet enjoyment implied by law by reason of the use of the word *demise*. But the public statutes, having authorized the Crown to do what it did, made it lawful to commit a breach of its covenant, whereby the breach became innocent in law, and not actionable.

The claim of the suppliant must, therefore, be

(1) [1906] A.C. 110.

rested on the compensation provided by the statute, and that is a claim for injury to the suppliant's land, that is to his leasehold.

I agree with the learned judge's conclusion that until the 29th May, 1901, the cutting off of the water was temporary within the meaning of the lease; and for the injury before that day the provisions of the lease exempted the Crown from liability, except for six months during the season of navigation, and in that case limited it to six months' rent. On the day named the stoppage of the water became permanent, and on that day the injury to the suppliant's leasehold term became complete, and his right to compensation arose.

I think the learned judge was bound to assess the suppliant's damages just as he would have assessed them on that day. If on the following day the mill and machinery had been destroyed by fire or tempest, or if the adjacent river had overflowed its banks and had swept away, not only the suppliant's buildings, but the very land itself comprised in the lease, the suppliant's damages and compensation due from the Crown must have been the same.

That consideration at once excludes *profits,* as such, as an item of damage. The fact that the business carried on had been profitable, no doubt, is proper to be considered in comparing the value of the leasehold before and after the injury; but the question is how much less valuable the suppliant's property was after the injury, than it was before—for how much less would it sell in the market, having regard to the terms of the lease. *Ricket* v. *Metropolitan Railway Co.* (1); *Metropolitan Board of Works* v. *McCarthy* (2); Cripps on Compensation (5 ed.), 144-7.

(1) L.R. 2 H.L. 175. (2) L.R. 7 H.L. 243.

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In determining that question, too, the proviso contained in the lease enabling the Crown to terminate the lease at any time, if the land or any part thereof should be required for the canal or any public purpose, on payment of the then value, with an addition of ten per cent., of all the buildings and fixtures thereon, belonging to the lessee, would be proper to be considered. The learned judge has found upon the evidence that the buildings and fixtures may be taken to have been worth $50,000 and that seems to be the fair effect of the evidence, therefore, the whole property was in effect by the terms of the lease under an option of purchase to the Crown for $50,000, plus ten per cent.

With that option held by the Crown and the liability to temporary interruption of the supply of water, practically without compensation, it may be a question for how much, if anything, more than $55,000, the property could have been sold, just before the permanent cutting off of the water.

Then how is the depreciation to be estimated?

I think the learned judge was bound to look at all the surrounding circumstances in order to come to a just conclusion. That the mill was not rendered permanently useless or valueless was clear enough. It could be operated by steam. The suppliant had done that for a year or more, not to its full capacity, it is true, but sufficiently to shew that operation in that way was possible. Then it could also be operated by electricity, and the necessary power for producing electricity was now available, and in the hands of the suppliant himself. The suppliant had a high opinion of the value of the new concession of power granted to him, five times as much as he had under the old lease, and while he desired and expected a much larger

amount of power, he was eager to accept the 400 horse-power which he received, and it is manifest that he had in mind using it for his mill. Of course he is not bound so to use it. Nevertheless its existence, and probable availability, would not be disregarded by any intending purchaser of the dis-watered mill.

Looking at all the circumstances, as stated in his very elaborate judgment, the learned judge came to the conclusion that the amount of damages proper to be awarded to the suppliant is the sum of $20,000, and he has awarded interest on that sum from the 29th May, 1901, the date on which the water was cut off permanently. The Crown does not appeal, and the question which we have to consider is whether or not the appellant has satisfied us by his evidence that a larger sum should have been awarded.

I have gone over the evidence both oral and documentary with great care, and I am unable to see any evidence on which we would be warranted in increasing the amount of the judgment.

I am of the opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant: *J. Hilliard.*

Solicitors for the respondent: *Chrysler & Bethune.*

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*March 5.

THE OWNERS OF THE STEAMSHIP "ALBANO" AND HER FREIGHT... } APPELLANTS;

AND

THE OWNERS OF THE STEAMSHIP "PARISIAN" AND HER FREIGHT.. } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT.

Maritime law—Collision—Crossing ships—Admiralty rules, 1897, *rule* 19.

The SS. "Parisian," making for Halifax Harbour, came along the western shore, sailing almost due north to a pilot station, on reaching which she slowed down, finally stopping her engines. The "Albano," a German steamship for the same port, approached some miles to the eastward, sailing first, by error, to the north-east, and then changing her course to the south-west, apparently making for the eastern passage to the harbour. She again altered her course, however, and came almost due west towards the pilot station. When about a quarter of a mile from the "Parisian" she slowed down, and on coming within eight or nine ship's lengths gave three blasts of her whistle, indicating that she would go full speed astern. The "Parisian" then, seeing that a collision was inevitable, went full speed ahead for about 200 feet when she was struck on the starboard quarter and had to make for the dock to avoid sinking outside. The "Parisian's" engines were stopped about six minutes before the collision, and a boat from the pilot cutter was rowing up to her when she was struck. At the time of the collision, about 5 p.m., the wind was light, weather fine and clear, there was no sea running and no perceptible tide.

Held, affirming the judgment of the local judge that the captain of the "Albano" had no right to regard the "Parisian" as a crossing ship within the meaning of rule 19 of the Admiralty Rules, 1897; and that the "Parisian" having properly stopped to take a pilot on board, and being practically in the act of doing so at the time, the "Albano" was bound to avoid her and was alone to blame for the collision.

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

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APPEALS from judgments of the local judge of the Nova Scotia Admiralty District in favour of the respondents.

The collision in question occurred on 25th March, 1905, near Chebucto Head, at the entrance to Halifax Harbour, for which both vessels were bound, coming in from the sea. Cross actions were brought by the owners, The Allan Line Steamship Company seeking to recover damages sustained by their vessel, the "Parisian," against the "Albano" and the Union Dampfchiffs Rhereri Actiengesellsschaft, owners of the "Albano," to recover damages against the "Parisian." The local Judge, in deciding that the "Albano" was alone to blame described the situation at the time of the collision as follows:—

"These vessels were both coming in from sea and both bound for Halifax, when the collision occurred. The charts put in evidence on the trial indicate the positions of the respective ships when they sighted each other and the course respectively taken by them till the accident occurred. There is a pilot station at or near Chebucto Head, and both vessels were, previous to the collision, making for the pilot station with the view of procuring a pilot into the port of Halifax, and the collision occurred when the 'Parisian' had stopped at this station and while the pilot was approaching the ship to board her.

"Captain Johnson, the master of the 'Parisian,' in his evidence says: 'It was about 4.30, I think, in the afternoon when I saw the land about Chebucto Head or Sambro and at the same time I saw smoke to the eastward close to the north-eastern land. I was on the bridge, and had been there for some time before. About 4.45 p.m. I made it out to be smoke from a steamer, and I think then she bore north or

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north by east. I did not take the bearings as she was too far off, but I could see her from the bridge. She was to the north of us. I could see the whole beam of the ship when I first saw her. I did not see her again till she was coming right down on us full speed right straight for the funnel of the ship. The "Parisian" was at this time stopped.'

"As the 'Albano' approached she blew three blasts of her whistle which, it appears, indicated that her engines were put full speed astern. This, it appears from the other parts of the evidence, took place about two minutes before the collision took place. It appeared to be disputed by the witnesses for the 'Parisian' that the 'Albano's' engines were reversed at all, but while I am disposed to think that the engines were reversed shortly before the actual collision, I am satisfied it was done too late to be effective, even in lessening the force of the impact of the striking ship. According to the evidence of the captain of the 'Parisian,' perceiving this collision was inevitable and that his ship would be struck about amidships, he went full speed ahead, which moved the 'Parisian' forward about two hundred feet with the result, as the evidence shews, that the ship was struck further aft and, as the 'Parisian' claims, this saved the ship and probably the lives of the passengers on board."

The manner in which the vessels were being navigated immediately prior to the collision is described in the judgment of the court delivered by His Lordship Mr. Justice Davies.

The nautical assessor, Commander Tinling, R.N., who assisted at the trial, presented a report giving his view of the situation and stating that, in his opinion, both ships were in fault. The local judge found that the "Albano" alone was to blame for the

collision, dismissed the action by her owners against the "Parisian" and ordered judgment to be entered in favour of the Allan Line Steamship Company for the damages caused to the "Parisian," to be assessed by a referee, with costs against the "Albano" in both actions. The owners of the "Albano" assert the present appeals from both judgments.

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Newcombe K.C. and *Morrison* for the appellants.

Nesbitt K.C. and *W. B. A. Ritchie K.C.* for the respondents.

The judgment of the court was delivered by

DAVIES J.—These were cross-actions brought by the respective owners of the SS. "Parisian" and the SS. "Albano" against each other arising out of a collision which took place between the two steamships outside the mouth of the Harbour of Halifax, Nova Scotia, on the 29th day of March, 1905.

The "Parisian" is a British passenger steamer of 3,385 tons net with a speed of about 15 knots. The "Albano" is a German freight steamer of 2,423 tons net with a speed of about 9 knots.

The time of the collision was about 5 p.m., the wind was very light and the weather fine and clear. There was no sea running and no perceptible tide. The place of the collision was near the inner automatic buoy which marks the approach to Halifax Harbour and is situate near Camperdown overlooking Portuguese Cove. The pilot station at Portuguese Cove is near the place of collision and it was about there where incoming steamers generally take a pilot. The "Albano" arrived first off the harbour, but mistaking one of the buoys ran away some miles to the

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eastward when, on discovering her mistake, she changed her course from N. by E. ½ E. sharply to W.S.W. ¾ W., and continued on that course till she came nearly up to and abreast of Rockhead Shoal, when she altered her course to W. ¼ S., a direction which would take her up to the automatic whistling buoy near by which the pilot schooner was lying, the object being to procure a pilot so as to enter the harbour.

Something was said at the argument as to the erratic character of the "Albano's" course in approaching this pilotage ground, but we do not think anything turns upon that or that the "Albano" is in any way to blame respecting it.

The "Parisian," on the other hand, having made a good land fall came in along the western shore, her courses being N.W. by N. and N.N.W., when seeing the pilot's flag she was steered for the pilot schooner and about 4.56 or 4.57 p.m. as the captain said, she was steering N. by W.

The cutter "Petrel," pilot boat No. 4, with pilots for both steamers, was lying to, a little east of the automatic buoy. The "Parisian" slowed down as she approached the buoy. The time now becomes most important. Captain Johnson says that at 4.52 he gave the order to "stand by"; at 4.57, "half speed"; at 4.58, "slow"; and at 4.59 he stopped the engines. At about 3 minutes past five, he says, the "Parisian"

> would be thoroughly stopped. The pilot boat would be a little ahead of me and the pilot thought that the impetus of the ship would bring us up to him, but we were so thoroughly stopped that he had to pull down to us.

The reference is to a row boat which had left the pilot cutter with a pilot for him. He says it was 2 or

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3 minutes after that, or as he put it, "about 5 o'clock and 5 or 6 minutes," that he heard the "Albano" whistle and saw her coming down on him, and that about 5.05, when he saw that the collision was inevitable and that he would be struck abreast of his ship's engines, he gave the order to go full speed ahead and his vessel forged ahead about 200 feet and was struck further aft, about the starboard quarter and abreast of No. 5 hatch.

According to the evidence of Captain Johnson and his officers and engineers, the engines of the "Parisian" were stopped at least six and perhaps seven minutes before the collision. He himself says he did not see the "Albano" more than 2 or 3 minutes before there was danger of collision, and that there was about one or one and a half minutes from the time he saw there might be danger of collision till it actually occurred.

On the other hand, Captain Kubenhold says, and as regards his time and orders he is supported by his officers and engineers, that at 4.55 he gave the order to stand by, at 4.57 half speed and slow, and 4.58 to stop, immediately followed by "full speed astern," and the blowing three blasts of his whistle to indicate to the "Parisian" what he was doing. He says the "Parisian" was then "about 5 lengths away a little more or less," and that for two minutes he was going full speed astern until the collision, which by his time occurred a few seconds after 5 o'clock. There was a difference between the "time" of the two steamers of six minutes, which explains apparent discrepancies in the evidence of the two captains. He further says that the course of his ship was not altered from the time it was changed to W. ¼ S. off Rockhead Shoals; that he saw the pilot row close to the bow

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of the "Parisian"; and that it would not take much over two minutes to stop the "Albano" at the rate she was going; and that up to or about the time he whistled, he thought the "Parisian" would go either full speed ahead or full speed astern to avoid collision; that he was about ¼ of a mile away when he noticed she had slowed down and that the "Parisian" was moving about 1½ knots "as far as he could make it out" immediately proceding the collision. In cross-examination he said he did not think

> at the time the "Albano" was put at half speed there would be any collision; there was not much danger then,

and that then the "Parisian"

> might be 8 or 9 ship's lengths away from him, he did not notice, his object in easing being to take a pilot.

That was at 4.57 by "Albano's" time, 5.03 by the "Parisian's," or about 3 minutes before collision. He further says that it might be ½ or ¼ mile from him when the "Parisian" slowed down and that he believed she slowed down for a pilot and to let him pass, and that was the reason he kept his course and finally that to prevent a collision he would have had to reverse a couple of ship's lengths before he did.

Under these circumstances it becomes vitally important to determine whether as a seaman he had, under all the circumstances before him, reasonable grounds for believing that the "Parisian" was, at the time he was approaching her and when risk of collision might be avoided, a crossing ship within the 19th rule, having the "Albano" on her starboard side and bound to keep out of her way. It seems to me, after listening to the able arguments addressed to us and carefully reading and considering all the evidence,

that the determination of this controversy lies in the answer to that question. If the "Parisian" was such a crossing ship at the time immediately before the collision when the risk of collision could be avoided, then Captain Kubenhold was right in keeping his speed and course and depending upon the "Parisian" obeying the rule and keeping out of the way, nor does it seem to me that by reducing his speed when he did he was guilty of breaking the rules, because at that time he did not believe the risk of collision imminent, and when he reversed he did so at a time when he saw the "Parisian" was remaining stationary and a collision was inevitable.

The pilot in charge of the cutter was watching both vessels and sent off a row boat first to the "Parisian" as he found her approaching the pilot grounds first. The row boat had reached the bow of the "Parisian." Even with the little tide and wind there was carrying the "Parisian" towards them the row boat found they had to row to her. The occupants of the boat say they could touch the vessel with their oars and the line was about to be thrown to them at the moment the whistles of the "Albano" blew.

The engines of the "Parisian" had then been stopped either 6 or 7 minutes, probably six, and while I conclude from a careful analysis of all the evidence on the point, and there is much, that there was a slight motion of the ship through the water reaching from $\frac{3}{4}$ of a knot to a knot, I think it is clear that for at least two minutes and probably 3 minutes before the collision she was without any steerage way whatever and so practically, though not absolutely, without any motion.

Being on the pilotage ground without any steerage way for several minutes, two at least, evidently

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waiting to take up her pilot, with the pilot boat alongside, the line actually being about to be thrown, could the master of the other vessel, which was coming on almost at a right angle, but was at least ¼ of a mile and probably more away, the weather being calm and clear and nothing to hinder or obstruct the view, say, as a reasonable business or nautical interpretation of the rule, that the "Parisian" was still a crossing vessel and subject to the ordinary rule applicable to two steamers really approaching or moving towards and crossing each other so as to invoke risk of collision?

Are not the special circumstances of the actual stoppage for an appreciable time of the vessel which had first reached the pilotage ground, and the fact that the pilot was alongside of her and about to be taken aboard all in view of the approaching steamer "Albano" sufficient to make the regulation inapplicable and justify the captain of the "Parisian" in thinking that he would not then be run down?

It is true that Commander Tinling, who acted as assessor with the Chief Justice of Nova Scotia who heard the actions, thought the regulations did apply and so advised. But all his advice and findings seem to me to be based upon his main finding that as the "Parisian"

> was under way, having steam up and not being prevented from using the same, it was her duty to keep clear of the "Albano."

The Chief Justice thought, I think correctly, that it was his province and not that of the assessor to put a construction upon the language of the rules, and to determine their application to the facts. After much consideration I agree with the conclusion he reached, that rule 19 was not applicable to the case of the "Parisian," and that under the circumstances the "Albano" alone must be held to be in fault.

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But then it was argued, that even if it is held that the rules invoked are inapplicable, the "Parisian" was in fault in not having kept a better "look out" and watched more closely the movements and approach of the "Albano" and in not having done something to avoid the blow. Mr. Ritchie strenuously contended that as no such fault was charged in the "Albano's" preliminary act, and the issue was not tried out in the court below, it would be unjust that a decision in appeal should be based upon it. But I think it clear that a fault or neglect on the part of one vessel, which cannot be presumed and is not proved to have been known to the other at the time of the fyling of the preliminary act, is not from that circumstance alone to preclude its consideration in determining the liability of the ships. As to the issue not having been tried out in the court below, it would appear that all the evidence possible to be given upon it was given by all of the officers of the "Parisian," and from that evidence it is clear that up to the moment when the "Albano" blew her whistle, or at any rate a very few seconds before that, no attention was being paid by the officers of the "Parisian" to her movements. The captain and officers of the latter ship had lost sight of the "Albano" and evidently had not the slightest idea of incurring any danger from her movements. We have not the advantage of being advised in this court by skilled assessors or of asking questions from them with regard to points of seamanship or what nautical skill or prudence required to be done under given circumstances. The assessor's finding of "gross neglect" on the part of the "Parisian" with respect of her "look out" depends entirely upon his main conclusion or finding that under the circumstances it was the duty of that ship under the rules to keep out of

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the way of the "Albano," from which conclusion I differ. But apart from that, from the best judgment I have been able to form, I cannot see that there were any measures of precaution which the "Parisian" ought under the circumstances to have taken, and which her officers failed to take. The "Parisian" was justified in coming to a stop for her pilot and had no reason to anticipate danger of collision from the "Albano" when she did so stop. It is said she should either have reversed her engines and gone astern or gone full speed ahead. It appears to me that either course would have only increased the risk of collision. I think that under the circumstances already detailed Captain Johnson had a right to assume either that the "Albano" would have stopped her speed, or if maintaining her speed would have either ported or starboarded her helm so as to have passed either astern or ahead of the practically motionless steamer in front of her, and that any attempt on his part, from the time when he should have seen that there was a risk of collision, to avoid it by forging forward or going back would only be likely to increase the danger. Not having steerage way on he could do very little while, on the other hand, the steamer approaching at the rate of 8 or 9 knots an hour controlled the situation. The "Parisian's" strength under the circumstances lay in "sitting still," and unless it could be held that his coming to a practical standstill to take up his pilot was in itself negligence under the circumstances I do not think, assuming the "Albano" to have been guilty of negligence as above held by me, that the "Parisian" could, by the exercise of the ordinary care, skill and diligence her officers were bound to bring to bear, have avoided the mischief which happened.

With regard to the construction and application of the regulations for preventing collisions at sea, the rule seems to be correctly laid down by Brett M.R. in *The Dunelm*(1), that they are to be construed,

> if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing,

which I take to mean that they ought to be construed as they would probably be understood by the class of men, masters of vessels, for whose guidance they are prepared.

The same learned judge said in *The Beryl*(2) :

> Another rule of interpretation of these regulations is (the object of them being to avoid risk of collision) that they are all applicable at a time when the risk of a collision can be avoided—not that they are applicable when the risk of collision is already fixed and determined. We have always said that the right moment of time to be considered is that which exists at the moment before the risk of collision is constituted.

See also *The Banshee*(3).

As to the application of these rules, the same judge in the same case of *The Beryl*(2), at pp. 138 and 139 (in language quoted and expressly adopted by Lord Herschell in *The Theodore H. Rand*(4) said:

> When you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known to the parties at the time; you cannot regulate the conduct of people as to unknown circumstances * * * Therefore the consideration must always be in these cases not whether the rule was in fact applicable, but were the circumstances such that it ought to have been present to the mind of the person in charge that it was applicable.

Some observations made by their Lordships of the Judicial Committee in *"The Pekin"*(5) are, I think,

(1) 9 P.D. 164, at p. 171.
(2) 9 P.D. 137, at p. 140.
(3) 6 Asp. Mar. Cas. N.S. 221.
(4) 12 App. Cas. 247, at p. 250.
(5) [1897] A.C. 532, at p. 536.

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in point in the case before us. They had reference to article 22 of the then regulations, now article 19 of the existing ones, and as to the effect to be given the words "crossing so as to involve risk by collision," as regards vessels navigating the open sea and those passing along the winding channels of rivers. After pointing out that with regard to the latter vessels whether they are crossing vessels or not "depends upon their presumable courses" their Lordships go on to say:

> The question therefore always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment and this greatly depends on the nature of the locality where she is at that moment.

These later observations I understand to be general in their character, and not confined alone to vessels following the winding channels of rivers.

We were pressed with the case of *The Ada* v. *The Sappho*(1), affirmed in appeal by the Judicial Committee of the Privy Council(2).

When examined, however, that case, which in many respects is the converse of the one before us, will not be found to be a controlling guide for our decision in this case. The main question of fact in the case (as stated in the report of the hearing before Sir Robt. Phillimore) was as to which of the two vessels came up first to the pilot cutter, and the judgment of the learned judge proceeds upon the conclusion he reached from the evidence that

> the lights of the "Sappho" were first seen from the pilot boat and she being the inside vessel the senior pilot ordered that she should be the first vessel to which the pilot should be sent and accordingly the boat was first sent to her.

The "Ada" was, therefore, held to be solely in fault

(1) 1 Asp. Mar. Cas. 475. (2) 2 Asp. Mar. Cas. 4.

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for not stopping soon enough to have avoided the accident, the vessels being crossing vessels, the "Sappho" having the right of way and the circumstances not of themselves sufficient to take the case out of the rule.

It is to be observed that the answer made by the learned judge to the contention that the "Sappho" which under ordinary circumstances had the right of way should have avoided the collision because she should have foreseen that the "Ada" would stop about where she did for her pilot, was not that such circumstances had nothing to do with the case and that the "Sappho" had nothing to do but obstinately adhere to the crossing rule; but the answer was that the "Sappho" had herself got first to the pilot grounds and that the pilot was coming to her and not to the "Ada."

Sir J. W. Colville delivered the judgment of the Judicial Committee concurring with the court below in holding that there was nothing to relieve the "Ada" from the ordinary rule which required her to keep out of the way, and from his judgment it will be seen that it was not contended in that case that the "Ada" had not a right to stop at a suitable point for a pilot, but the contention was that she had approached too near to the pilot cutter in view of the position of the "Sappho," and he says:

On the other hand, if the vessels were crossing vessels as their Lordships think they were, and, as their Lordships also think, and the event has shewn, vessels crossing so as to involve risk of collision, it seems to their Lordships that it was the duty of the "Ada" to become absolutely motionless at a far earlier period that that at which she is said by some of the witnesses to have stopped, and thus, when it did, or ought to have become clear that the "Sappho" was coming inside the pilot vessel, and therefore would be the first to take the pilot, to have had the means of reversing her engines and keeping out of the way.

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In the case before us, however, the "Parisian" had clearly first reached the pilotage grounds, had slowed down till she was practically motionless, without steerage way, was, it may be said, in the very act of taking aboard the pilot who had come alongside of her from the pilot cutter in a row boat when the risk of collision first arose, and although so lying that the "Albano" was on her starboard side was not, in my humble judgment, from these circumstances, all of which must be held to have been present to the eye and mind of the "Albano's" captain, a crossing ship within the rule.

The appeals should, therefore, be dismissed with costs.

IDINGTON J. (dissenting).—I think no one can dispute that, for some time before any risk of collision in question, the lines of the courses of these vessels being prolonged would intersect.

They were thus within Marsden's definition of crossing vessels.

There were such distances, thus respectively sailed by each in its course, immediately preceding the collision, as to have involved the risk of collision within the meaning of article 19.

Once within the operation of this rule it became the duty of the officers in charge of the "Parisian" to keep out of the way of the "Albano." Why did they not?

Clearly, I think, because they failed to see, where they clearly should have seen, the "Albano."

I think the excuse given, of the "Parisian" having stopped for a legitimate purpose, is not to the point at all. The steps necessary to keep out of the way ought to have been taken some time before she

was stopped, and considered in relation to the purpose of stopping and a proper place therefore selected.

I have no doubt that had the captain and others responsible for the navigation of the "Parisian" seen what was taking place in broad daylight, as they ought to have seen, they would have realized the risk involved as and when it became so, and when the risk could have been avoided; before, in the language of Brett M.R. in the case of *The Beryl*(1) it had become "already fixed and determined." True, that was said of a different rule, but one calling for similar interpretation.

The fact is clear on the evidence, that if the effort the "Parisian" made, when the risk had become thus fixed and determined, had been made two minutes earlier she would have been clear of the "Albano."

She had no right to stop just in front of the "Albano," or in the line of the course that the "Albano" was running, and had run, long enough for the "Parisian" to have found out the course being so run, and to have observed the rule of the road laid down for her in article 19.

It is idle to say, as has been urged, that if the "Parisian" had ventured ahead or to stop further back, clear of that line, the "Albano" might have done something else. The rule bound the "Albano" under such circumstances to have so continued her course and speed that the "Parisian" could confidentially act on her doing so. The "Albano" departing from this would have to suffer the consequences, if any.

As the judgment of this court, about to be given, is that the appeal be dismissed I need not labour with the conflicting evidence on this and many other points. I accept, for the present, as sufficient to know here,

(1) 9 P.D. 137 at p. 140.

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though contradicted, what Captain Johnson says as to the stopping of the "Parisian" in the following evidence:

Q.—After 4.59, how long was it before the vessel was still in the water? A.—At about three minutes past five she would be thoroughly stopped. The pilot boat was a little ahead of me, and the pilot thought that the impetus of the ship would bring us up to him; but we were so thoroughly stopped that he had to pull down to us.

Q.—How long after that was it that you heard the whistle and saw the vessel coming down on you? A.—It would be about five o'clock, and five or six minutes.

The preliminary act of the "Parisian" fixes the collision as taking place at six minutes and thirty seconds past five.

Two to three minutes is the length of the stopping there was of the "Parisian," according to the respondents' captain, who cries out about the "Albano" coming down upon him whilst lying still.

I assume as true that which the captain and officers of the "Albano" say as to the course of their vessel. I cannot see reasonable grounds for doubting it.

She had continued in what, generally speaking, was the same course for a good many miles. In that course slightly varied she had continued for the two or more miles she had sailed immediately preceding the collision.

That this distance was two or more miles may be verified in many ways either by computation based on times and rates of speed Captain Johnson gives, or on what Captain Kudenhold and others respectively state, as to the distance the "Albano" was from the pilot boat or cutter.

It was quite far enough off to have enabled the "Parisian" to have got out of the way, and quite near enough, I should say, to have then or thereabout in-

volved the risk of collision *before the "Parisian" slowed at all.*

The case of *The Ada* v. *The Sappho*(1) disposes of the contention, rested on the facts, about each of the vessels going to take a pilot.

That case shews that such purpose does not dispense with the need of the observation of this article 19, and I would say especially so when a pilot might be taken on thereabout; not at a fixed point that could accommodate only a single vessel at a time, but at a place where this operation might have taken place within a field of possibly two miles or more in width and also in breadth.

My conclusion is, therefore, entirely different from that reached in the judgment of my brother, Sir Louis Davies, which I have read.

And if article 19 were not to govern, and the questions raised by article 27 had to be considered, I would not even then exonerate the "Parisian," and hence cannot concur in the results arrived at by the rest of the court.

The cases, I think, should be decided in favour of the "Albano."

My only doubt is as to whether or not the captain of the "Albano" ought not to have had more regard to article 27, and if blamable for not doing so his vessel might have to share the loss. But in my humble judgment the "Parisian's" officers had not regarded either rule until too late, and were guilty of negligence that caused the accident.

Appeal dismissed with costs.

Solicitor for the appellants: *Alfred G. Morrison.*

Solicitor for the respondents: *Henry C. Borden.*

NOTE.—Upon the application of the appellants, on

(1) 27 L.T. 718.

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30th March, 1906, to the full court, for an order to fix the bail on appeal to His Majesty in Council, it was contended by the respondents that there was no appeal *de plano*. After hearing counsel for both parties the court granted the application *pro formâ*, but expressed no opinion as to the right of appeal.

THE RUTLAND RAILROAD COMPANY .... APPELLANTS;

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*Feb. 20.
*March 1.

AND

FRANCOIS LIGOURI BÉIQUE AND THE MINISTER OF RAILWAYS AND CANALS FOR CANADA .... RESPONDENTS;

FRANK D. WHITE .... APPELLANT;

AND

FRANCOIS LIGOURI BÉIQUE AND THE MINISTER OF RAILWAYS AND CANALS FOR CANADA .... RESPONDENTS;

EDWARD A. D. MORGAN .... APPELLANT;

AND

FRANCOIS LIGOURI BÉIQUE AND THE MINISTER OF RAILWAYS AND CANALS FOR CANADA .... RESPONDENTS.

ON APPEALS FROM THE EXCHEQUER COURT OF CANADA.

Judicial sale of railways—Interested bidder—Disqualification as purchaser—Counsel and solicitors—Art. 1484 *C.C.—Construction of statute—Discretionary order—Review by appellate court—*4 *&* 5 *Edw. VII. c.* 158 *(D.)—Public policy.*

Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by article 1484 of the Civil Code of Lower Canada.

The Act, 4 & 5 Edw. VII. ch. 158, directed the sale of certain rail-

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies, Idington and Maclennan JJ.

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ways separately or together as in the opinion of the Exchequer Court might be for the best interests of creditors, in such mode as that court might provide, and that such sale should have the same effect as a sheriff's sale of immovables under the laws of the Province of Quebec. The judge of the Exchequer Court directed the sale to be by tender for the railways *en bloc* or for the purchase of each or any two of the lines of which they were constituted.

Held, that the judge had properly exercised the discretion vested in him by the statute in accepting a tender for the whole system, in preference to two separate tenders for the several lines of railway at a slightly increased amount, and that his decision should not be disturbed on appeal.

APPEALS from the decision of the judge of the Exchequer Court of Canada, rendered on the 8th of November, 1905, accepting the tender of the respondent Béique for the purchase of the railways authorized to be sold under the provisions of the Act, 4 & 5 Edw. VII. ch. 158 (D.), for the sum of $1,051,000.

In giving the reasons for acceptance of the tender of the respondent Béique for the purchase of the railways in question, *en bloc,* the learned judge of the Exchequer Court of Canada, His Lordship Mr. Justice Burbidge, said:

"By an Act of the Parliament of Canada, 4 & 5 Edw. VII. ch. 158, respecting the South Shore Railway Company and the Quebec Southern Railway Company, it was among other things provided that the Exchequer Court might order the sale of the railways mentioned and their accessories as soon as possible and convenient after the passing of the Act, and that such railways and their accessories respectively should be sold separately or together as in the opinion of the Exchequer Court would be best for the interests of the creditors of the said companies. The order for such sale has been made and tenders have been received in accordance therewith as follows:

"First.—A tender of $105,000 for the East Richelieu Valley Railway;

"Secondly.—A tender of $503,000 for the South Shore Railway;

"Thirdly.—A tender of $1,006,000 for all the said railways together;

"Fourthly.—A tender of $551,000 for what was formerly known as the United Counties Railway and the East Richelieu Valley Railway together; and

"Fifthly.—A tender of $1,051,000 for all the said railways together;

"And the question now is which tender or tenders it is for the best interest of the creditors to accept? That is a question that the statute leaves to the opinion of the court.

"In answering that question it is not necessary to consider the first tender or the third tender mentioned. Obviously it would not be in the interests of the creditors to accept either of these. The question lies between the acceptance of the second and fourth tenders which would give a price of $1,054,000 for the whole property, or of the fifth tender which would give therefor the somewhat smaller sum of $1,051,000. By accepting the second and fourth tenders the property would realize for the creditors $3,000 more than would be realized therefor by accepting the fifth tender. That course would have another advantage. It is easy to foresee that in the distribution of the moneys arising from the sale of the property in question, and probably in other connections, it will be necessary to attribute a portion of such moneys to each railway, and if the second and fourth tender is accepted, that question, so far as the South Shore Railway interests are concerned, will be eliminated, leaving only the question as to the distribution of the sum of $551,000

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between the United Counties Railway interests and the East Richelieu Valley.

It is suggested that the latter question ought not to present any serious difficulty, seeing that the value of the East Richelieu Valley Railway may be taken to be determined by the bid of $105,000 made therefor. But if that view is correct, then equally it might be contended that the value of the South Shore Railway is determined by the bid of $503,000 made for that railway and its accessories, and that would leave the balance, whatever it might be, for the United Counties Railway. For example, if the second and fourth tenders were accepted we should have:

"The South Shore Railway...........	$503,000
The United Counties Railway.......	446,000
The East Richelieu Valley Railway..	105,000
Total..................	$1,054,000

"and if the fifth tender were accepted we would have on the basis of division above mentioned, for

"The South Shore Railway...........	$503,000
The United Counties Railway.......	443,000
The East Richelieu Valley Railway..	105,000
Total..................	$1,051,000

"In that way the difference of $3,000 would fall upon the United Counties Railway interests.

"But whether in case the one tender rather than the two were accepted, the whole difference should fall upon the United Counties Railway or be equitably distributed between the three railways is a question that need not now be determined. The matter may be left for future consideration, but upon the main ques-

tion I see no reason to doubt that a fair distribution of the total price may be made between the three railways without any considerable expense.

"There is, however, another consideration. If the property is sold and part sold to one purchaser and part to another, two new and diverse interests will at once arise, and it will be necessary to divide the property both real and personal and to make two transfers. It is also to be seen that these interests may be adverse and perhaps hostile, and the expense of determining any controversies that may arise between them is likely in the main to fall upon the funds that will be brought into court as the price of the several railways. What the amount of that expense may be it is of course not possible to foresee, but experience suggests that it may very easily exceed a sum of three thousand dollars. I am therefore of opinion that it is better for the creditors of the said companies, and in their best interests, not to create any such diverse interests, but to avoid that difficulty by accepting the single tender of $1,051,000 for the whole property.

"So far I have dealt with the matter wholly from what, in my opinion, is the best interests of the creditors of the said companies, as I agree that under the statute that is the proper test to apply.

"But we cannot overlook the fact that it is a question in which the public have a large and direct interest. That interest in the present proceeding is represented by the Minister of Railways and Canals, and counsel for the minister has stated that in the minister's opinion the public interest will be best served by a sale of the whole property to one person or company. The interest of the public is that the several roads be kept open and be duly operated for the public convenience, and it seems reasonable to conclude that that is

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more likely to happen where the property passes into the hands of one person or company, than where it passes into the hands of two persons or companies. If in this case the public interest and the best interests of the creditors of the several companies were opposed, I should think that, in accordance with the statute under which the sale is made, the interests of the creditors should prevail, but in my opinion they are not opposed. It appears to me to be both in the best interests of the creditors and in the public interest, that the highest tender for the property as a whole should be accepted.

"That brings me to another matter. There has been filed with the registrar of this court a letter or notice purporting to come from the Atlantic & Lake Superior Railway Company protesting against the sale of the properties in question here. It purports to be signed by the secretary of the latter company and has been read in open court so that all parties interested may have notice of it. There is also an opposition filed on behalf of the Great Northwestern Telegraph Company against including in the sale of the property of the several companies mentioned its interest in the equipment of the telegraph system along their said lines. I do not propose at present to deal with the question raised by the letter or notice mentioned, nor with the petition of the Great Northwestern Telegraph Company; neither do I think that I should delay action with respect to the tenders. I shall leave these matters largely with the purchaser, and he must satisfy himself as to what weight or consideration is to be attached to the communication of the Atlantic & Lake Superior Railway Company. If in that respect there should be any defect in the title that the court can give under the statute, the loss, if

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any, must fall upon the purchaser and not upon the creditors of the said companies. I shall also expect the purchaser to give a satisfactory undertaking to protect the creditors and the receiver and registrar and those acting under the authority of the court from any just claim of the telegraph company mentioned. There was, I am sure, no intention on the part of any one to include in the sale any property of the Great Northwestern Telegraph Company, nor am I aware that any of its property has been so included. But there may be some questions as to what its real interests and rights are in the matter, and as to that the purchaser must in the first instance satisfy himself. If under these circumstances he wishes to withdraw his tender and deposit rather than go on with the purchase, leave is given him to make an application for such withdrawal. If, however, notwithstanding the notice and petition he is willing to go on with the purchase on the terms and conditions I have mentioned, I ought not, I think, under all the circumstances of the case to defer action.

"Subject to the terms and conditions I have mentioned the order and direction of the court will be that Mr. F. L. Béique's tender of $1,051,000 for the property as a whole be accepted, and that the several railways mentioned with their accessories, be sold to him for that price, and that steps be taken to give effect to and to carry out such sale."

The present appeals have been asserted by the Rutland Railroad Co., a creditor of the South Shore Railway Company and of the Quebec Southern Railway Company, Frank D. White, a creditor of the same companies, and Edward A. D. Morgan, a creditor and bidder for the property of the South Shore Railway Company.

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On the 20th of February, 1906, motions were made on behalf of the said respondents to quash the appeals with costs on the grounds:

(1) That the Exchequer Court judge, acting in the matter in question, was a special tribunal designated by Act of Parliament and was not a court of record, but a functionary named for a special purpose, whose discretionary order was final for those purposes and not appealable. Parliament having reserved to itself the power of finally deciding as to the title of the purchaser to operate the road;

(2) That mere bidders at the sale of the road had no standing in court to maintain an appeal;

(3) That unproved claimants and creditors could have no standing in court;

(4) That these persons were not parties to any suit in which a judgment had been rendered; and

(5) That in no case could any creditor or other party have an interest exceeding $500 limited for appeals from the Exchequer Court, as the difference between the bid accepted and the combined amounts of the several separate bids for the several portions of the road separately (only $3,000) when distributed, could only leave a few dollars to each of the creditors; and

Finally, that the discretion of the Exchequer Court judge was a commendable discretion as it avoided diversity of interest in the operation of the system of railways and was in the general interest of the public by thus placing the whole control with one corporation.

Wallace Nesbitt K.C., Lafleur K.C., and *Parent K.C.* appeared for the motions. The sale in question was conducted under a special statute, 4 & 5 Edw.

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VII. ch. 158 (D.), and is not a proceeding in the ordinary sense in the Exchequer Court or under the "Railway Act, 1903," but before a *curia designata*, not a court of record. The functions vested in the officer are of a special character to be exercised in the interest of the public as well as of the parties more directly concerned and the statute contemplates, by its terms, that the exercise of these powers and the discretion thereby given should be final and not subject to any appeal.

Bidders at the sale can have no status to assert an appeal; neither can unproved claimants. The railway companies now appearing as creditors cannot, in any case, have any interest amounting to the value of $500, as limited for appeals from the Exchequer Court of Canada, as the whole controversy is concerning the division of the difference of $3,000 between a great number of interested parties, none of whom can have nearly as much interest as $500 in the distribution of this amount. None of the appellants were parties to any of the proceedings in regard to the sale and, consequently, have no *locus standi* before this court.

We refer to *The Canadian Pacific Railway Co.* v. *Fleming*(1), at page 36, per Strong C.J.; *Lachance* v. *La Société de Prêts et de Placements de Québec*(2); *The Union Colliery Co. of British Columbia* v. *The Attorney-General of British Columbia*(3); *The Ottawa Electric Co.* v. *Brennan*(4); and *Birely* v. *The Toronto, Hamilton and Buffalo Railway Co.*(5).

Chrysler K.C., J. E. Martin K.C., Morgan and *Beulac* appeared to oppose the motions on behalf of the various appellants.

(1) 22 Can. S.C.R. 33.
(2) 26 Can. S.C.R. 200.
(3) 27 Can. S.C.R. 637.
(4) 31 Can. S.C.R. 311.
(5) 25 Ont. App. R. 88.

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After hearing counsel on the motions and without calling upon the appellants, the court reserved the further argument of the questions submitted until the hearing of the case upon the merits.

On the first of March, 1906, the appeals were heard upon the merits.

Chrysler K.C. and *J. E. Martin K.C.* for the appellants, the Rutland Railroad Company; *Beulac* for the appellant White; *Morgan* for the appellant Morgan. The respondent Béique, in all the proceedings in this matter, appeared for and represented the receiver appointed by the Excheqeuer Court, both as solicitor and counsel; he virtually had charge of the sale of the railways, and, consequently, could not legally bid and become a purchaser thereof by reason of the position he occupied in respect to the proceedings. Art. 748 C.P.Q.; art. 1484 C.C.; Pothier, Proc. 218-220; Heric, Vente des Immeubles, 180, 181; Fuzier-Herman, vol. xxxvi., p. 851, vo. "Vente," also nos. 819-822; Fuzier-Herman, vol. vi., nos. 260, 269; vol. xxxiii., p. 728, vo. "Saisie Immobilière" nos. 1273, 1247; *Atkins* v. *Delmege*(1), at page 14; *Hall* v. *Hallett*(2); *Whitcomb* v. *Mitchin*(3); *Guest* v. *Smythe* (4); *Crawford* v. *Boyd*(5). The tender of the highest bidder should have been accepted. *Re Alger and The Sarnia Oil Co.*(6) and cases cited in the judgment in that case. The French jurisprudence is to the same effect.

The interest of the several appellants cannot be questioned as claims aggregating many hundreds of thousands of dollars have been filed against the rail-

(1) 12 Ir. Eq. R. 1.
(2) 1 Cox 134.
(3) 5 Madd. 62.
(4) 5 Ch. App. 551.
(5) 6 Ont. P.R. 278.
(6) 21 O.R. 440.

ways offered for sale and it is doubtful whether or not the price realized by the sale attacked will be sufficient to pay the creditors. All the appellants are interested in the marshalling of the assets and a ventilation according to the principles laid down in the Code of Civil Procedure (arts. 805 *et seq.* C.P.Q.).

On the question of jurisdiction we refer specially to *The North British Canadian Investment Co.* v. *The Trustees of St. John School District*(1); *The City of Halifax* v. *Reeves*(2).

Nesbitt K.C. and *Lafleur K.C.* appeared for the respondent Béique, and *Aimé Geoffrion K.C.* for the Minister of Railways and Canals, but were not called upon for any arguments.

The judgment of the court was delivered by

GIROUARD J. (oral).—The objection now taken for the first time on this appeal, that the respondent, Béique, could not legally bid or become a purchaser of the railways by reason of the position occupied by him as solicitor or counsel, ought not to prevail.

His position in regard to the proceedings does not bring him within the class of persons disqualified under the provisions of article 1484 of the Civil Code, but, even if it did so, the position he occupied would not involve absolute disqualification and render his acts null. There were no objections raised or steps taken to impeach his position before the judge of the Exchequer Court and none can now be taken on this appeal.

We have unanimously agreed that all the appeals should be dismissed with costs. We believe that the

(1) 35 Can. S.C.R. 461. (2) 23 Can. S.C.R. 340.

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learned judge of the Exchequer Court has properly exercised the discretion vested in him by the statute, 4 & 5 Edw. VII. ch. 158, and that we should not disturb his judgment or order.

The appeals are dismissed with costs.

Appeals dismissed with costs.

Solicitor for the Rutland Railroad Co., appellants: *J. E. Martin.*

Solicitor for the appellant, Morgan: *E. A. D. Morgan.*

Solicitors for the appellant, White: *Carter, Goldstein, & Beulac.*

Solicitors for the respondent, Béique: *Béique, Turgeon, Robertson & Béique.*

Solicitors for the Minister of Railways and Canals, respondent: *Aimé Geoffrion & J. L. Perron.*

ROBERT EDWIN JACKSON (PLAINTIFF) .... APPELLANT;

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*Mar. 13.

AND

DRAKE, JACKSON & HELMCKEN (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Account stated—Admission of liability—Promise to pay—Collateral agreement—Parol evidence.

On the dissolution of a partnership, the parties signed a statement shewing a certain amount as due to the plaintiff for his share and declaring that "for the sake of peace and quiet and to avoid friction and bother" the plaintiff waived examination of the firm's books and agreed that the amount so stated should be deemed to be the amount payable by the defendants to the plaintiff.

Held, that a promise to pay the amount of the balance so stated to be due should be implied from the admission of liability.

In an action for the amount of the balance, the defendants alleged that the plaintiff had verbally agreed that he would not sue upon the account as stated, and that the document should be treated as merely shewing what would be payable to him upon the collection of outstanding debts owing to the firm.

Held, that as the effect of the alleged collateral agreements was to vary and annul the terms of the written instrument they could not be proved by parol testimony.

APPEAL from the judgment of the Supreme Court of British Columbia affirming the judgment of Mr. Justice Martin by which the plaintiff's action was dismissed with costs.

The case is stated in the judgment now reported.

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

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W. C. Taylor K.C. for the appellant.
Peters K.C. for the respondents.

The judgment of the court was delivered by

IDINGTON J.—The appellant and the respondents as partners carried on business in Victoria, B.C., and the defendants agreed with appellant to pay him as a retiring member of the firm an annual sum that was fixed at $4,000.00 a year subject to certain reductions in the event of the business not producing a sum named.

The appellant desired at the end of a number of years a settlement of arrears due him, and after some prolonged negotiations the parties signed the following document:

Victoria, B.C., 2nd November, 1903.

Robert E. Jackson, Esq.:
in account with
Drake, Jackson & Helmcken.

STATEMENT.

By balance R. E. Jackson account....................	$4,923.50
By balance No. 1 account (old account)...............	4,286.90
By balance No. 1 account (in No. 2 account)...........	790.60
By annuity account ¼ share of net profits for year 1900	2,993.53
By annuity account ¼ share of net profits for year 1901	2,229.60
By annuity account ¼ share of net profits for year 1902 amount to $1,852.11, therefore, leaving Mr. Aikman's proportion of profits $2,518.86. The amount of $481.14 is deducted from Mr. R. E. J.'s share and added to Mr. Aikman's share to make $3,000.	1,370.97
	$16,595.10

N.B.—The balances herein are taken up to 31st December, 1902.

The above statement has been furnished to the said Robert E. Jackson by the said H. D. Helmcken and H. B. W. Aikman, who admit and allege, testified by their signatures hereto, that the sum of $16,595.10 is (except as to the moneys (if any) in which they were indebted to him in respect of an account known as the Drake

and Jackson rental account or rent of offices and of a certain promissory note dated the 3rd day of June, 1893, made by them the said H. D. Helmcken and H. B. W. Aikman and one B. H. T. Drake for $2,000 payable to the order of the said R. E. Jackson at the Bank of British Columbia, Victoria, on demand with interest at 7 per cent. per annum) the amount in which they were indebted to him the said R. E. Jackson on the 1st day of January, 1903. And the said R. E. Jackson, for the sake of peace and quiet and to avoid friction and bother, is willing to waive investigation of the books of the firms of Drake, Jackson & Helmcken, of which the said H. B. W. Aikman was or is a member, and to agree that the said sum of $16,595.10 shall (except as aforesaid) be deemed to be the amount which was payable by the said H. D. Helmcken and H. B. W. Aikman to him on the said 1st day of January, 1903, for balance of account.

Dated this 19th day of March, 1904.

H. DALLAS HELMCKEN.
H. B. W. AIKMAN.
ROBT. E. JACKSON.

The appellant, in August following the signing, desired payment of the amount fixed as above at $16,595.10, and in default of payment sued for said amount as due on an account stated.

The defences set up in the pleadings were numerous, but on this appeal rested upon (1) a denial of the account stated; (2) what was claimed to be a collateral contract, and; (3) upon mistake or mistakes in the account to such an extent as to render void the account stated.

The document itself, by its wording, seems to us to be as complete a reply as possible to all that was said on the first point. We do not see any other meaning that can be attached to the first part of the document than that of an account stated, and to the last of it, which relates to the first part, a promise to pay the amount, or at least an admission of such a liability to pay the amount that the law implies a promise to pay.

As to the second point taken there was alleged to

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be an agreement that the appellant would not sue upon such a document if given. The contention was also set up that the document if given was only to be used as evidence of the amount the plaintiff was entitled to receive when, but not until, there had been received by defendants, from the debtors owing the partnership the accounts that entered into the calculations upon which the balance was found due, money to pay this balance.

The evidence in support of these contentions was entirely oral.

It certainly was of a character to contradict in one of these alternatives or to vary in the other of them the plain language of the document.

Such evidence must be excluded from our consideration.

Neither alternative set up under this head can be rightly said to be in the nature of a collateral agreement of which parol evidence would be admissible.

Either such alternative is not only inconsistent with the written document, but seems to contradict, or vary, and indeed absolutely to nullify it.

There is no such evidence in support of either proposition as would entitle defendants to ask for reformation of this document as the result of a mutual mistake.

The alleged promise not to sue is one of those vague, indefinite sorts of expression often used in negotiations such as this and if taken literally contradicts the document.

If taken in a more reasonable sense it means little or nothing, possibly a promise of forbearance, as was shewn here, for a short time; or more extended than that, yet so vague that no reformation can be made to give effect to it.

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Reformation can only be granted when it is clearly and explicitly shewn, not only that there has been a mutual mistake, but also what the definite terms of the agreement were intended to have been.

The evidence fails to support any such case.

These remarks as to mistake apply in part to the third ground taken. We are, perhaps, unable to comprehend, correctly, any further contention under that head. The alleged mistake of adopting as the basis of settlement accounts due and owing but unpaid seems to be the only one upon which there is tangible evidence. It would seem to be covered by what I have said. Clearly, appellant never for a moment intended to bargain on any other basis than treating all the accounts carried in the books as good down to the time of treating for this settlement.

He, by accepting this stated account, abandoned any claim to receive from doubtful accounts that were dropped out of this reckoning in previous years, pursuant to what we are told was part of the system.

Preferring an acknowledgment, by the defendants, of liability to him for what had been carried forward as good assets, to the doubtful benefit of awaiting collection of the last dollar that might possibly be got, he can now get no more, and defendants must give no less, than a balance so arrived at. If the defendants find their judgment of the results was mistaken that is not a mistake they can claim now to be relieved from.

If, however, for example, a clear error in the computation had been shewn, of course relief could have been given. No such clear error appears here.

We think the appeal must be allowed with costs of appeal here and in the court below, and judgment

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be entered for plaintiff against the surviving defendant Helmcken for the amount sued for with costs.

Appeal allowed with costs.

Solicitor for the appellant: *C. J. Prior.*

Solicitors for the respondents: *Moresby & O'Reilly.*

MOÏSE LEROUX AND OTHERS (PETITIONERS) .... APPELLANTS;

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*March 23.

AND

THE CORPORATION OF THE PARISH OF STE. JUSTINE DE NEWTON (DEFENDANT) .... RESPONDENT.

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

Appeal—Jurisdiction — Annulment of procès-verbal — Injunction — Matter in controversy—Art. 560 *C.C.—Servitude.*

In a proceeding to set aside resolutions by a municipal corporation giving effect to a *procès-verbal*, the court followed *Toussignant* v. *County of Nicolet* (32 Can. S.C.R. 353) and quashed the appeal with costs.

Art. 560 C.C. referred to.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, sitting in review, at Montreal, and restoring the judgment of the Superior Court, District of Montreal, by which the petition of the present appellants and the injunction prayed for by them were refused with costs.

The proceeding was by petition to set aside two resolutions of the council of the corporation providing for the opening of a public road according to *procès-verbal* made on 1st September, 1857, and homologated on the 13th of October of the same year, but which had not been put into execution up to the time of the resolutions, in 1904. The petitioners also

*PRESENT:—Sedgewick, Girouard, Davies and Idington JJ.

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asked for an injunction forbidding the execution of the *procés-verbal* and resolutions. In the Superior Court Mr. Justice Dunlop dismissed the petition and demand for an injunction and dissolved the interim injunction which had been issued, with costs. In the Court of Review the judgment at the trial was reversed and it was declared that the *procès-verbal* of 1857 had ceased to be in force and the corporation was enjoined against the execution of the *procès-verbal* and resolutions in question. By the judgment appealed from the Court of King's Bench reversed the judgment of the Court of Review and restored the judgment of the Superior Court.

Beaudin K.C. and *Mignault K.C.,* for the motion, cited *Toussignant* v. *The County of Nicolet*(1); *McKay* v. *Township of Hinchinbrooke*(2); *Dubois* v. *Village of Ste. Rose*(3); *Moir* v. *Village of Huntingdon*(4); *County of Verchères* v. *Village of Varennes*(5), and section 24 of the Supreme Court Act, R.S.C. ch. 135.

Belcourt K.C. and *Pelissier K.C.* contra. This case can be distinguished from the cases cited and comes within the rule of *McGoey* v. *Leamy*(6). The appellants are exposed to being deprived of a portion of their lands over which the proposed road will pass; *Stevenson* v. *City of Montreal*(7); and an injunction is likewise sought. In this case there is also a charge upon the lands involved in connection with the maintenance of the road by statute labour or special taxa-

(1) 32 Can. S.C.R. 353.
(2) 24 Can. S.C.R. 55.
(3) 21 Can. S.C.R. 65.
(4) 19 Can. S.C.R. 363.
(5) 19 Can. S.C.R. 365.
(6) 27 Can. S.C.R. 193.
(7) 27 Can. S.C.R. 187.

tion. Even if the road was properly laid out in 1857 there has never been any use made of it since that time, the appellants have remained in possession under adverse claims and they have acquired a title by prescription; arts. 2242, 562 C.C.

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THE COURT referred to article 560 C.C. and, considering that the case of *Toussignant* v. *County of Nicolet*(1) was binding, quashed the appeal with costs.

Appeal quashed with costs.

Solicitors for the appellants: *Bastien, Bergeron & Cousineau.*

Solicitors for the respondent: *Beaudin, Loranger & St. Germain.*

(1) 32 Can. S.C.R. 353.

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*March 9.
*April 6.

BEACH ADONIJAH LASELL (PLAINTIFF) .... APPELLANT;

AND

ADAM HANNAH (DEFENDANT) ...... RESPONDENT;

AND

THE THISTLE GOLD COMPANY.... DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Company law—Illegal consideration for shares—Fraud—Breach of trust.

With a view to concealing the financial difficulties of a mining company and securing control of its property, the manager entered into a secret arrangement with the respondent whereby the latter was to acquire the liabilities, obtain judgment thereon, bring the property to sale under execution and purchase it for a new company to be organized in which the respondent was to have a large interest. The manager, who was a creditor of the company, was to have his debt secured and to receive an allotment of shares in the new company proportionate to those held by him in the old company and he agreed that he would not reveal this understanding to the other shareholders.

Held, affirming the judgment appealed from (11 B.C. Rep. 466) Sedgewick J. dissenting, that the agreement could not be enforced as the consideration was illegal and a breach of trust by which the other shareholders were defrauded.

APPEAL from the judgment of the Supreme Court of British Columbia(1) reversing the judgment of Martin J. and dismissing the plaintiff's action with costs.

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

(1) 11 B.C. Rep. 466.

The action was to recover 12,500 shares, being one-eighth of the capital stock in the Thistle Gold Mining Company, under the following circumstances:—

In 1899 and 1900 the plaintiff was manager and owner of 62,500 shares, being one-eighth of the capital stock, of the Sutherland Gold Mining Company. A Mr. Sutherland was president of the company, was largely interested therein, and had induced some residents of Minneapolis, Minn., also to become largely interested in the company. The defendant Hannah was a banker in Minneapolis, and it was through his influence that a large number of persons had been induced to become shareholders in the undertaking. Largely through mismanagement by Sutherland the company got into difficulties and became discredited and embarrassed. Towards the end of 1900 Hannah, in order to rehabilitate the company's credit and to secure everyone interested therein, including the creditors, conceived the idea of re-constructing the company. After discussing the matter with Sutherland and his attorney he was advised to adopt the following plan:— He was to advance a sufficient sum for the purpose of acquiring all the outstanding obligations of the company, except $1,600 due to the plaintiff, to obtain judgment on one of these obligations for $3,000, and, after purchasing the company's properties at sheriff's sale, to organize another company and distribute the shares of the new company, in proportion to the shares held by them, to such of the shareholders of the old company as were entitled to them.

At this time the plaintiff was a creditor of the old company to the extent of $1,600, and owned one-eighth of the capital stock, 62,500 shares. He was at the mines in Cariboo, B.C., and Hannah and Sutherland were in Minneapolis. On 16th November, 1900,

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Hannah wrote to the plaintiff setting out his views regarding reconstruction, and the method by which he proposed to accomplish that end, and asked the assistance of the plaintiff, at the same time promising to protect his interests. On 28th November he sent him a telegram stating that he had already written him, explaining everything. A few days later the plaintiff instructed his solicitor to commence an action against the company for $1,600 due to him, but as he then contemplated leaving British Columbia he assigned his claim to a Mr. Wendell, as a matter of expediency and convenience only, Mr. Wendell being the nominal plaintiff. Hannah had also commenced an action against the company to recover a sum due on notes which he had purchased with the intention of re-constructing the company. Hannah's action having been served upon the plaintiff as manager of the company, he immediately travelled to Minneapolis for the purpose of informing and consulting with Sutherland, the president of the company. There they discussed the position of the company's affairs, and Hannah reiterated the request to refrain from pressing his claim, but to keep the arrangement secret and to speed the proposed sale of the company's property for the purpose of re-construction. To this the plaintiff agreed, upon consideration of receiving a proportion of shares in the new company equivalent to those he then held in the old company, as well the assurance of payment, at a deferred date, of the $1,600 due to him.

The plaintiff thereupon stood by and permitted Hannah to proceed with the sale, assisted him therein, abandoned the proceedings to recover the $1,600 and took no steps in respect of his own shares in the old company. Hannah sold the property of the old com-

pany under execution, purchased it himself, organized the Thistle Gold Co. and conveyed the assets of the old company to the new company issuing to himself, *inter alia,* the shares which he had promised to transfer to the plaintiff. All the debts of the old company were paid and discharged, including the debt due to the plaintiff, but Hannah did not deliver the shares as promised.

On these facts the trial judge ordered judgment to be entered for the plaintiff for 12,500 shares in the Thistle Gold Company, or their value, and the action against the Thistle Gold Company was dismissed. An appeal to the Full Court was allowed, Mr. Justice Morrison dissenting.

Wilson K.C. for the appellant.
Ewart K.C. and *George A. Morphy,* for respondent.

SEDGEWICK J. (dissenting).—In my opinion the learned trial judge, Mr. Justice Martin, was right in maintaining the action in respect to the allotment of shares claimed by the plaintiff for the reasons then stated by him; I also agree with the view taken by Mr. Justice Morrison, who dissented from the majority of the court below. For these reasons I think that the present appeal should be allowed with costs in this court and in the court below and that the judgment of the learned trial judge should be restored.

GIROUARD J.—This appeal should be dismissed with costs for the reasons given by Chief Justice Hunter.

DAVIES J.—A careful perusal of the evidence and correspondence between the parties satisfies me be-

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yond any reasonable doubt: (1) That there was no sufficient evidence of any such contract having been entered into between the parties as that sued upon; (2) That if it was possible to spell out or infer the existence of such a contract from the letter written by defendant to plaintiff wherein he stated

I purpose to take care of you and to take care that your interests are properly protected,

it seems decisive that such letter was not received by plaintiff or its contents known to him until long after he had his interview with defendant in Minneapolis when he alleged he made the contract sued on.

I think that, apart from this letter, the correspondence between the parties after the Minneapolis meeting is conclusive against such an agreement having been come to orally at such meeting; that such correspondence is also conclusive that there was no consideration for such alleged agreement arising in any way whatever out of the debt which the Sutherland Gold Mining Co. owed plaintiff; that if there was any consideration whatever for the alleged promise or agreement it was an illegal one, namely, that plaintiff, who was superintendent and manager of the Sutherland Gold Mining Co., should conceal from the directors and others of the company interested the proceedings which the present defendant for the benefit and on the behalf of Sutherland, the president of the company, had instituted for the purpose of obtaining judgment against the company, and selling all its assets and property and then re-organizing the company under a new name with the result of "freezing out" those shareholders who were objectionable to Hannah, the defendant, and Sutherland, on whose behalf he was acting.

It was argued by Attorney-General Wilson that there was nothing illegal in what Hannah had done to sell out the assets of the Sutherland Gold Mining Co., and leave it a company in name only. Mr. Ewart did not controvert that position by itself, but submitted that Hannah by his own statement to the plaintiff Lassels was avowedly acting in the proceedings he took for and on behalf of, and for the benefit of the president, Sutherland. That he knew and so informed Lassels, the superintendent and general manager of the company, that absolute secrecy was an essential element of the success of their plans, and "in order not to give Mr. Sutherland's claimants any advantage," and that "rapid action was actually necessary."

In fact on the 6th December, 1900, Hannah writes to Lassels from Minneapolis, the headquarters of the Sutherland Gold Mining Company, saying:

> It has evidently got out that you have been here. Should there be any leak about the proceedings we are taking, we might be caused considerable trouble and the affairs of the company would again fall back into the quagmire in which they were before.

It simply came back to this, that proceedings were being taken against the company by Hannah for Sutherland, the president's benefit, and the general manager and superintendent on whom the writ was served and who, of the company, alone knew of the proceedings, was to maintain absolute secrecy, and not let the secretary or directors know anything about them until the sale had been completed and the company's assets sold.

If this was the construction, and I see no other possible, then I agree with the Chief Justice in the court below that the agreement was a fraud on the part of the plaintiff as superintendent and general manager

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of the company, as against the company, and its shareholders, which the courts will not lend their aid to have consummated.

IDINGTON J.—I think, for the reasons assigned by Chief Justice Hunter in support of the judgment appealed from, this appeal should be dismissed with costs.

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

Appeal dismissed with costs.

Solicitors for the appellant: *Wilson, Senkler & Bloomfield.*

Solicitor for the respondent: *George A. Morphy.*

GEORGE L. MILNE (PLAINTIFF).....APPELLANT;

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*Mar. 12, 13.
*April 6.

AND

THE YORKSHIRE GUARANTEE AND SECURITIES CORPORATION (DEFENDANTS)............ RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Suretyship—Collateral deposit—Ear-marked fund—Appropriation of proceeds—Set-off—Release of principal debtor—Constructive fraud—Discharge of surety—Right of action—Common counts—Equitable recourse.

K. owed the corporation $33,527.94 on two judgments recovered on notes for $10,000 given by him to R., and a subsequent loan to him and R. for $20,000. M., at the request of and for the accommodation of R., had indorsed the notes for $10,000 and deposited certain shares and debentures as collateral security on his indorsement. K. and R. deposited further collateral securities on negotiating the second loan, but K. remained in ignorance of M.'s indorsements and collateral deposit until long after the release hereinafter mentioned. These judgments remained unsatisfied for over six years, but, in the meantime, the corporation had sold all the shares deposited as collateral security, and placed the money received for them to the credit of a suspense account, without making any distinction between funds realized from M.'s shares and the proceeds of the other securities and without making any appropriation of any of the funds towards either of the debts. On 28th February, 1900, after negotiations with K. to compromise the claims against him, the agent of the corporation wrote him a letter offering to compromise the whole indebtedness for $15,000, provided payment was made some time in March or April following. This offer was not acted upon until November, 1901, when the corporation carried out the offer and received the $15,000, having a few days previously appropriated the funds in the suspense account, applying the proceeds of M.'s shares to the credit of the notes he had indorsed. The negotiations and the final settlement with K. were not made known to M., and K. was not informed of his continuing liability towards M. as a surety.

Held, per Sedgewick, Girouard, Davies and Idington JJ. (reversing the judgment appealed from (11 B.C. Rep. 402)) that the secret

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

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dealings by the corporation with K. and with respect to the debts and securities were, constructively, a fraud against both K. and M.; that the release of the principal debtor discharged M. as surety, and that he was entitled to recover the surplus of what the corporation received applicable to the notes indorsed by him as money had and received by the corporation to and for his use.

Held, by Maclennan J. that, on proper application of all the money received, the corporation had got more than sufficient to satisfy the amount for which M. was surety and that the surplus received in excess of what was due upon the notes was, in equity, received for the use of M. and could be recovered by him on equitable principles or as money had and received in an action at law.

APPEAL from the judgment of the Supreme Court of British Columbia(1), reversing the judgment of Morrison J. and dismissing the plaintiff's action.

The action was brought, in May, 1903, for a declaration that the plaintiff was discharged from any liability to the corporation as indorser and surety for the amount of four promissory notes for $2,500 each, made by one James Cooper Keith in favour of Rand Brothers, indorsed by them and on which the plaintiff had become a second indorser, at the request of Rand Brothers and for their accommodation, at the time they were discounted, in 1892, by the said corporation.

The circumstances material to the issues raised on the present appeal are stated in the judgments now reported.

Aylesworth K.C. and *Deacon*, for the appellant.

Davis K.C. for the respondents.

SEDGEWICK J.—This appeal is allowed with costs. I concur in the reasons stated by my brother Idington.

GIROUARD J.—I concur in the judgment allowing

(1) 11 B.C. Rep. 402.

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the appeal with costs for the reasons stated by my brother Idington.

DAVIES J.—I agree generally in the reasoning and conclusion of Duff J. in the court below and concur in the judgment prepared by my brother Idington. I desire only to add a few words.

The relation in which the parties stood towards each other and towards the principal debtor Keith at the time the offer of compromise was made by the defendant corporation to him in February, 1900, was this. Keith owed the corporation about $33,527.94. The corporation held in their hands the proceeds of certain collateral securities which Milne, the appellant, and a surety for the payment of $10,000 forming part of the $33,527.94, had deposited with them. These proceeds had been carried by the corporation to the credit of a suspense account opened in Milne's name, or earmarked with his name, but had not been appropriated by them to the credit of the notes which Milne had indorsed as surety. Milne was a second indorser of the notes and his indorsement was unknown to Keith as was also the fact of the former having deposited the collateral securities with the respondent and that their proceeds were then standing to the credit of the suspense account.

In August, 1900, some months after the offer of compromise had been made to Keith, he obtained and deposited in a bank in Victoria the $15,000 which the corporation had offered to accept in full discharge of his indebtedness and notified it of the facts of his readiness to carry out their offer. The manager, however, did not at once absolutely accept, but intimated that he would probably do so. It was not, however, until the beginning of November or the last of Octo-

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ber, 1901, that the corporation actually executed the papers carrying out the offer of compromise and received the $15,000 bargained for, although the papers are dated as of August, 1900, when Keith deposited his money and notified the corporation of the fact.

The reasons for the delay appeared to be the corporation manager's hope of obtaining from the sureties of Keith—Milne and one Rand, who had each deposited collateral with the corporation—the full amount of the debt due to them.

Milne, however, was kept in ignorance of the negotiations and agreement respecting the compromise with Keith and never had any knowledge of them until long after they were finally completed.

Keith, on the other hand, up to the time of his discharge had no knowledge that Milne had indorsed his notes for $10,000 and was surety for their payment.

In March, 1901, the corporation gave a memorandum to Milne shewing a large amount as due from him on his suretyship contract and, in the following May, they brought suit against him to recover the amount. It was not, however, until March, 1902, long after the receipt of the $15,000 from Keith and the assignment over to his nominees of the judgments and mortgages they held from Keith, that the corporation proceeded with their suit against Milne. They then delivered their statement of claim in the action to which Milne pleaded the Statute of Limitations, and the release of the principal debtor. Upon this the corporation discontinued that action and in giving his evidence on the trial of this suit the manager swore that he was only "running a bluff" upon Milne in filing the statement of claim.

A day or two before receiving the $15,000 from Keith and handing over to his nominees the assign-

ment of the mortgages and judgments they held, the corporation respondent made the entries in their books transferring the amount standing to the credit of Milne in the suspense account in respect of the shares and debentures they had received from him as collateral, to the credit of the notes he had indorsed for Keith.

But even then, in November, 1901, when getting as he thought his full discharge, Keith knew nothing of Milne having indorsed his notes or deposited any collaterals with the corporation as security for them. He thought he was being absolutely discharged, while if the respondent corporation's contention was to prevail, he would, as a matter of law, be still liable to Milne his surety for the monies the latter paid into the suspense account and which the corporation on the day before executing the papers appropriated to Keith's indebtedness. A legal fraud was, therefore, being perpetrated on Keith if that appropriation was held to be good and he became liable to his surety Milne for the amount.

Looking, therefore, at the substance of the agreement made between the corporation respondent and Keith their principal debtor for his absolute discharge, in the light of the correspondence and exhibits produced in evidence as well as the oral evidence of the manager of the corporation and of Keith and Milne, and remembering the relative positions the parties occupied towards each other and the ignorance of the principal debtor Keith of Milne's suretyship or deposit of collaterals to secure payment of the amount, or of the appropriation of the proceeds of those collaterals by the corporation towards the specified debt which he thought he was discharging for $15,000, it seems to me, that the offer of the corporation made to

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Keith and subsequently carried out must be construed as having reference to the time when the parties intended the discharge to take effect.

No appropriation of the amount now in dispute had then been made by the respondent, and any subsequent attempt to do so secretly and without Keith's knowledge and so to impose a liability upon him from which all parties thought he had been discharged would be a fraud.

In discharging Keith no reservation of the corporation's rights as against sureties was made and his discharge, of course, operated as a discharge of his sureties.

If the secret appropriation after the offer and its practical acceptance was illegal as against Keith it must also be so as against Milne, who had no notice or knowledge of Keith's discharge and who from the time when that discharge must be held to relate to the date of the assignments to Keith's nominees, was entitled to have his collateral securities returned to him or their proceeds paid over to him.

IDINGTON J.—The appellant indorsed four promissory notes made by one Keith to Rand Bros. for $2,500 each. This indorsement was for the accommodation of Rand Bros. and renewed in November, 1892. Rand Bros. and Keith each transferred to the respondents by way of security for payment of these renewals, collaterals consisting of stock in the Vancouver Gas Company.

The respondents sold by arrangement with appellant this stock to the wife of the appellant and the money received from such sale was placed by respondents to the credit of a suspense account to be held in lieu of the stock to await the results of time, either

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in the way of payment by Keith of these notes, or the realization of hopes Keith had of an improved financial condition.

This was done in 1894 and the accounts meantime stood in the same position till after the 28th February, 1900, save that certain accretions of this stock came to the hands of respondents as the holders of the stock, or having been such were by virtue of the arrangements respecting the same entitled to receive and hold such accretions.

It is not now necessary to repeat the story of the dealings of all these parties and amplify all that was done with these collateral funds. It is sufficient to say, that on the said 28th of February the part of such funds now in question had never been appropriated by the respondents to the payment of these promissory notes or the judgment which had been recovered against Keith thereon, on 1st October, 1893.

There was another claim of respondent's against Keith in respect of which they recovered judgment about the same time for $21,180.23.

Upon this judgment there was received by respondents from various collateral sources money applicable to its payment. Apart from these payments there was nothing done in respect of said judgment, until in February, 1900, when Keith found himself in a position to negotiate for a compromise of all these claims against him.

The respondents' agent then wrote as the result of these negotiations the following letter:

VANCOUVER, B.C., 28th Feb., 1900.

J. C. Keith, Esq., City.

Dear Sir,—With reference to our negotiations and conversations in connection with your indebtedness to this corporation, amounting to $33,527.94, as per annexed statement, if you can make arrangements to pay me some time in March or April the sum of not less

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than $15,000, I will transfer to you or your nominee the following securities and free you from all liability to this corporation, viz.:

Judgment 2nd October, 1893..................$21,180.23

Judgment 1st October, 1893.................. 10,634.23

Mortgages and interest amounting to $30,339.32, covering lots 612, 615, 616, south half of lot 620,614, all in North Vancouver.

Blocks 1, 2, 3, 4, 5, 6, 7 of District lot 367.

Lots 14, 15, 16 and 17, Block 67, subdivision 185, City of Vancouver; also Anglo B.C. Packing Co. 50 preference shares, and Anglo B.C. Packing Co. 50 ordinary shares.

Yours faithfully,

I have said that up to this time at least there was nothing done to appropriate the funds now in question and lying at the credit of the suspense account.

It is, however, urged that inasmuch as this letter states the total sum due for both claims at $33,527.94, we ought to infer that this amount is the result of some such prior appropriation of these funds as I have said was not made.

The able counsel for respondents was not able to shew any such calculation resulting from this supposed appropriation he contended for as could shew to my mind any semblance of results therefrom that could be made in any way the approximate equivalent of this sum of $33,527.94.

The "annexed statement" referred to in this letter was not produced. No attempt was made at the trial or on the reference to shew how it was made up or how this result of total was arrived at.

If such a statement ever existed and was shewn to Keith when negotiating for this compromise, as would have proved an appropriation then or theretofore upon the said notes or judgment to Keith's knowledge of the fund now in question, then the respondents could by using that in evidence have removed any ground of complaint on the part of Keith and de-

stroyed the slightest hope of appellant succeeding in his present suit. Yet not only is there no proof of such a statement or such knowledge thereof on Keith's part, but also an entire absence of any attempt on trial or reference or in any way to shew such facts.

The commercial honour of respondents was at stake as well as the money. The plain palpable consequences of such proof being produced would have spurred up the respondents' intelligent agent to have fully demonstrated this alleged appropriation if possible.

Not only is he silent on the point, but the application of the other credits on the larger judgment and the computation of the interest thereon when these credits are properly reckoned with, results in a sum which when added to the sum of $10,634.23 (stated in this letter as amount of the judgment on the notes in question here) produces almost the identical total of $33,527.94.

What is the proper inference to be drawn from such a finding? Clearly to my mind that in respect of the larger judgment there was from time to time an appropriation of the moneys received from collateral sums applicable thereto.

And there was this further that the products of the collaterals applicable to the smaller judgment had been kept as placed originally in suspense and unappropriated.

In consequence of this condition of things, the respondents' agent in writing this letter and using the material before him counted the smaller judgment at its face value and the larger one at its proper value. He either hesitated as to what was to be done with the suspense account, failed to observe it or did observe it and stated incorrectly the amount due on the smaller

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judgment. Whatever he did or whatever caused him to do what he did, he certainly did not apply this suspense account to liquidate the judgment to which in certain events it was intended to have become applicable.

I assume, therefore, that there was not any appropriation of these funds until after the negotiations had so advanced that common honesty required the implementing of the agreement arrived at between Keith and the respondents whether the law bound them or not.

The obvious purpose of the placing of these funds in a suspense account was to await the final condition of the relations between the creditors and their principal debtor.

Penetrating, as far as one can, through the war of words and discarding the improbable contentions put forward by either side on this point, that condition or that period had arrived when the funds in this suspense account had to be dealt with.

Candour and that good faith a surety is entitled to, and an over-burthened debtor is also entitled to, required that both should have been told exactly what the facts then were, and what the creditor proposed doing.

Clearly, failure to do this by the surety was a breach of the spirit of the arrangement between the creditors and surety whereby this suspense account was created to secure the debt.

It is idle to refer to the assignment, to Cooper & Smith, of these judgments and all the securities therefor, as if a sale thereof had been made to strangers.

They were but the nominees and trustees of Keith for whose benefit the whole negotiations were conducted by him and not by them.

The sole purpose of the dealings in question was to obtain the entire and final release of Keith from his obligations to the respondents.

The agent of the respondents, who carried on for them these negotiations, plainly admits this.

The desired result failed, if respondents can retain the appellant's money and drive him to a suit against Keith, and Keith in turn be driven to follow the respondents to complete his release.

I, with great respect, think that the majority of the court below failed to keep in view the purpose of Keith and the relation of Cooper & Smith to Keith instead of treating them as strangers, and thereby failed to reach the correct result.

I do not think that the question of whether the bargain made was binding until carried out has much to do with the matter.

I doubt if it can be said in law that all that transpired up to the delivery of the assignment could have prevented the respondents from receding from the negotiations.

I think, however, that there is a great deal of force in the view that the assignment duly executed in September, 1900, ready to be delivered upon the payment of the consideration therefor, immediately upon its delivery related back to the time of its execution when all the negotiations had been completed and everything done except delivery and payment.

The result of that view would be to leave the appellant's money in respondents' hands unappropriated and owing him as he was in such case freed from obligation by the release of his principal.

I would leave the matter there, but for a doubt I have, whether or not the law of relation back, in the

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case of escrows, can properly be applied to this assignment, when all the facts are borne in mind.

I prefer to rest upon this; that the surety can at all times appeal to the equitable jurisdiction of the court to have his principal as soon as the debt becomes due, and without any payment of the debt, ordered to pay the debt and relieve the surety; and that such right, if exercised now by bringing an action of that sort against Keith and joining the respondents and their assignees, could only have one result, and that would be that the respondents here would, upon Keith shewing that they had discharged him, be ordered to pay over to appellant the money now in question.

See *Wolmershausen* v. *Gullick*(1), where there is a most exhaustive and instructive judgment of Mr. Justice Wright dealing with the first proposition I put forward as to the rights of a surety.

The case of *Law* v. *East India Co.*(2) shews the power the court can exercise to protect a surety and adjust the rights of him and his creditors.

The money now in question could no doubt be ordered, as there, into court to abide the result and be paid out as and where the court found the same ought to go.

The rights of sureties in this regard are so much the outcome of the growth of equitable principles that one finds often the test of what would or might be done in case of resort to a court of equity as the best way to find the rights of sureties.

I merely put forward the possible proceeding I indicate to furnish this illustrative test.

I think it is clear that the money in question is, under the facts I have dealt with, money in the hands

(1) (1893) 2 Ch. 514.
(2) 4 Ves. 824.

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of the respondents which in justice and equity belongs to another, and is recoverable as money had and received; or at all events the court can direct it to be paid to the plaintiff under the plain, palpable facts of the case, once it finds, as I do, no appropriation of it was made until, on the eve of handing over the release of the principal debtor, what looks not unlike a fraudulent appropriation was made.

The case of *Litt* v. *Martindale* (1) may be referred to for illustration of the principle upon which, in a case of fraud, an action for money had and received may rest. A contract is implied rather than to let improper conduct, fraudulent conduct if such you will, prevail.

If there could be said to exist any technical difficulty I would allow the principal Keith to be added as a defendant, for conformity sake, and then grant relief against a dealing of the company that cannot be permitted to stand.

I think the appeal should be allowed with costs and the judgment of Mr. Justice Morrison be restored.

MACLENNAN J.—This is an appeal by the plaintiff from a judgment of the Supreme Court of British Columbia, reversing a judgment of Morrison J. which awarded to the plaintiff two sums of $1,600 and $1,329.95 and interest, and dismissing the action.

The plaintiff, as surety, sues the defendants as creditor, to recover the two sums in question, as having been deposited with the defendants by the plaintiff, or received by them from him, to answer the suretyship, and as now recoverable on the ground that the debt has been paid or satisfied by or released to the debtor, without resort to and irrespective of the

(1) (1856) 18 C.B. 314.

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sums paid by the plaintiff; or on the ground that the debt was satisfied and discharged in full, partly by the debtor and partly by another surety, who was liable to the plaintiff.

In the year 1892 the defendants discounted for Messrs. Rand Brothers' four promissory notes of even date and tenor, amounting in all to $10,000, made by one J. C. Keith and indorsed by Rand Brothers, and the plaintiff. The plaintiff's indorsements were made at the request and for the accommodation of Rand Brothers, as was well known to the defendants. About the same time the defendants made another loan to Rand Brothers, to the amount of $20,000, on securities held by them from the same debtor Keith; but this other transaction was unknown to the plaintiff.

The notes having been dishonoured at maturity, and the loan of $20,000 not having been paid, actions were brought by the defendants and two judgments were recovered against Keith on the 2nd of October, 1893, one on the four notes indorsed by the plaintiff, for $10,634.23 for debt and costs, and the other upon the other loan made to Rand Brothers for the sum of $21,180.23.

The action on the four notes was brought against Rand Brothers and the plaintiff, as well as against Keith, and judgment was recovered against both Keith and Rand Brothers, but the defendants did not then or at any time proceed to judgment against the plaintiff. This forbearance towards the plaintiff, in the first instance, was in consideration of his depositing with the defendants, as security for his liability as indorser, two hundred and fifty shares of Vancouver Gas stock, which was done some time early in the year 1894. Rand Brothers had made a deposit with the defendants of five hundred shares of the same

stock as further security when applying for the discount of the notes indorsed by the plaintiff; and they also, when subsequently entering into the $20,000 transaction with the defendants, made a similar deposit of other five hundred shares of the same stock as security for that transaction, in addition to the securities held by them from Keith. Keith, therefore, was the principal debtor, and the person ultimately liable to pay both judgments. Rand Brothers were also liable to the defendants for both, while the plaintiff was only liable for the $10,000 judgment, and was entitled to look to both Keith and Rand Brothers for his indemnity.

In the year 1894, after the deposit of those gas shares with the defendants, the Vancouver Gas Company issued to its shareholders certain debentures, by way of dividend or bonus, and the defendants, having received their proportion in respect of the twelve hundred and fifty shares held by them, sold the debentures and received the following sums therefor: On the 9th May, $3,241; on the 18th of June, $3,225; and on the 17th July, 1894, $178.54, amounting in all to $6,646.54. These sums they had a right to appropriate, at the respective times they were received, in due proportion, in satisfaction of the respective judgments recovered by them, that is, two-fifths to the larger judgment and three-fifths to the judgment for which the plaintiff was liable. There is no evidence that they did not so appropriate those sums, and it must be presumed that they did so.

Afterwards, on the 31st December, 1894, the plaintiff procured the defendants to sell to the plaintiff's wife all the shares held by them as above stated, namely, twelve hundred and fifty shares, for the sum of $8,000, and that sum was received by the defendants

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and, by arrangement with the plaintiff, was placed to his credit in a suspense account. The plaintiff's evidence of what passed between him and the defendants on that occasion is not very clear, but it is apparent that the money was agreed and intended to be held by way of security in the same manner as the shares had been. Inasmuch as the defendants might have sold and converted the shares at any time and have applied the proceeds upon the debt, they could also, at any time, have done the same with the money deposited in the suspense account. See *Commercial Bank of Australia* v. *Official Assignee of the Estate of John Wilson & Company* (1).

It is to be observed that although the second deposit of gas shares made by Rand Brothers was made as security for their second loan, the defendants chose to place the proceeds of the whole to the plaintiff's credit in the suspense account. It may be that the defendants might lawfully do that, if they chose so to do, and that neither Keith nor Rand Brothers could object or complain, for they were both debtors in both judgments to the defendants, and the defendants could hold all the securities received by them for one of the debts from either Keith or Rand Brothers until both were paid; and, moreover, not only Keith, but Rand Brothers also were bound to indemnify the plaintiff against his whole liability.

Matters remained in this position from the 31st December, 1894, until the 28th of February, 1900, except that the defendants had received some payments and dividends from the Keith securities amounting to about 6,000, which they had applied on the larger judgment. In the meantime Rand Brothers had failed and nothing had been received from them.

(1) (1893) A.C. 181.

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Under these circumstances the defendants, on the 28th day of February, 1900, wrote a letter to Keith, the principal debtor, in both judgments, upon which the plaintiff places great reliance. He says that this letter and what was afterwards done by the defendants and Keith in pursuance of it discharged him, the plaintiff, from all liability as surety and that, as a result, he is entitled to recover from the defendants the proceeds of the sale of the two hundred and fifty shares deposited by him as security, and also a proportionate part of the proceeds of the sale of the gas debentures, and these are the two sums for which he obtained judgment in the first instance, namely, $1,600, the purchase money of his two hundred and fifty shares, and $1,328.90, one-fifth of the proceeds of the debentures.

The letter of the 28th of February, 1900, so far as material, is as follows:

> With reference to our negotiations and conversations in connection with your indebtedness to this corporation, amounting to $33,527.94, as per annexed statement, if you can make arrangements to pay me some time in March or April the sum of not less than $15,000, I will transfer to you or your nominee the following securities and free you from all liability to this corporation:—
>
> Judgment 2nd October, 1893..................$21,180.23
> Judgment 2nd October, 1893.................. 10,634.23
> Mortgages and interest amounting to $30,339.32, covering certain lots, etc., etc.
>
> Yours faithfully,

The statement here referred to is not produced nor was any evidence of its purport given.

Now this proposal, on the face of it, is to accept a less sum in satisfaction of a greater, and, I think, it is not pretended by any one that, at that date, the whole debt owing by Keith to the defendants did not very largely exceed $15,000, the sum offered to be

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accepted in discharge of his whole debt. The promise would, therefore, on that ground alone, be *nudum pactum*, and void. Not only so, but the time for payment was limited to the following months of March or April, and nothing was done in the way of providing the money until long after these months had elapsed. That proposal, except as to the time of performance, is what was ultimately carried out, and that was not done until the 6th November, 1901, when, by separate instruments executed on that day, but dated the 20th August, 1900, the two judgments of 2nd October, 1893, and the other securities in their hands belonging to Keith were assigned by the defendants to nominees of Keith and they received a sum exceeding $19,000, the excess over $15,000 being for advances made by the defendants to Keith to pay arrears of taxes.

While it is proved orally that both judgments against Keith, as well as the other securities held by the defendants from him, for those judgments were in fact assigned to Keith's nominees on the 6th of November, 1901, the only instrument relating to that transaction which has been produced is an assignment by deed of the $10,634.23 judgment, as already mentioned.

It bears date the 20th of August, 1900, and it recites the judgment and the sum for which it was recovered and proceeds thus:

And whereas the party of the first part has agreed to assign the said judgment and all benefit to arise therefrom, either at law or in equity, unto the said parties of the second part in manner hereinafter expressed; Now this indenture witnesseth, that, in pursuance of the said agreement and in consideration of the sum of $10,634.23 of lawful money of Canada to the said party of the first part in hand well and truly paid by the said parties of the second part at or before the execution hereof, the receipt whereof is hereby

acknowledged, the said party of the first part hath granted, bargained, sold, etc. * * * to the parties of the second part all the said judgment and the money due or to grow due by virtue thereof for principal, interest and costs.

It was contended very strongly that, although the transaction was not carried into effect until the 6th November, 1901, it must be construed to relate back to the date of the letter of the 28th February, 1900, and although the deeds were dated the same day as the letter, and although the transaction finally carried out was substantially what was proposed by the letter written nearly two years before, I think that during the interval there was no agreement between the parties, and that there was no moment, during all that time, during which the defendants were legally bound to do what they ultimately did. It was argued that this transaction of the 6th November was merely an assignment of securities to third persons and had no effect in discharging Keith's indebtedness. I think, however, upon the whole of the evidence, that it was in fact and in law a settlement between the defendants and their debtor, Keith, although, in form, it was an assignment of the debt to third persons.

But the proceeds of the debentures, as I have pointed out, had been applied upon the debt when received in 1894 and the proceeds of the plaintiff's shares had been so applied, at latest, on the 31st October, 1901.

If, therefore, this appeal depended on whether the proceeds of the plaintiff's shares and relative debentures had or had not in fact been appropriated to the debt, before the settlement with Keith, I should have thought the plaintiff could not succeed.

But, I think, he is entitled to succeed on another ground. I have already described the form of the

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transaction between the defendants and Keith in relation to the judgment in question. It is proved that at that time they actually received from him, or on his behalf, the sum of $15,000, and they acknowledged by deed that what they received for this particular judgment was the sum of $10,634.23. The defendants had a right to appropriate that sum to that extent to that judgment and there could be no more solemn or effectual appropriation of so much of the money received to that particular judgment debt. I think the defendants cannot be heard to say, as between themselves and Keith, that they did not, either on the 20th of August, 1900, or on the 6th of November, 1901, actually receive from him, as and for a payment of that judgment against him, the sum of $10,634.23. Keith was the principal debtor. He owed the whole amount of the judgment to somebody. So far as he knew, the only persons to whom he owed it all were the defendants. There is no evidence that he knew that the defendants had either sureties or security, except what he had himself given, for the debt or any part of it, or knew that they had received any payment on account from any one. Under these circumstances, Keith paid that sum of $10,634.23 to the defendants, and they received it as and for a payment on that judgment debt.

Now, it follows, in my opinion, that, if at that time, by reason of the payments which they had received from Rand or the plaintiff, or from the securities received from them for that judgment debt, there was not so much due as $10,634.23, whatever was received more than was due was in equity received for the plaintiff and Rand Brothers, according to their respective rights as between themselves, and was money clearly recoverable from them on equitable

principles, or as money had and received in an action at law.

The plaintiff has a right to recover his money from somebody. If he were to sue Keith, his answer would be that he had paid the debt himself to the extent of $10,634.23, without knowledge that the plaintiff had anything to do with it.

The question then is: What sum was due to the defendants on the judgment in question when they received the payment? It may be that the plaintiff has a right to regard the payment as made on the 28th February, 1900, but, in any view, as made on the 6th of November, 1901.

I have made a computation, allowing interest at four per cent. on the judgment from date of recovery to the 23rd of July, 1894, when the rate was changed by statute to six per cent., and, applying the payments received from seven hundred and fifty shares of gas stock and the relative debentures at the dates when the same were received, and I find that the sum due on the judgment was only $3,314.61, or the defendants received $7,321.38, out of which to repay the plaintiff what they had received from him. Or, if we compute what remained due on the judgment by applying thereon the sums received from Rand Brothers five hundred shares and debentures alone, and as if they had never applied the plaintiff's shares or debentures at all, but held them for him, they would still have received $3,081.39 more than was due. The defendants have received from the debtor, in my opinion, more than enough to repay the sums received from the plaintiff and for which he, in the first place, recovered a judgment, and, in my opinion, the appeal should be allowed and the judgment should be restored.

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For the satisfaction of the parties I append my computations.

Computation applying the sums received from plaintiff's two hundred and fifty shares and Rand Brothers five hundred shares and relative debentures:

Judgment, Oct. 2, 1893	$10,634.23
Int. to 9 May, 1894, 219d, at 4%	255.22
	$10,889.45
Paid 9 May, 1894	1,944.60
	8,944.85
Interest from 9 May, 1894, to 18 June, 40 d. at 4%	39.20
	8,984.05
Paid 18 June, 1894	1,935.00
	7,049.05
Int. 18 June to 11 July, 23 d at 4%	17.76
	7,066.81
Paid 11 July, 1894	107.12
	6,959.69
Int. 11 July to 23 July, 12 d at 4%	9.15
Int. at 6% 23 July to 31 Dec. 157 d.	179.59
	7,148.43
Cash on sale of 750 shares	4,800.00
	2,348.43
Int. 31 Dec., 1894, to 6 Nov., 1901, 6y. 10m. 6d.	965.18
	$3,314.61

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Computation applying only to Rand Brothers' 500 shares and relative debentures:

Judgment, Oct. 2, 1893	$10,634.23
Int. to 9 May, 1894	255.22
	10,889.45
Paid 9 May	1,296.40
	9,593.05
Int. 9 May to 18 June, 40d. at 4%	42.05
	9,635.10
Paid 18 June	1,290.00
	8,345.10
Int. 18 June to 11 July, 23d. at 4%	21.28
	8,366.38
Paid 11 July	70.40
	8,295.98
Int. to 23 July, 12d. at 4%	11.04
Int. 23 July, '94, to 31 Dec., '94, 157d. at 6%	216.68
	8,523.70
Cash on sale of 500 shares	3,200.00
	5,323.70
Int. to 6 Nov., 1901, 6y. 10m. 6d.	2,229.14
	$7,552.84

Appeal allowed with costs.

Solicitor for the appellant: *W. J. Bowser.*

Solicitor for the respondents: *D. G. Marshall.*

1906
*Mar. 29, 30.

THE OTTAWA ELECTRIC RAILWAY COMPANY .... APPELLANT;

AND

THE CITY OF OTTAWA AND THE CANADA ATLANTIC RAILWAY COMPANY .... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Construction of subway—Apportionment of cost—Person interested or affected—Street railway—Agreement with municipality.

The power of the Board of Railway Commissioners, under sec. 186 of the Railway Act, 1903, to order a highway to be carried over or under a railway is not restricted to the case of opening up a new highway, but may be exercised in respect to one already in existence.

The application for such order may be made by the municipality as well as by the railway company.

The Board, on application by the City of Ottawa, ordered a subway to be made under the track of the Canada Atlantic Railway Co. where it crosses Bank Street, the cost to be apportioned among the city, the C. A. Ry. Co. and the Ottawa Electric Ry. Co. By an agreement between the Electric Company and the city the company was given the right to run its cars along Bank Street and over the railway crossing, paying therefor a specific sum per mile. The company appealed from that portion of the order making them contribute to the cost of the subway, contending that the city was obliged to furnish them with a street over which to run their cars and they could not be subjected to greater burdens than those imposed by the agreement.

Held, that the Electric Co. was a company "interested or affected" in or by the said work within the meaning of sec. 47 of the said Railway Act, and could properly be ordered to contribute to the cost thereof.

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

Held, further, that there was nothing in the agreement between said company and the city to prevent the Board making said order or to alter the liability of the company so to contribute.

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APPEAL from an order of the Board of Railway Commissioners for Canada, by leave of said Board, directing that a subway be made under the track of the Canada Atlantic Railway Co. where it crosses Bank Street in the City of Ottawa and that the cost thereof be apportioned among the city, the Canada Atlantic Railway Co. and the Ottawa Electric Railway Co.

The order of the Board was made on the application of the City of Ottawa. Leave to appeal to the Supreme Court was granted the Ottawa Electric Railway Co. as follows:

"THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

MEETING AT OTTAWA.

Tuesday, the fifth day of September, A.D. 1905.

"Present:

A. C. KILLAM, K.C.,
Chief Commissioner.

HON. M. E. BERNIER, LL.D.,
Deputy Chief Commissioner.

JAMES MILLS, M.A., LL.D.,
Commissioner.

"IN THE MATTER OF

"The application of the Ottawa Electric Railway Company, under section 43 of the "Railway Act, 1903," to the Board for an Order allowing an appeal

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to the Supreme Court of Canada from the order of the said Board dated the 17th day of July, A.D. 1905, directing the Canada Atlantic Railway Company to construct a subway at the crossing of Bank Street, in the City of Ottawa, by the said Canada Atlantic Railway, and apportioning the cost between the Corporation of the City of Ottawa, the Canada Atlantic Railway Company, and the Ottawa Electric Railway Company, as therein set forth;

"Upon hearing counsel for the Ottawa Electric Railway Company, the Canada Atlantic Railway Company, and the Corporation of the City of Ottawa, and the evidence adduced—

"IT IS ORDERED

"That permission be given to the Ottawa Electric Company to appeal to the Supreme Court of Canada upon the following questions of law:

"1. Whether, by reason of the terms of the agreement between the Ottawa Electric Railway Company and the City of Ottawa, dated the 28th day of June, 1893, the Ottawa Electric Railway should have been ordered to contribute to the cost of the work thereby ordered to be constructed;

"2. Whether the Ottawa Electric Railway Company was entitled under said agreement, to have the City of Ottawa furnish to the Ottawa Electric Railway Company, for the use of the said company in the exercise of its running powers, a street or highway known as Bank Street, including that portion of the said street where it is crossed by the tracks of the Canada Atlantic Railway Company (either with the existing grade or with a changed grade as proposed), upon terms as to payment or compensation as laid down in the said agreement, and whether, if such was

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the effect of the said agreement, the Ottawa Electric Railway Company should have been ordered to contribute to the cost of the work thereby ordered to be constructed.

(Sgd.) A. C. KILLAM,
Chief Commissioner,
Board of Railway Commissioners for Canada."

G. F. Henderson for the appellants. The Board cannot make an order in derogation of our rights under the contract with the city which is an interference with property and civil rights in the province. *In re Goodhue*(1); *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*(2); *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(3).

Under the law as it existed when the contract was entered into this order could not have been made and subsequent legislation cannot impair our rights under it. Cooley on Constitutional Limitations, (6 ed.), pp. 335, *et seq.*; *Dartmouth College* v. *Woodward*(4).

McVeity for the respondents City of Ottawa, and *Chrysler K.C.* for the *Canada Atlantic Railway Co.* were not called upon.

The judgment of the court was delivered by

DAVIES J.—This is an appeal granted by leave of the Board of Railway Commissioners from their order directing the Canada Atlantic Railway Company to construct a subway at the crossing of Bank Street in

(1) 19 Gr. 366.
(2) [1899] A.C. 367.
(3) 22 Times L.R. 330.
(4) 4 Wheat. 518.

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the City of Ottawa by the said railway and apportioning the cost between the parties to this appeal.

The permission to appeal was limited to the two following questions of law:

1. Whether by reason of the terms of the agreement between the Ottawa Electric Railway Company and the City of Ottawa, dated the 28th day of June, 1893, the Ottawa Electric Railway Company should have been ordered to contribute to the cost of the work thereby ordered to be constructed.

2. Whether the Ottawa Electric Railway Company was entitled under said agreement to have the City of Ottawa furnish to the Ottawa Electric Railway Company, for the use of the said company in the exercise of its running powers a street or highway known as Bank Street, including that portion of the said street where it is crossed by the tracks of the Canada Atlantic Railway (either with the existing grade or a changed grade as proposed), *upon terms as to payment or compensation as laid down in the said agreement,* and whether, if such was the effect of the said agreement, the Ottawa Electric Railway Company should have been ordered to contribute to the cost of the work thereby ordered to be constructed.

This appeal is, therefore, to be determined by the construction of the said agreement of the 28th day of June, 1893, and unless there is something to be found therein entitling the Ottawa Electric Railway Company to exemption from contribution to the cost of the construction of the said subway the appeal must fail.

Mr. Henderson in a lengthy argument contended that the Board of Railway Commissioners had not on a proper construction of sections 186 and 187 of the "Railway Act, 1903," jurisdiction to make the order appealed from at all.

We were unable to appreciate the force of Mr. Henderson's reasoning on this point, and considered the provisions of the Act referred to broad and ample enough in their terms to enable the Board to act, although that point was not within the terms of the order allowing the appeal.

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Mr. Henderson's contention on the agreement was that by its terms the Electric Company could not be obliged to contribute anything to the cost of any work ordered by the Board of Railway Commissioners for the protection of the public at the crossings of the city streets by the Canada Atlantic Railway and the Ottawa Electric Railway, and that it was entitled to have the street in question provided for it without the imposition of any additional burden.

The clause in the agreement on which Mr. Henderson mainly relied was the 30th. It reserves to the corporation the right to take up the streets traversed by the railway for the purpose of altering the grades thereof or for any purpose within the powers, privileges, duties and obligations of the corporation without any compensation to the company and

without being liable to the companies for damages occasioned thereby to the company or the works connected therewith.

The argument then was that inasmuch as the application to the Board of Railway Commissioners for the construction of this subway was made at the instance of the city it must be taken to be such action relating to the alternative of the grades of the street as is contemplated in and provided for in the agreement, and that the terms of the agreement with reference to these works and alterations preclude the imposition upon the electric railway company of any of their cost.

We did not entertain any doubt whatever on the point at the argument, and did not deem it necessary to call on the other side.

The jurisdiction of the Board of Railway Commissioners under the 187th section does not in any way depend upon the person or company making applica-

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tion under it. We think the Board could, on giving proper notice, invoke that jurisdiction of its own mere motion in the public interest and without waiting for the intervention of any one.

The construction of the subway ordered cannot be said to be an alteration of the grade of the street within the municipal power of the corporation as provided for in the 30th section of the agreement.

On the contrary it is a work in the interest and for the benefit of all parties concerned, ordered by a paramount authority having the fullest jurisdiction over the subject matter, whether invoked by "any party interested or affected," or whether acted on of its own motion without application.

The two railways, the Canada Atlantic and the Ottawa Electric, were under the jurisdiction of the Dominion Parliament as works declared to be for the general advantage of Canada.

In a case lately before us, *City of Toronto* v. *Grand Trunk Railway Co.*(1), we decided that the municipality was a "party interested" within the meaning of the Act there in question, and liable to pay the proportion of the cost of the protective works directed by the Railway Committee of the Privy Council to be paid by it.

The words "party interested" have by the present Act, section 47, been amended to read "party interested or affected," and we have no doubt whatever that in the case before us the Board had full jurisdiction to act, that its order binds alike the corporation and the two railway companies affected, and that there is nothing whatever in the agreement between the city and the electric company which can in any way alter the liability of the company to pay its share

(1) 37 Can. S.C.R. 232.

of the cost of this work ordered by a paramount authority to whose orders as such the company was subject.

We, therefore, answer the first question in the affirmative, reading the words "should have been ordered" as "could have been ordered," which seems to us to cover both questions submitted.

Appeal dismissed with costs.

Solicitors for the appellants: *McCracken, Henderson & McDougal.*

Solicitor for the respondents, City of Ottawa: *Taylor McVeity.*

Solicitors for the respondents, C. A. Ry. Co.: *Chrysler & Bethune.*

1906
*March 16.
*April 6.

ALEXANDER GIBB (PLAINTIFF) ..... APPELLANT;

AND

THOMAS FRANCIS McMAHON, WILLIAM WALSH AND LOUIS P. WALSH, TRUSTEES OF THE ESTATE OF THE LATE MARY FURLONG (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trust—Co-trustees—Joint action—Delegation of trust.

A trustee in Toronto wrote to a co-trustee in St. Mary's stating that an offer had been made to purchase a portion of the trust estate for $12,000 and giving reasons why it should be accepted. The co-trustee replied concurring in said reasons and consenting to the proposed sale. The Toronto trustee afterwards had negotiations with the solicitors of G. and at their suggestion offered to sell the same property to G. for $13,000 but without further notice to his co-trustee. The offer was accepted by the solicitors whereupon the party who had offered $12,000 raised his offer to $14,000 and the trustee notified the solicitors of G. that the sale to him was cancelled. In a suit by G. for specific performance:—

Held, affirming the judgment of the Court of Appeal (9 Ont. L.R. 522) that the letter written by the co-trustee in St. Mary's contained a consent to the particular sale mentioned therein only and could not be construed as a general consent to a sale to any person even for a higher price. Even if it could there were circumstances which occurred between the time it was written and the signing of the contract with G., which should have been communicated to the co-trustee before he could be bound by said contract.

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

*PRESENT:—Sedgewick, Girouard, Davies and Idington JJ.

(1) 9 Ont. L.R. 522.

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Court and restoring that given at the trial in favour of the defendants.

T. F. McMahon and William Walsh, of Toronto, and Louis P. Walsh, of St. Mary's, Ont., were trustees of an estate and on Sept. 1st, 1903, McMahon wrote the following letter to Louis P. Walsh:

My Dear Lou:—

According to the terms of the will of the late Mary Furlong, we are obliged to sell all her property on or before February, 1905. As times are so good here at present and as there is a possibility of further temperance legislation Mr. Walsh and I thought it wise to sell the hotel only now. We advertised the hotel for sale early in August, but received only one bid, namely, from the present tenant, William Hammill, for $11,500. We interviewed all the brewers and have not succeeded in getting another bid. H. H. Williams made a valuation and valued it at $9,600 as a going concern having a license, or $6,600 without a license. Hammill will give us $12,000, and we think it is a good price and think of accepting the offer. Of course, the property is paying better at present, as we now get $1,100 a year. We tried to get permission to hold it until the youngest heir is of age, but both our solicitors and the official guardian tell us that no judge would relieve us of responsibility, and that if any loss resulted from holding it we might be held responsible. Mr. Power objects to selling it, but he has no authority in the matter, and we think his judgment is bad, in fact we think we have an excellent offer, and there is danger of not getting nearly so much a year or more from this time. Will you kindly let me know your opinion at once? Are you willing that we should accept $12,000? Hoping to hear from you promptly, and with kindest regards.

On the 7th of September, 1903, Louis P. Walsh replied as follows:

Dear Doctor:—

Yours received *re* the Furlong estate. Taking everything into consideration I think that it would be wise to accept Hammill's offer. As you say that further temperance legislation is possible, that house is as likely to be cut off as any, in which case, as you say, it would not be worth nearly as much. Another proof of its value is the fact of your having advertised it and receiving no offers, even from the brewers; if there was a snap in it they would soon grab it. Under the circumstances I think it would be better to accept. The reason that I did not answer sooner is that there was

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a friend of mine, living in this neighbourhood, who, a while ago, thought of going to Toronto to buy out a hotel. I saw him Saturday and he has changed his mind.

The third trustee, Wm. Walsh, was a consenting party to the above and to what was done by his co-trustee McMahon afterwards.

Before these letters were written an agent of the appellant Gibb had made some inquiries about the Wheat Sheaf Hotel from McMahon, and on Sept. 14th the latter, having ascertained by telephone that Gibb would consider an offer for the property, wrote the following letter to his (Gibb's) solicitors:

Gentlemen:—

In reply to your request to quote for your client our price for the property, known as the Wheat Sheaf Hotel, corner King and Bathurst Streets, we beg to say that we are prepared to accept thirteen thousand dollars ($13,000) for the same.

This offer lapses after 24 hours.

This offer the solicitors accepted by letter, which was personally delivered to McMahon on the same day.

McMahon did not notify his co-trustee Louis P. Walsh of his intention to make a sale of the property to Gibb, but relied on the letter of Sept. 7th as his authority to sell to any person for $12,000 or more.

On Sept. 19th the solicitors of the trustees wrote the following letter to the appellant's solicitors:

Dear Sirs:—

Dr. T. F. McMahon, of Bathurst Street, has called on us with regard to this matter and instructed us to write you. When he wrote you on or about the 14th inst. offering to take $13,000 for the property he acted in good faith and still desires to do so, but unfortunately the devisees to whom the property belongs have entered a very strong protest against the property being sold, on the ground principally, that the income from the purchase money would not amount to half of the income from the property itself by way of rental. It appears that Mr. Hammill has agreed to rent the property for a number of years at $1,100 per year and he pays the

taxes. The result is that our client's co-trustees have refused to join in the deal with him, and hence he is powerless, as you know one of several trustees cannot act alone in a matter of this kind.

Our client regrets very much the position matters have assumed as above related, but there is no help for it. Our client is, therefore, obliged to declare the deal off, which we hereby do on his behalf.

Yours very truly,
Hearn & Slattery.

P.S.—Under the circumstances our client feels that he should pay you your taxable costs which you have lawfully incurred in this matter. If you will kindly let us have the bill of these costs we will have them paid at once. H. & S.

The appellant then brought an action for specific performance of the contract by McMahon to sell to him. The trial judge dismissed the action holding that the letter of Louis P. Walsh only authorized a sale of the hotel property to the person mentioned therein and was not an authority to sell to any other. The Divisional Court reversed his judgment and decreed specific performance. The Court of Appeal restored the judgment at the trial.

C. H. Ritchie K.C. for the appellant.

Aylesworth K.C. and *Delamere K.C.* for the respondents.

SEDGEWICK J.—I agree with Mr. Justice Davies.

GIROUARD J.—This appeal involves only a question of fact settled by two courts. Did the three trustees agree to sell the land in question? Two certainly did so, but has the third, Louis Walsh, also consented? There may be reasons for doubt upon this point. But I am certainly very far from being clear that he did not consent. For that reason, I do not feel disposed to disturb the judgment appealed from.

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DAVIES J.—This is an action to enforce specific performance of an agreement alleged to have been made by the three defendants, who were trustees for certain infant children, with the plaintiff for the sale to him of an hotel property in Toronto for $13,000.

The agreement was in the form of a letter to the plaintiff from and signed by one of the trustees. It was common ground that the offer had been made with the authority of another of the trustees. It was at once accepted by the plaintiff and if the two trustees making it did so with the authority of their co-trustee it would, of course, be binding. This third trustee lived at St. Mary's, in Ontario; the other two in Toronto.

The authority to the Toronto trustees to act for the trustee living in St. Mary's was, it was contended, contained in a letter written by the latter to one of the former in answer to one asking his opinion and judgment on a proposed sale to the tenant of the property, one Hammill.

The questions to be decided are whether that letter contained a general authority from Walsh, the trustee living in St. Mary's, to his co-trustees to sell for $12,000 or anything they could get over, or whether it was to be limited to the facts and conditions set out in the letter to which it was an answer; and, secondly, whether any new facts or circumstances happened after the 1st September when Louis Walsh was asked for his opinion as a trustee which should have been submitted to him before any new contract was entered into with other parties by his co-trustees purporting to bind him.

The Court of Appeal, unanimously reversing the unanimous decision of the Divisional Court and re-

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storing that of the trial judge, dismissed the action, and I agree with that disposition of the case.

The letter from Louis Walsh to his co-trustee must not be construed as a letter from a principal to his agent would be and the case of *Ireland* v. *Livingston* (1), in 1872, relied on by the Divisional Court has therefore no application to the facts before us.

These letters were those of consultation between independent trustees, the judgment of each one of whom the *cestuis qui trustent* had a right to. Louis Walsh's letter of the 4th Sept. to his co-trustee, which is relied upon as authority for the agreement alleged to have been entered into with plaintiff, must be construed with strict reference to the facts contained in the letter of his co-trustee to which it was an answer. He expresses his opinion that in view of the facts and circumstances stated to him the offer of Hammill for $12,000 should be accepted. These were "the possibility of further temperance legislation," the call for tenders resulting in only one being put in, namely, the tenant Hammill for $11,500, the fact that his co-trustees had "interviewed all the brewers without succeeding in getting a bid," the valuation by Williams (a real estate valuator) of the hotel as a "going concern" at $9,600 and Hammill's advance upon his tender to $12,000, which the Toronto trustees thought should be accepted.

Now looking at the two letters together as a written consultation between two trustees as to the exercise of an independent judgment or discretion vested in each of them I cannot construe Louis Walsh's letter as in any sense an attempt to delegate such a trust as he held.

That, of course, he could not do unless in cases of

(1) L.R. 5 H.L. 395.

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moral necessity arising from the usages of mankind to employ an agent.

Speight v. *Gaunt*(1) at page 19; *Re Gasquoine* (2); *Re Weall* (3).

Neither reasonableness nor necessity required any such general delegation or even such limited delegation as is contended for in the present case. The trustees in Toronto were in a position directly to communicate with their co-trustee in St. Mary's by either telephone or telegraph, and when circumstances occurred which satisfied them they should not sell to Hammill, but to another person for a higher sum, they were bound to submit these circumstances to him for his consideration.

A material change of circumstances occurred which convinced the two resident trustees that there were other and better probable purchasers, one of whom at least was considering an offer of $13,000 made to him by William Walsh, one of the trustees, He was the now plaintiff, a person described as "one who was accustomed to buy and sell hotel property."

Without consulting their co-trustee they make him a written offer which he, through his solicitor, promptly accepts and now seeks to enforce a specific performance of on the ground that Louis Walsh's previous letter of 4th Sept., with reference to the facts submitted to him re Hammill's offer of $12,000, bound him to agree to this subsequent sale.

I agree with the Court of Appeal and the trial judge that it did not and that the changed circumstances demanded that he should be consulted and should concur before another sale was made or the estate as such bound to another sale.

(1) 9 App. Cas. 1.
(2) [1894] 1 Ch. 470.
(3) 42 Ch. D. 674.

The first intimation Louis Walsh had of any negotiations or attempted sale subsequent to those with Hammill for $12,000 was when the latter and a friend waited upon him urging his ratification of an agreement they had made with Wm. Walsh, his co-trustee, for $14,000. He afterwards learned of the alleged sale to plaintiff for $13,000. He promptly and properly refused to do anything until he had time for inquiry and consideration and so far as he is concerned it is agreed he is without blame.

The plaintiff knew that Dr. McMahon, who wrote him the offer of sale and signed on behalf of the estate, was only one of several trustees. He took the risk of his being authorized to make the offer. It now turns out that he was not so authorized to act for Louis Walsh, who never was consulted with regard to it, and who before he knew of it knew also that others were willing to give more money. Unless Louis Walsh, therefore, was bound by his previous letter he would be guilty of a breach of trust in selling for a less price to the plaintiff than he knew others were willing to pay. Not being so bound, in my opinion, the action must fail and the appeal be dismissed.

IDINGTON J.—I think the Court of Appeal rightly restored the judgment of Mr. Justice Street. I accept his reasons. I share his regrets. The defendant McMahon and William Walsh treated plaintiff unfairly. McMahon's action deserves stronger language to describe it. Plaintiff's solicitor explained to him that plaintiff refrained from making an offer lest it should be hawked about to raise the price on another, and he asked for an offer which his client could accept or reject and end the matter.

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McMahon made an offer which he now says he had no authority to make.

Gibb, trusting his good faith and that he had not neglected his duties as a trustee to be armed with authority before offering, accepted, and McMahon thereby got just what Gibb desired to withhold from him and no doubt used it.

He neglected to inform his co-trustee, Louis Walsh, of all this, when the plain duty of one in McMahon's position was not only to have informed his co-trustee, but also to have got from him, if he were willing to give it, his assent to the proposal. It is not often a man can accomplish so much within so narrow a compass.

If I could see my way clear to the application here of the purely agency case of *Ireland* v. *Livingston* (1), at page 416, I would, considering these peculiar actions of McMahon, be much puzzled to find or to be assured of the element of good faith in McMahon's conduct so necessary as an essential part of the legal proposition formulated in that case.

Had McMahon lost instead of gained by the course of events he would have had to make good such loss to the estate. It would not mend matters, however, as I construe Louis Walsh's letter to McMahon, to declare as law that such a letter is such possible authority to any man in the position McMahon was in as co-trustee or co-owner as to enable him to enlarge its effect beyond what it says. The indirect motive in a future case might be found operating the other way to the detriment of honest men. It would, I say it with great respect, be better not to add another to the long list of hard cases making bad law.

(1) L.R. 5 H.L. 395.

I think the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Ritchie, Ludwig & Ballantyne.*

Solicitors for the respondents: *Hearn & Slattery.*

1906
*March 30.
*April 6.

THE JAMES BAY RAILWAY COMPANY........................ } APPELLANT;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA......... } RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Appeal to Supreme Court.

The Board of Railway Commissioners granted an application of the James Bay Railway Co. for leave to carry their line under the track of the G. T. Ry. Co. but, at the request of the latter, imposed the condition that the masonry work of such under crossing should be sufficient to allow of the construction of an additional track on the line of the G. T. Ry. Co. No evidence was given that the latter company intended to lay an additional track in the near future or at any time. The James Bay Co., by leave of a judge, appealed to Supreme Court of Canada from the part of the order imposing such terms contending that the same was beyond the jurisdiction of the Board.

Held, that the Board had jurisdiction to impose said terms.

Held, per Sedgewick, Davies and Maclennan JJ., that the question before the court was rather one of law than of jurisdiction and should have come up on appeal by leave of the Board or been carried before the Governor General in Council.

APPEAL by leave of a judge from an order of the Board of Railway Commissioners for Canada granting an application of the appellants for a crossing under the Grand Trunk line and directing that the substructure be made sufficient to support a second line if thereafter laid.

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

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The order of the Board was as follows:—

"In the matter of

"The application of the James Bay Railway Company, hereinafter called the 'applicant company,' under section 177 of the 'Railway Act, 1903,' to the Board for an Order authorizing an undercrossing of the tracks of the Midland Division of the Grand Trunk Railway Company of Canada, at a point near Beaverton, Ontario, in Lot 13, Concession 7, Township of Thorah, County of Ontario, as shewn on plan on file with the Board under reference No. 16908, file No. 1455;

"Counsel having been heard, for the applicant company and the Grand Trunk Railway Company, and upon the evidence adduced, and the report of the Chief Engineer of the Board—

"It is ordered

"That the applicant company be, and it is hereby authorized to construct and carry its proposed line of railway under the track of the Grand Trunk Railway by means of an under-crossing, at the point shewn on said plan on file with the Board under reference No. 16908, file No. 1455, said under-crossing and drainage facilities in connection therewith to be constructed in accordance with plans to be submitted by the applicant company to and approved of by the Chief Engineer of the Board.

"That, for the purpose of such crossing, the Grand Trunk Railway Company of Canada shall, at the expense of the James Bay Railway Company, raise the tracks of the former mentioned company at the point of crossing aforesaid, and for such distance on each side thereof as shall be considered by the Chief Engineer of the Board necessary to provide a proper grade, to such a height (not exceeding two feet) over

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the present level of said tracks as the Chief Engineer of the Board shall require; and upon completion of the work of so raising such tracks and restoring the roadway to as good a condition as that in which it now is, the James Bay Railway Company shall pay to the Grand Trunk Railway Company the whole cost of such work.

"That the masonry work of the said undercrossing shall be sufficient to allow of the construction of an additional track on the line of the Grand Trunk Railway Company, the superstructure of such additional track to be supplied by the Grand Trunk Railway Company at its own expense when it constructs a double track.

"That the cost of all works in connection with the construction and maintenance of the said undercrossing, save and except the superstructure provided for in the immediately preceding paragraph, shall be borne by the applicant company.

"That the said works are to be carried on under the direction and supervision of an Engineer to be appointed by the Grand Trunk Railway Company, who is to receive a reasonable remuneration for services rendered; and that all works directed to be done under this Order shall be subject to the supervision of the Chief Engineer of the Board."

Barwick K.C. and *G. F. Macdonnell* for the appellants.

Chrysler K.C. for the respondents.

A. G. Blair, Jr., for the Board.

SEDGEWICK J.—This appeal is dismissed with costs. I agree in the reasons stated by my brother Davies.

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GIROUARD J.—I am for dismissing this appeal with costs. The Board had jurisdiction, and even if their decision is wrong we cannot interfere.

DAVIES J.—This appeal comes before us on permission granted by Idington J. upon a question as to the jurisdiction of the Board of Railway Commissioners in making an order allowing the appellant railway to cross the track of the respondent railway to direct that the masonry work of the under-crossing should be sufficient to allow of the construction of an additional track on the line of the respondent railway.

The only question for our determination is that of jurisdiction and the argument at bar resolves itself into this, that there was nothing on the face of the record to justify the part of the order appealed against. It was, of course, conceded that over the whole subject matter in dispute the Board had complete jurisdiction, and Mr. Barwick admitted that if any evidence had been given on the part of the respondent company of an intention to build the second track within a reasonable time no objection could be raised to the order.

A perusal of the "Railway Act, 1903," under which the Board is constituted will shew how very careful Parliament was to invest the Railway Board with the most complete powers over the persons, companies and subject matter placed under its jurisdiction.

Section 41 enacts that

> no order of the Board need shew upon its face that any proceeding was had or given or any circumstance existed necessary to give it jurisdiction to make such order.

And section 42

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that the finding or determination of the Board upon any question of fact within its jurisdiction should be binding and conclusive upon all courts.

From the statute creating the Board it would seem that there are three modes in which its orders can be attacked. One is by way of appeal to the Supreme Court of Canada on a question of law when permission so to appeal is granted by the Board. A second is the mode adopted here of appealing to such court on a question of jurisdiction when permission so to appeal is granted by a judge of this court; and the third is the right of review vested in the Governor in Council in his discretion either upon petition of any interested party or on his own motion.

The point raised here is a very nice one, but from the best consideration I can give it I have reached the conclusion that it is not so much a question of jurisdiction as it is one of law which could only come before us by leave of the Board or one involving the merits of the order made—which can only be reviewed by the Governor in Council.

The question is: Was the term or provision objected to a reasonable one to impose upon the granting of the order asked for by the appellant company? And that is a matter over which the Board had jurisdiction, and the objection simply is that the Board acted on insufficient evidence.

It would seem, therefore, to be more properly either a matter for review before the Governor in Council or one for determination as a matter of law on a reference by the Board.

At any rate there is not, in my opinion, such a manifest defect of jurisdiction in the Board in the imposition of the provision complained of that justifies our setting it aside. The objection is not founded on the absence of any essential preliminary or in the

nature of the subject matter. It is simply that the Board has made an order in the absence of definite evidence which it was competent to make had proper materials been before it. It assumes that having general jurisdiction over the subject matter the Board properly entered on the inquiry, but miscarried in the course of it, a miscarriage which a court of appeal alone could rectify.

See *The Colonial Bank of Australasia* v. *Willan* (1) at page 443.

IDINGTON J.—The appellants applied to the Board of Railway Commissioners for Canada for leave to construct their road across the respondents' road and this was granted; but it was made a term of the order

that the masonry work of the said under-crossing shall be sufficient to allow of the construction of an additional track on the line of the Grand Trunk Railway Company, the superstructure of such additional track to be supplied by the Grand Trunk Railway Company at its own expense when it constructs a double track.

The question raised is whether or not this term was *ultra vires*.

The limit of authority given to the Board in dealing with the questions of such railway crossings is that in sub-section 2 of section 177 of the "Railway Act, 1903," which is expressed by the words

the Board may by order grant such application on such terms as to protection and safety as it may deem expedient * * * as under the circumstances appear to the Board best adapted to remove and prevent all danger of accident, injury or damage, etc.

"Protection and safety" from "danger of accident, injury or damage" would seem to cover all that the Board is entitled in this regard to aim at. All other provisions on the subject of such crossings in other

(1) L.R. 5 P.C. 417.

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sections and in this sub-section are but means to the ends of "protection and safety." Are "protection and safety" directly or indirectly secured by the requirement in this order? No evidence was taken. No statements, as admissions, were put before the Board. Statements were made to which I will presently advert.

In some cases that come before the Board the nature and very essence of the questions raised are such, are so clearly part of what the Board was constituted to pass upon, that formal evidence is not called for to establish a jurisdiction in the Board. There often needs nothing more than the statement of the case for the purpose.

There are other cases, however, in which the questions raised may not be of this character and, for the purpose of finding out whether or not jurisdiction does exist, evidence of a more or less complicated character must be heard and considered. The question raised here is of this latter character.

The distinction between the two kinds of cases is well illustrated by the case in hand. The permission to one railway to cross another is of the first named class. The incidental power of fixing the terms upon which that may be done may be of the secondly named class.

In determining the issue here raised it is not self-evident just how far the Board may go. The questions of "protection and safety" must depend on evidence. The jurisdiction to deal with such questions must rest more or less on evidence shewing that the case comes within the meaning of the phrase as used in the sub-section I have referred to. In every such case, the Board must, in the first place, determine whether the

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facts have brought the matter within their jurisdiction or not.

The Board is so far master of the situation that, if there be any evidence to support a case of jurisdiction, this court cannot interfere with the finding of fact that the Board has made. If upon the evidence, however, this court should be of opinion that there was no evidence to support the jurisdiction or no jurisdiction given upon the facts as determined by the Board, it would become the duty of this court to interfere.

Let us apply these principles to this appeal. It appears upon the case before us that the Grand Trunk Railway had no double track, but only a single track at the point in question.

It was admitted in argument that the charter of the Grand Trunk Railway Company gave power to build a double track. The exercise of that power (it is suggested by paragraph 8 of the case) is subject to leave not yet given. I am unable to find such restriction. Even if it exist, I think that the question is: Can the Board of Railway Commissioners look beyond existing conditions of structure and anticipate what is soon to happen?

I think, although it was not, as I understood, conceded by Mr. Barwick, that there may exist cases of prospective double-tracking, in its relation to a crossing by another railway, that have to be considered in making the order allowing the crossing. Where it is clearly the purpose of the senior road immediately to lay a double track I think such a case must fall within this class.

Take the case of a declared intention to proceed with double-tracking, perhaps extensive preparations made, and where it was quite apparent that the work

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of double-tracking would within every reasonable probability, arising from the surrounding facts and circumstances, be done before the crossing works could be finished. Can it be that, in such a case, the bare chance of which may have moved a few days earlier than the other in announcing a purpose or in beginning to execute it, must determine the whole question of jurisdiction?

It seems to me as if all the facts must be considered and, if the senior road shew a *bonâ fide* present intention to proceed with double-tracking, it might well be said to have shewn a case that fell within the needs of "protection and safety" from "accidents," etc.

Clearly the doing of the work one month in one way, as if for a single track, and next month supplementing the work, or by doing it again in another way, would be doing that which might, I imagine, be in entire disregard of the "protection and safety" of either the travelling public or those engaged in such construction work.

It might be that an immediate purpose of the kind might be simulated. In such a case it would be for the Board to determine what the facts really were. Thorough investigation would make that plain.

This case is presented in a most unsatisfactory way. It seems to me that the appellants, when before the Commissioners, could hardly have had any idea of raising the issue they are now raising, else it would have been made apparent on the record. So far from raising the question of jurisdiction, it was assumed by all parties, as a matter of course, that whatever order in regard to providing for double-tracking might be made, was wholly within the discretion of the Board.

If, notwithstanding the impression of the parties,

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there was, in fact, no jurisdiction, we are not relieved from all responsibility.

The case of *Farquharson* v. *Morgan*(1) shews that, where want of jurisdiction is made clear, it is the duty of the court to prohibit, even though the parties had acquiesced.

There is not, in any case where evidence is necessary to shew how the jurisdiction arose, any legal presumption in favour of jurisdiction. The question to be answered here must be: Is there any evidence in support of the jurisdiction?

That must be determined by the sense in which we take the statements made at the hearing.

It was stated that the Grand Trunk Railway Company intended to put down a double track. Was this said as, and is it to be taken as meaning, an intention to do so within such time as clearly and beyond peradventure would give jurisdiction to the Board of Commissioners to deal with the claims springing out of such an intention, when disposing of the application for a crossing?

It was expressly conceded, when the statement was made before the Board, that it was made in good faith. It was argued that, notwithstanding that, there should not be imposed upon the appellants any such terms.

Statements and arguments were blended together by the parties in their respective support of, or repelling of, the propositions submitted to the Board, and that is the kind of record now presented to us upon which to pass upon one of the most difficult questions of jurisdiction likely to arise. The very unsatisfactory condition of the evidence, for such statements and their acceptance as fact by those concerned are to be

(1) [1894] 1 Q.B. 552.

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received as evidence, makes the case more difficult than it need have been.

I am, in the light I have presented the matter, inclined to think that the statements before the Board are rather a slender basis for the inference necessary to support the jurisdiction.

I do not wish to assent to the proposition that, if the question of jurisdiction be doubtful, we must refrain from exercising the duty imposed upon us by the Railway Act. Where the jurisdiction is a matter of doubt, and the doubt appears in the construction of the statute, I think it clearly our duty to interfere. We lay down for this court the line (for the exercise of our jurisdiction) beyond which we cannot pass at where there is a doubt, whether this court have jurisdiction or not.

We hold, then, that we have not.

The same rule must apply in interpreting the "Railway Act" in relation to any question arising thereunder as to the jurisdiction of the Board of Railway Commissioners.

When the doubt arises, however, from the interpretation of the evidence to be considered and determined by the Board of Commissioners, we may be relieved to some extent from interfering.

The Board of Railway Commissioners may have read the facts which give the jurisdiction in a more liberal sense than we would do in such a case, but, as long as there is any evidence upon which reasonable men might say that the facts are thus and so, we cannot say, then, that there is no evidence and interfere. I cannot say, here, that there is no evidence; the doubt is as to whether the purport or effect of it is as shewing present intention to double-track or a mere prospect in the remote future.

I have confined my opinion to a present existing purpose as giving the limit of jurisdiction in this regard, and I assume the statements I have adverted to as possible evidence of that intention.

We are not concerned, therefore, here to answer the question as to a more remote purpose. When such a case arises, I would desire to be free from the embarrassment of any present expression of opinion. I, therefore, express none.

I may be permitted to express the hope that, when parties go before the Board hereafter, they will, as they ought to, if intending to raise a question of jurisdiction, do so before the Board, and have the matter there thoroughly threshed out.

Prohibition, for which this proceeding before this court has in relation to the Board of Railway Commissioners been substituted by the "Railway Act, 1903," has been refused upon the ground that the objection to jurisdiction was not raised in the court trying the cause.

In *Moore* v. *Gamgee* (1) it was held that the right to object might be waived. I do not wish to express any final opinion upon the point as to whether or not this may be applicable to cases arising under the "Railway Act" in question. I rather incline to think that the purpose of the legislature in this Act was to impose an imperative duty on this court in relation to the jurisdiction of the other.

But if, in similar cases upon which the question of jurisdiction depends upon whether there is evidence to support it or not, parties have failed to thresh the matter out in the way I have suggested they may find a difficulty in getting leave to appeal.

I adhere to the opinion I entertained in granting

(1) 25 Q.B.D. 244.

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leave that it should be granted, as a general rule, where there is, as I think there was here, a fairly arguable case. Yet if it should turn out, on further investigation, that we have any discretion in such a case, I think it would be well exercised in refusing leave to appeal in a similar case.

The novelty of the practice introduced by the "Railway Act" allotting to this court the power we are now called upon to exercise is the only excuse for the matter having been left in the way the parties chose to leave it, and is also the only reason for adverting, at such length as I have done, to some of the principles that must be considered in administering this new jurisdiction.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I agree for the reasons stated by my brother Davies.

Appeal dismissed with costs.

Solicitor for the appellants: *G. F. Macdonnell.*
Solicitor for the respondents: *W. H. Biggar.*

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*March. 14.
*April 6.

THE SHIP "NORTH," HER GOODS, BOATS, TACKLE, RIGGING, APPAREL, FURNITURE. STORES AND CARGO (DEFENDANT) . . . . APPELLANT;

AND

HIS MAJESTY THE KING, EX REL. THE ATTORNEY GENERAL FOR THE DOMINION OF CANADA (PLAINTIFF) . . . . RESPONDENT;

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT.

Canadian waters—Three-mile-zone—Fishing by foreign vessels—Legislative jurisdiction—Seizure on high seas—Pursuit beyond territorial limit—International law—Constitutional law—B.N.A. Act, 1867, *s.* 91, *s-s* 12—*Sea-coast fisheries—R.S.C.* 94, *ss.* 2, 3, 4.

Under the provisions of the British North American Act, 1867, sec. 91, sub-section 12, the Parliament of Canada has exclusive jurisdiction to legislate with respect to fisheries within the three-mile-zone off the sea-coasts of Canada.

A foreign vessel found violating the fishery laws of Canada within three marine miles off the sea-coasts of the Dominion may be immediately pursued beyond the three-mile-zone and lawfully seized on the high seas. Girouard J. dissenting.

The judgment appealed from, (11 B.C. Rep. 473) was affirmed.

APPEAL from the decree of Mr. Justice Archer Martin, local judge in admiralty for the British Columbia Admiralty District, in the Exchequer Court of Canada(1), condemning the ship "North," her

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

(1) 11 B.C. Rep. 473.

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goods, boats, tackle, rigging, apparel, furniture, stores and cargo as forfeited to His Majesty for violation of the "Act respecting Fishing by Foreign Vessels," (1) with costs.

On the 8th of July, 1905, the Dominion Government cruiser "Kestrel" sighted the American schooner "North" on the fishing grounds in Quatsino Sound within the three-mile-zone off the coast of British Columbia, having four dories out and evidently engaged in fishing for halibut contrary to the provisions of the Act, R.S.C. ch. 94. On being chased by the cruiser, the schooner picked up two of her dories and stood out to sea. The cruiser kept up a continuous chase (picking up one of the dories on the way) overhauled and seized the schooner on the high seas, some distance outside the three-mile-zone, and towed her into port at Winter Harbour, B.C., where she was properly attached and libelled in the Admiralty Division of the Exchequer Court of Canada. At the time of seizure freshly caught halibut were lying upon the deck of the schooner and there were other evidences present shewing that she had been recently engaged in fishing.

The action was brought on the information of the Attorney General for Canada and the present appeal is from the above mentioned decree made on the 25th of August, 1905.

The questions raised on the appeal are discussed in the judgments not reported.

Wilson K.C. (Attorney General for British Columbia) for the appellant. The ship "North" was, at the time of the seizure, on the high seas and was part of the territory of the United States of America. See

(1) R.S.C. ch. 94.

Reg. v. *Anderson*(1), *per* Blackburn J. at page 163; *Reg.* v. *Lesley*(2); *Reg.* v. *Carr*(3); *Marshall* v. *Murgatroyd*(4); *Cranstoun* v. *Bird*(5). Consequently, she could not be lawfully seized there by the officers of a foreign state for violation of a municipal regulation. In any case, the territorial waters known as the "three-mile-limit" off the sea-coast of British Columbia form part of that province and are not subject to the legislative jurisdiction of the Dominion of Canada nor can the present controversy come within the jurisdiction of a Dominion court.

The doctrine of pursuit rests on the opinion of Mr. Hall and other writers on international law, and is contrary to the law of England, which maintains the territoriality of the ship. The doctrines of international law are only to be applied as between nations. Even if the doctrines of international law are to be applied, then they must be expressed in some proclamation or statute of the nation desiring to give effect to them. No statutory authority exists in Canada to pursue or to seize beyond the three-mile-limit. If the right to pursue beyond the territorial limits of a state exists without statute, then it is the exercise of sovereign power pursuant to international law, and this power has not been conferred on Canada. Canada has no jurisdiction beyond her territorial boundaries —in this case, the three-mile-limit. See *Low* v. *Routledge* (6); *Reg.* v. *Brierly* (7), at page 534; *Reg.* v. *Keyn*(8); *Re Smith* (9); *McLeod* v. *Attorney General*

(1) L.R. 1 C.C.R. 161.
(2) Bell C.C. 220.
(3) 10 Q.B.D. 76.
(4) L.R. 6 Q.B. 31.
(5) 4 B.C. Rep. 569.
(6) 1 Ch. App. 42.
(7) 14 O.R. 525.
(8) 2 Ex. D. 63.
(9) 1 P.D. 300.

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for New South Wales (1); and *The Lord Advocate* v. *Weymss* (2), *per* Watson L.J., at page 66.

The attention of the court is directed to an article entitled: "Is International Law part of the Law of England?" in the January number of the current Law Quarterly Review, (3) by J. Westlake K.C.

Newcombe K.C. (Deputy Minister of Justice) for the respondent. In the case of a crime a seizure may be made where the pursuit is continuous. This case involves a violation of the law which constitutes a crime, and as such it would be regarded by the law, not only of this country but by that of England and by that of the United States of America. This is no question of municipal or local laws or regulations, but involves the rights of the Crown particularly in international relations. It is essentially sovereign legislation and the jurisdiction of the Crown is not limited to a distance of three miles from the coast.

The statute, R.S.C. ch. 94, does not absolutely prohibit fishing by foreigners, but only provides that they shall not do so without a license. The exclusive rights in fisheries within the territorial waters of the sea-coast are not strictly property, but are interests respected by foreign nations and form an appanage of the state. These rights, whether territorial or of jurisdiction, cannot be vested in the province the authority of which is confined to the bounds of the province. There is, however, no question of property involved in the present case.

The Dominion alone represents the country *quoad* transactions with parties outside the state. This

(1) (1891) A.C. 455.
(2) [1900] A.C. 48.
(3) 22 L.Q.R. 14.

is particularly the case so far as the territorial waters are concerned, the principle of the recognition of which is the need for provision for the security of the state. All matters affecting defence belong to the Dominion.

The Dominion, under the express provisions of the British North America Act, 1867, has alone the power to legislate with regard to sea-coast fisheries, and to prescribe the terms, if at all, on which foreigners shall be permitted to fish therein.

The court is referred to the following authorities: *The "Appollon"* (1); Woolsey on International Law, pp. 27, 69, 71, 365; 5 Revue de droit international (2 ser.), 82; Moore on Extradition, pp. 292 to 302; Westlake International Law, pp. 172-4; The "Interpretation Act," R.S.C. ch. 1, sec. 7, par. 37; *The "Marianna Flora"* (2); 59 Geo. III. ch. 38, sec. 2; Oppenheim International Law, p. 321; Hall International Law (5 ed.) 256; Cobbett's Leading Cases on International Law, p. 344; *Reg.* v. *Scott* (3).

SEDGEWICK J.—For the reasons given in the court below, I am of the opinion that this appeal should be dismissed.

The appeal is dismissed with costs.

GIROUARD J. (dissenting).—I have had the advantage of carefully perusing the opinion of my brother Davies, and were it not for our own statute in the matter, An Act respecting Fishing by Foreign Vessels, R.S.C. ch. 94, I do not think I would have dissented.

(1) 9 Wheaton, 362.

(2) Scott Cas. Int. Law, 874; 11 Wheaton 1.

(3) 9 B. & C. 446.

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Girouard J.

I cannot agree with him that section 4 alone determines the jurisdiction of the court. I think sections 2, 3 and 4 must be considered together. True, section 4 refers to seizure, that is to say, I presume, the warrant of the Admiralty Court served on a vessel; if that section stood alone the conclusions arrived at by the majority of the court would undoubtedly be correct.

Sections 2 and 3, although not referring to seizure, mention certain steps which are conditions precedent to the seizure and the jurisdiction of the court. Section 2 declares that the officer in charge of the governmen cruiser

may go on board of any ship * * * within any harbour in Canada, or hovering in British waters within three marine miles of any coast;

and then section 3 adds that the said officer

may *bring* any ship * * * within any harbour in Canada or hovering within British waters within three marine miles of any of the coasts * * * into port, etc.

It seems evident to me that the government officer cannot go on board of any ship violating our fishery laws except within three marine miles of any coast, and that, likewise, he cannot bring any such ship into port except within the three-mile-limit. Of course, I understand that if the officer boarding any such ship within the three-mile-limit is taken outside of it by force of circumstances, in such a case he would probably have the right to pursue, but this is not the case before us. The seizure, properly so called, was made in port and is not generally executed otherwise, for it is done by issuing a warrant out of the Admiralty Court and serving it on board the vessel in default after she has been brought into port.

But whether it be so or not, I look upon the board-

ing of a vessel and taking it into port within the three-mile-limit as conditions precedent which must be complied with to give jurisdiction to the court and make the seizure legal. I think the language of section 4 has made that proposition still more clear, for it declares that

all goods, ships * * * liable to forfeiture *under this Act* may be seized, etc.

This forfeiture cannot take place except as provided for in sections 2 and 3, and, without complying with the requirements of these sections, I say again that the court had no jurisdiction.

Much reliance has been placed on the decision of the Queen's Bench Division in *The Queen* v. *Hughes* (1), and on a late decision of the Court of Appeal for Ontario, *In re Walton* (2), but in both these cases the courts had not before them a statute like the Act respecting Fishing by Foreign Vessels, R.S.C. ch. 94, and which to my mind affects the very jurisdiction of the court. Had the jurisdiction of the court been involved in these cases, I am inclined to think that the conclusion would have been very different. Lopes J., speaking with the majority in *The Queen* v. *Hughes* (1), said:

I think the warrant in this case was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices.

Hawkins J., quoting Erle C.J. with approbation, said:

In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such step.

(1) 4 Q.B.D. 614. (2) 11 Ont. L.R. 94.

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As I have already remarked, our Canadian statute has imposed the necessity of boarding the fishing vessel and taking her into port within the three-mile-limit before the seizure can be made, and for that reason, and only for that one, I believe the appeal ought to be allowed with costs, and the seizure quashed, except as to the two small boats actually caught within the three-mile-limit.

DAVIES J.—The "North" was an American Fishing schooner and was found by the Dominion fishing cruiser "Kestrel" on the 8th July, 1905, fishing off the coast of British Columbia within the three-mile-limit or zone.

On being discovered the poaching schooner immediately endeavoured to escape into the high seas beyond the three-mile-limit. She was at once pursued by the "Kestrel" and two of her boats, which were out fishing and which she was unable to pick up while endeavouring herself to escape, were captured. The schooner was not overtaken till she had passed out beyond the three-mile-limit into the high seas. She was, when overtaken, taken possession of for illegal fishing, brought into port, libelled in the Admiralty Court and after trial condemned.

Some questions were raised on this appeal by Mr. Wilson as to the legality of the condemnation on the ground that the fisheries along the coast belonged to the province and not to the Dominion and that the legislation for their protection should have been provincial and not Dominion. The simple answer to such objections is that the British North America Act, 1867, conferred upon the Dominion the exclusive power of legislation with respect to seacoast and inland fisheries and that the judgment of the Judicial

Committee in the case of *Attorney General of Canada* v. *Attorney-General of Ontario*(1), determines affirmatively the exclusive right of the Dominion Parliament to make or authorize the making of regulations and restrictions respecting the fisheries of Canada.

The "North" being a foreign schooner was charged with the offence of fishing within three miles from the sea coast without a license, against the provisions of the Dominion statute, R.S.C. ch. 94. Though not formally abandoned on the appeal it was not contended that the evidence of the vessel's guilt was defective or insufficient. The appeal was rested solely on the ground that when the schooner was actually overtaken and seized she had passed out of the three-mile-limit on to the high seas and that the officers had no right under the statute, under the circumstances, to make the seizure and bring her into port and that the subsequent condemnation of the schooner was, therefore, illegal.

The ground taken by Mr. Wilson was that a true construction of the Dominion statute did not authorize any of the officers clothed with authority to seize fishing vessels poaching in the territorial waters of Canada to follow such vessels outside of the three-mile-limit, although found committing the offence within that limit, and that any seizure made outside of such limit, even when made in hot pursuit of the offender, was without authority and illegal.

To confer such a power Mr. Wilson contended that two things must exist: a treaty between the nation whose ship was charged with the offence and the nation whose ship seized the offender authorizing the seizure on the high seas beyond territorial waters

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

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and municipal legislation in furtherance of that treaty.

I am quite unable to agree with these contentions. I think the Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations, and that by that law when a vessel within foreign territory commits an infraction of its laws either for the protection of its fisheries or its revenues or coasts she may be immediately pursued into the open seas beyond the territorial limits and there taken. As Mr. Hall observes in the Book upon International Law (4 ed.) at page 267:

> It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun or which but for the accident of immediate escape would have been begun within the territory itself and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised.

This clear terse statement of the law and the reason for it is amply sustained by the array of authorities cited by Martin J. the local judge in admiralty in his judgment. The right of hot pursuit of a vessel found illegally fishing within the territorial waters of another nation being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge in this prosecution.

The language of our statute does not limit the powers of the officers entrusted with the protection of our seacoast fisheries to their exercise within the three-mile-limit. That language is, I think, quite broad enough to cover such a case as the one before us, and the fourth section of the statute, so far from negativing the doctrine of immediate or hot pursuit of a poacher by its broad and general language, may

be said impliedly to adopt it. I do not agree that any special treaty is necessary to enable a nation to protect its fisheries within the zone prescribed by the law of nations or that unless such a treaty exists embodying the doctrine of hot pursuit of a vessel found illegally fishing within territorial waters such vessel is immune from seizure once she passes beyond those waters into the high seas.

The laws of a state can only, as Mr. Hall says, run outside its territorial waters against the vessels or subjects of another state with the express or tacit consent of the latter. Municipal legislation embodying the doctrine of the law of nations with respect to seizure of foreign vessels beyond territorial jurisdiction would not confer any additional authority as against a foreign ship to that embodied in international law from which alone the right to seize a foreign vessel beyond territorial waters for infraction of municipal law within these waters can be obtained. No such legislation as that contended for as necessary by Mr. Wilson exists, as far as I am aware, in the British dominions, nor did he cite any precedent from the legislation of any foreign country. I am quite satisfied that the existing legislation of the Dominion is sufficient and that the seizure of the "North" under the facts of this case as practically admitted was legal.

But even if there was a reasonable doubt as to the power of the officers of the cruiser to seize the schooner on the high seas beyond the three-mile-limit, under the circumstances before us, I am of the opinion that such irregularity could not affect the jurisdiction of the Admiralty Court to hear and determine the offence charged against the schooner. That offence being within the jurisdiction of the court and the vessel being also within such jurisdiction and pro-

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perly attached and libelled could not plead an alleged irregularity in the mode of her being taken on the high seas as a defence.

The manner in which she was brought into port and within the jurisdiction of the court was, if wrong or irregular, matter for diplomatic protest at the instance of the country to which she belonged or for civil action by the owners of the ship. If that country does not complain of any offence against its honour and dignity the ship libelled cannot do so. If the poaching schooner had escaped into the territorial waters of her own country and had been chased there, captured and brought back the government of that country might well justify intervention. But short of such intervention I think the ship charged with illegal fishing within the three-mile-limit being within the jurisdiction of the Admiralty Court and properly libelled there for an offence committed within its jurisdiction proceedings cannot be defeated or the jurisdiction of the court ousted merely by an irregularity in the taking of the ship.

The principle underlying the decisions relating to persons kidnapped and brought before magistrates having jurisdiction over the offence with which they are charged are, I think, in point. These cases shew that the remedy for the illegal arrest and the kidnapping of the prisoner is by proceedings at the instance of the government of the foreign country whose laws or territory has been violated or at the suit of the injured party against the trespasser.

See *In re Walton*(1) where many cases in point are cited. Se also *The Queen* v. *Hughes*(2), where a very strong court of ten judges held, with one dissent alone, that a person being before justices and

(1) 11 Ont. L.R. 94. (2) 4 Q.B.D. 614.

charged with an offence over which they had jurisdiction in respect of time and place no irregularity in his arrest or bringing before the court could avail to impeach their jurisdiction to try him.

The remedies of the prisoner for illegal arrest or detention remained unimpaired, but the jurisdiction of the court was unquestionable and unaffected by the manner in which the prisoner was brought before it.

I think the appeal should be dismissed with costs.

IDINGTON J.—This is an appeal from the condemnation of the appellant in the Exchequer Court. The learned trial judge, Mr. Justice Martin, sitting in the British Columbia Admiralty district found that the appellant ship had become liable to forfeiture under the provisions of the "Act respecting Fishing by Foreign Vessels," ch. 94 of the Revised Statutes of Canada.

The ship was fishing within the three-mile-zone on the coast of British Columbia. When observed and pursued she fled and was captured outside the three-mile-zone.

There seems to be no real contention about the findings of fact though not admitted to be absolutely correct. The appeal raises several questions of interest and some of them of considerable importance.

The appellant's counsel did not rest the appeal upon a contestation of the facts, but upon a denial of the right of pursuit according to international law and claimed that

even if the doctrines of international law are to be applied then they must be expressed in some proclamation or statute of the nature desiring to give effect to them.

Without assenting to this proposition as being one of universal application I assume that for the pur-

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poses of this case the judgment must be rested upon the statute.

Whether or not this was present to the mind of the learned trial judge does not appear.

The general, though not universal, principle that municipal legislation is necessary to give effect to the doctrines of international law may have been assumed by him, and I think probably was assumed. These principles would not in themselves be effective or become operative in cases of this kind without municipal legislation.

Paradoxical as it may seem, the recognition of a right that international law gives should precede the municipal legislation. No prudent sovereign power would willingly, in these modern times, invite conflict with a neighbour by enacting a statute directing that to be done which international law had clearly forbidden or that which had been denied as an inherent right.

This statute now in question must be read in light of the well known, recognized, customary or international law that has preceded it, and is yet in force, and receive interpretation thereby.

The meaning of this statute when so read seems to be beyond all doubt.

The right of search is first given in the case of vessels in Canadian waters.

Then section 3 describes what may be done, or so done as to cause a forfeiture of the vessel.

Then section 4 enacts that vessels so liable to forfeiture may be seized and secured by any officers mentioned in the second section.

The right to seize must have originated and the attempt to seize must have begun in Canadian waters.

There is nothing in the statute itself expressly

limiting the attempt to seize or seizure to the Canadian waters. Where is the limitation to be found? Certainly not in the words of the statute.

In the absence of words of limitation it might be urged that power was intended to be given to seize on the high seas wherever the offending vessel might be found, so long as no other state was invaded.

It would be unsafe to assume, that any such intention existed in the mind of Parliament in using such comprehensive and unlimited language as used here.

Why so? Clearly because by the customary law or international law or established usage, call it which you will, the right to rove anywhere and everywhere over the ocean and make seizure of vessels is not recognized by the general opinion of civilized men or by the sovereign powers of later times as a thing that should be done or permitted to be done in cases such as this.

The wide, general nature of the words used must, by observing these considerations, therefore, be restricted within what all men, having to do with such matters, understand as reasonable.

This understanding we find in the expositions of text writers, the judgments of courts, and the treaties of nations. We must assume it was present to the minds of the legislators using this wide language, and intended by them to lend it a reasonable meaning.

It seems to be conceded by counsel that such is the almost universal modern understanding, derived from such sources, that what is known as the three-mile-limit might be considered as within these words relative to seizure, if they mean anything, but not beyond.

I am unable to comprehend why we should adopt

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the one part of this recognized, customary, or international law and discard all else.

The sole question raised here seems to be whether or not the authority given by section 4 does not imply that the seizure may be made where and under such circumstances as international law would permit.

I think clearly that this is the meaning of the statute. It gives the widest authority that international law, or in other words, established usage, may justify.

It is just as if a statute authorized in like words a sheriff to seize goods or person. That would be read as meaning, though not expressly saying so, within his county.

The case of *McLeod* v. *The Attorney-General of New South Wales*(1), I think, well illustrates what I am trying to explain as my view of this statute.

The interpretation of the Act in question there, in which the words used were capable of an unlimited sense, was held to be that it must be read as meaning, and only in force, so far as the legislature of New South Wales had power to legislate.

The authority to seize here is to be restricted as within the limits that international law recognizes, a seizure can be made.

The seizure is not to be frustrated by the wrongdoer's attempt to escape. The right of pursuit is recognized by international law. It springs from the necessity of the case. It rests upon what in the last analysis is the base of so much international law in many analogous cases, the necessities of self-defence and protection.

The growth of that body of custom known as international law has, only in modern times, found re-

(1) (1891) A.C. 455.

cognition of hard and fast lines in some cases. In its still growing condition it must be tested in regard to the questions here raised by what appeals to all men as reasonable, where the occasion arises for the protection of the coast-line of the land, the three-mile-zone recognized as quasi appurtenant thereto, and the fish therein. This implies all else that demands the exercise of sovereign power, beyond the land, to make that protecting power efficient within it.

The counsel for appellant took three other points which may be looked upon as subsidiary and are covered perhaps by what I have said, but summed up in the last one taken by him, which is thus stated:

> Canada has no jurisdiction beyond her territorial boundaries, in this case the three-mile-limit,

and which I should perhaps briefly notice.

In so far as this objection rests upon the absence of special statutory enactment relative to that part of the ocean beyond the three-mile-limit, it is answered by the interpretation already given the statute. If, however, the objection is intended to distinguish between the authority that may exist in the Imperial Parliament and that more limited authority that the Canadian Parliament as a mere colonial legislature may possess, different considerations may arise. In this way of putting the objection it seems to be covered by section 91, sub-section 12 of the British North America Act, 1867, and the case of *"The Fisheries Act"*(1). This section 91 was intended to and does, I think, confer upon Canada as full power in every respect in relation to the sea-coast and inland fisheries of Canada as was possessed by the Imperial Parliament itself. It seems to be beyond doubt that

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

such delegated authority would carry with it the right to pass such an Act as that now in question. The Act was upheld in the case just referred to.

The right to legislate in respect of the right of pursuit so far as it existed, in relation to the necessity for protecting the sea-coast and fisheries thereon, would be thus impliedly if not explicitly conferred.

The right of pursuit is expressly recognized by such eminent authority as the late Mr. Hall and others. The exact points involved in the case now in hand have not been passed upon by any of the decisions cited to us or any that I can find. But clearly the principles underlying the decision in the case of *Hudson* v. *Guestier* (1) support a seizure on the high seas, even for breach of a municipal regulation, though the seizure took place beyond the three-mile-limit and even beyond the two leagues that the regulation there in question specified for a seizure to be made. If taken as authority for us here it would support: First, the case of the forfeiture by reason of a breach of our municipal law: and; Secondly, the adjudication by reason of the vessel having been brought when seized within the jurisdiction of the court which had to adjudicate upon the offence, and determine whether forfeiture had taken place or not.

The decision in the case of *Church* v. *Hubbart* (2) did not turn upon the principles asserted by Chief Justice Marshall as quoted by the learned trial judge in his judgment. The case turned upon the reception of what was held to have been inadmissible evidence and for that reason a new trial was granted.

But clearly the principles enunciated by Chief Justice Marshall and the holding in *Hudson* v.

(1) 6 Cranch 281. (2) 2 Cranch 187.

Guestier (1), if correct, shew that the fundamental right existed to so legislate that a foreign vessel might become forfeited for non-observance of a municipal regulation, and be seized beyond the three-mile-zone. This right has been repeatedly asserted by legislation relative to breaches of shipping laws, neutrality laws, and customs or revenue laws, as well as the case of fisheries. In each case the reasonable necessity seems to have been the basis for such legislation and the reason for its recognition in international law.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I agree in the reasons stated by my brother Davies.

Appeal dismissed with costs.

Solicitor for the appellant: *J. H. Senkler.*

Solicitor for the respondent: *D. G. Macdonell.*

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(1) 6 Cranch 281.

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*April 2, 3.
*April 14.

RICHARD CONNELL AND OTHERS (DEFENDANTS) .... APPELLANTS;

AND

WILLIAM CONNELL AND MARTIN CONNELL (PLAINTIFFS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will — Promoter — Evidence — Subsequent conduct of testator — Residuary devise—Trust.

In proceedings for probate by the executors of a will which was opposed on the ground that it was prepared by one of the executors who was also a beneficiary there was evidence, though contradictory, that before the will was executed it was read over to the testator who seemed to understand its provisions.

Held, Idington J. dissenting, that such evidence and the facts that the testator lived for several years after it was executed and on several occasions during that time spoke of having made his will and never revoked nor altered it, satisfied the onus, if it existed, on the executor to satisfy the court that the testator knew and approved of its provisions.

Held, also, that where the testator's estate was worth some $50,000 and he had no children it was doubtful if a bequest to the propounder, his brother, of $1,000 was such a substantial benefit that it would give rise to the onus contended for by those opposing the will.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of Mr. Justice Britton in favour of the defendants.

The proceedings in this case were instituted in the Surrogate Court for probate of the will of James Connell by the plaintiffs, his executors, and were resisted by his brothers and sisters, who claimed that the will

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*PRESENT:—Sedgewick, Girouard, Davies, and Idington JJ.

was prepared by one of the plaintiffs, who took a benefit under it and that it was not executed in the manner required by law. The case was removed into the High Court by order.

The will was prepared by William Connell, one of the plaintiffs, at the testator's house where he was confined to his bed and apparently very ill. William Connell testified that it was signed by the testator in the presence of the two subscribing witnesses, both of whom, however, swore positively that it was not. The trial judge believed the latter and held that the will was not properly executed.

William Connell, who prepared the will, received a legacy of $1,000 and a large portion of the estate was left to Martin Connell, the other executor. The evidence was conflicting as to whether or not the will was read over to the testator before execution, but the Court of Appeal, which reversed the judgment at the trial as to the execution, held, also, that the fact of the testator living for sixteen years longer without revoking or altering it satisfied the onus on William Connell to establish that he knew and approved of its terms.

Watson K.C. for the appellants. This case turns almost entirely on the credit to be given to the respective statements of the witnesses concerning the circumstances attending the preparation and execution of the will. As to this the ruling of the judge at the trial should not have been disturbed. *Village of Granby* v. *Ménard*(1); *Kirkpatrick* v. *McNamee*(2); *Royal Electric Co.* v. *Paquette*(3); *Montgomerie & Co.* v. *Wallace-James*(4).

(1) 31 Can. S.C.R. 14.
(2) 36 Can. S.C.R. 152.
(3) 35 Can. S.C.R. 202.
(4) [1904] A.C. 73.

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Whiting K.C. and *Middleton* (*French K.C.* with them) for the respondents.

A. A. Fisher watched the case for the widow.

The judgment of the court was delivered by

DAVIES J.—I agree with the judgment of the Court of Appeal delivered by Mr. Justice Maclennan and would dismiss this appeal.

The two points argued at great length before us were, first, non-compliance in the execution of the will with the statutory requirements, and, secondly, that the substantial benefits alleged to be conferred upon William Connell, the draftsman of the will, raised an onus upon him of satisfying the court that the testator knew and approved of the contents of the instrument.

We have had occasion very lately to consider the latter question very fully in the case of *The British & Foreign Bible Society* v. *Tupper*(1), and there can be no doubt that the rule as contended for by Mr. Watson as laid down in *Barry* v. *Butlin*(2); *Fulton* v. *Andrew*(3); and *Tyrrell* v. *Painton*(4), is the correct rule. But I concur with the Court of Appeal in thinking that such onus, if applicable here, has been satisfied by the evidence given and the facts that the testator after executing his will recovered his usual health, lived for sixteen years afterwards, on several occasions spoke of having made his will and never revoked nor altered it.

I desire also to say that the benefit which gives rise to the onus embodied in the rule laid down by

(1) 37 Can. S.C.R. 100.
(2) 2 Moo. P.C. 480.
(3) L.R. 7 H.L. 448.
(4) [1894] P.D. 151.

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Baron Parke in *Barry* v. *Butlin* (1) must be a substantial one and that a small bequest or one made to the draftsman in common with others of a class to which he belonged and which owing to his relationship to the testator he might naturally expect would not necessarily give rise to the onus mentioned in the rule. And so in this case having regard to the value of the testator's estate at the time he made the will, and to the fact that he had no children, I would greatly doubt that the $1,000 bequests to his brother William and to William's daughter by themselves would, considering the other bequests, give rise to the onus contended for.

So far as the residuary devise is concerned declaring that such residue

should be placed in the hands of my executors hereinafter named and to be disposed of by them as they might think proper,

it is, I think, not an absolute gift to the executors as individuals, but one simply in trust and must fail because the trust is so indefinite. It does not contain any express words of gift, but simply a disposing power with directions to the executors as to such disposition which directions fail because of their indefiniteness, and for want of adequate expression of the trust intended. *Yeap Cheah Neo* v. *Ong Cheng Neo* (2). at pp. 390-2, seems to be conclusive on the point.

Then with respect to the execution of the will the only point upon which the evidence of the witnesses to the will and the two Connells, William and Martin, is at variance is the signing by the testator of the will in the manner they describe *in the actual presence* of the witnesses.

Of course such signing was not absolutely neces-

(1) 2 Moo. P.C. 480. (2) L.R. 6 P.C. 381.

sary. A previous signing with an acknowledgment by the testator in the presence of the two witnesses would be sufficient. It seems to me that this was probably what took place, and if so it would go far to reconcile the apparently conflicting testimony. That the signature is that of the testator there is no question, and it is equally true that it was there signed when the witnesses signed their names. It may have been so signed by the testator in the manner William and Martin describe, but just before the witnesses entered the room, a theory quite consistent with every word Mr. McFadden, the witness, swore to and which would reconcile the conflicting evidence.

The crucial point would be then: Was James, the testator, fully conscious of what was being done at the time the attestation clause was read to the witnesses and when they signed and was this done at his request?

Looking at all the evidence I have no difficulty in agreeing that he was so conscious and that there was a legal acknowledgment by the testator in the presence of both witnesses of the signing of the will by him.

IDINGTON J. (dissenting)—The late James Connell died on or about the 30th day of May, 1903.

On the 9th day of January, 1887, he signed a document now propounded as his last will. The learned trial judge held that this was not executed in presence of two witnesses as required by law and therefore void. He also held that by reason of the executor, William Connell, who drew the will, being a beneficiary, and the other circumstances attendant upon the execution being such as to arouse suspicion, the executors had failed to satisfy the conscience of the

court as required in such cases by the rules laid down in *Barry* v. *Butlin* (1), and the application of the same principles as lie at the foundation of these rules as illustrated by the case of *Tyrrell* v. *Painton* (2).

I quoted in the recent case of *British and Foreign Bible Society* v. *Tupper* (3), decided in this court last term, the rules in *Barry* v. *Butlin* (1). In *Tyrrell* v. *Painton* (2), at page 157, Lindley L.J. says:

> The rule in *Barry* v. *Butlin* (1); *Fulton* v. *Andrew* (4); and *Brown* v. *Fisher* (5), is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the court; and whenever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the documents, etc.

The deceased was a farmer who at the date of the document in question was worth from forty to fifty thousand dollars. He had six brothers and three sisters; his father, still living, a very aged man; and his wife, to whom he had been married and with whom he had lived happily for fifteen years, still living.

His will was not spoken of by deceased until, when very ill, suffering from pneumonia, the doctor in attendance advised the summoning of any relatives the now deceased might desire to see. Three of his brothers, Richard, William and Martin, in consequence of messages thus received visited the deceased on the evening in question. The daughter of Richard was also in attendance. The brothers, William and Martin, who are named as the executors of this alleged will, were with the deceased in his bed-room from

(1) 2 Moo. P.C. 480.
(2) [1894] P.D. 151.
(3) 37 Can. S.C.R. 100.
(4) L.R. 7 H.L. 448.
(5) 63 L.T. 465.

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some time between nine and ten o'clock in the evening until two o'clock next morning. Richard had been recommended to retire to rest about ten o'clock. No one came into the room during this period except deceased's wife, on one or more occasions, for the purpose of attending to her duties as his nurse. She was not told of a will being made. She was not consulted by either of the brothers. They received paper, pen and ink from some one in the house between nine and ten, and were using writing material when she passed into the room. When she entered conversation ceased. Being an intelligent woman she drew the inference that the business going on was the making of the will for her husband. Some time after midnight on one of the occasions of her going into the room the husband asked her whether she would like money or property, and she replied she would be satisfied with whatever he determined in that regard. Nothing more was said to her.

The document now propounded as the last will was the product of the labour of the four or five hours thus spent.

The wife was only given a lot of trifling value in Prescott, the household furniture, the privilege of keeping a portion of the dwelling house as long as she wished, and the sum of three hundred dollars annually in lieu of dower, as long as she remained a widow. The daughter, and I think the only child of William Connell, a girl about ten years of age, was to receive one thousand dollars; the daughter of Martin another one thousand dollars; a sister of deceased one thousand dollars; William himself one thousand dollars; the brother Richard, who was a labouring man, one hundred dollars a year during the term of his natural life; and the father was to be taken care of. Subject

to these charges all his real estate, except the Prescott lot, was devised together with chattels and farm implements to his brother Martin. And then, after making these provisions, the residuary bequest was made as follows:

It is also my will that the residue of my property, heretofore not disposed of, such as mortgages, notes, moneys or security for money, after paying my just debts out of the same, be placed in the hands of my executors hereinafter named, and to be disposed of by them as they may think fit and proper.

The real estate then consisted of 400 acres of lands worth, according to William Connell's very conservative estimate, $20,000. Making allowance for the narrowness of view such men as the deceased sometimes have upon such a subject, one cannot reconcile the provision made for the deceased's wife as in accord with the dictates of ordinary human feeling. It was not what the deceased a few months afterwards told his wife he had left her; she tells the story as follows:

What did he say? A. He said I left you a home here so long as you wish to stay, and all that was in the house, or all that is in the house, and the best horse and carriage that is on the place, and if I wished to live there, the best cow—and if I wished to leave there they were to build a good house for me on a lot that we owned in Prescott, they were to build a good house for me, and I was to go there, and I was to get my firewood and my provisions, such as butter, cheese, eggs, just what a farm would produce, pork and beef and all such things, just what a farm would produce, my provisions, what I needed off the place, and $300 a year, and he said—I may not have it all—I wanted to leave you more, but Will. said that was plenty for you, and he says anyway I did not will my money at all. Then he told me three different parties that he was going to leave money to, but there is no need of mentioning their names. He told me three different ones, and he said anyway that will is no good, and he says now I will destroy that will or have it destroyed—destroy that will—that is what he said at that time, and I don't know whether he said at that time that he never would make a will—whether it was at that time or whether it was another time. It may have been that time and it may not.

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We are asked by these brothers Martin and William to believe that the deceased not only was a meaner man than this statement of his understanding of the supposed will would lead us to believe him, but they also ask us to suppose that he wilfully misstated to his wife what the will contained. Is that possible? Is it probable? I certainly do not think so. It would do more honour to the name of Connell, of which and the perpetuating of it we have heard so much, to refuse to impute to the deceased all that we are asked thus to impute.

If he understood, when he heard the will read, what was read he could not imagine that it contained all the additional provisions this statement of the wife shews. If he did not understand the reading of the will then the plaintiffs are not entitled to have this document established as his will. The very suspicions that the principles governing such a case require to be removed have not been removed, and therefore plaintiffs' case must fail.

Passing from that to the other provisions of the will, we find no reason for leaving entirely out of his consideration his other brothers and sisters, save in the case of his brothers Thomas and John, with whom he, it is said, had had differences, the effect of which may not possibly have been removed. Can it be said that the explanations given with regard to the absence from home for such a length of time and the supposition that the others were amply provided for removed all suspicion that one may have in regard to their not sharing in his large estate?

Then let us consider the residuary bequest. We find that the bequest implies a trust.

By reason of the uncertainty of the trust as expressed it is void. The law implies another trust and

that is that the executors as such receiving property in this manner must hold it for the benefit of those who under the statute of distributions would be entitled to share therein.

The executor who drew the will as a result of this accident or design had thus given to him a share in the testator's estate that has in law the effect of making him in addition to his bequest of one thousand dollars, a very substantial legatee. The duty is, therefore, still more imperative than the first bequest would have made it to make clear that the testator understood what he was doing in this regard.

We find from the following evidence of Martin Connell that what the deceased desired to have done was to provide that the residue should be divided amongst the most needy ones of the family.

Q. Then when you were examined before you did not recollect anything about leaving it to the discretion of you and your brother to divide. Your words were "He said for us to divide it amongst the most needy ones of the family." A. That is all right.

Q. That is the only thing you said? A. That is all right.

* * * * * *

Q. You are asked here as to what had occurred and you say the way you understood it, he said for us to divide it amongst the most needy ones of the family, that is the way I understood it. A. That is the way I understood it at the time after I asked him the question.

Q. Was that the way you understood it at the time of your examination? A. Yes.

This statement he alleges was made whilst William, after receiving instructions, had retired to an adjoining room, to extend his draft notes and complete the preparation of the will. Both are agreed that after the document had been finished it was read over carefully to the deceased. It is quite clear that it did not purport to carry out any such intention as was thus expressed. Had it been

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expressed in these very words it might or might not have been any more effective in executing the purpose of the deceased than as it stands.

It might, however, have been then held as honestly written. That is what concerns us here. So written and so read it might have been in accord with the testator's purpose and be held as known and approved by him.

If any intelligent effort had been made to express the clear purpose of the deceased these executors (the most prosperous instead of the most needy of the family) would have been excluded from the possibility of hoping to share in the benefits of the residuary bequest. Now they stand to secure a share of the residue in addition to other benefits if this is upheld as the will of deceased.

But did the testator not tell William as well as Martin of what his purpose was? It took four or five hours to prepare this short document. What were these three brothers discussing during that time? We are left to speculate. Martin persistently says he did not express any opinion upon any subject relative to dispositions to be made in this proposed will. William, on the other hand, states that on two or three occasions during the discussion Martin did venture an opinion, but he fails to enlighten us upon what points such opinions were expressed.

If Martin were the almost dumb man that his evidence would lead us, if implicitly believed, to say he was, during all this time, there would seem to be more need for explanation of what consumed the time. The deceased was not likely in his then condition to have taken up much time with the comparatively simple matters involved in the provisions of this will, except those for the wife and those in the residuary bequest.

Only these exceptions involved the necessity of prolonged discussion.

William Connell was an experienced draftsman; he was a ready penman; he was an intelligent man and one of quick apprehension.

The two subject matters that required a good deal of consideration are those that give rise to much suspicion. If we are to believe William's story, that regarding the provisions for the wife did not give rise to prolonged, if any, discussion. This residuary bequest involved the disposition of ten to fifteen thousand dollars worth of personal property, and according to the wife possibly twenty thousand dollars of personal property. She knew his affairs. She was an honest witness. She placed his personal estate at from fifteen to twenty thousand dollars. Making every allowance for possible mistake or bias on her part, no matter how honest, I think we are quite safe in saying that the estimate just made of from ten to fifteen thousand dollars would be a fair one to act upon. Counsel in the argument did not seriously gainsay this estimate. It seems to me almost incredible that neither in regard to the amount nor the mode of distributing this amount should there have escaped any remark or discussion when such ample opportunity existed for mention thereof in William's presence. It was almost impossible he could accept such a trust without asking how the proposed testator might desire it to be executed.

Can we say that the evidence given has removed all ground for suspicion that something of the kind was said or referred to, and that the deceased did not in this regard know or understand the contents of this document? As if it were not suspicious enough already upon the bare statement of the purpose and

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effect of the kind of clause which should have been in the will as contrasted with that which is there, we find Martin Connell when giving his evidence on the trial attempting to put a new gloss upon the statement made by the deceased to him in William's absence.

He says:

Q. Then did he say that was to be intended for you yourselves? A. Well, while William was writing the will in the dining-room I asked him when I found out I was to be an executor—asked, for my own information says I, after your just debts are paid, what is your wish to be done with the residue of your property, and he said to give it to the most needy ones of the family, or do with it as you see fit.

Q. What did he say again? A. He said to give it to the most needy ones of the family, or do with it as you see fit, to dispose of it rather, he said, as you see fit.

He repeats twice over, immediately after the evidence just quoted, the same expression of dividing money amongst the most needy ones of the family or do with it what you see fit, and it is only when a little later he is reminded of what he had sworn to in his examination for discovery that he gives the evidence I have first quoted. Why did he change the statement? Which is the true version? Can there be any doubt upon the whole of this evidence that the purpose and intention of the testator was as Martin Connell first stated it? Can any one believe that he failed for two hours or more of giving instructions, as William's evidence suggests, to give utterance to so simple a thought?

Can we be quite free from the suspicion that instead of having such a provision appear on the face of this document, it was excluded, not by the intended testator, but by the mind and hand of William Connell? Can we doubt that if the will had gone un-

challenged William would have given himself a share and that share not the smallest?

Let us see so far as his prevaricating evidence will enable us to see what he did think.

Q. Did you think that was intended for your benefit and his benefit as your own property? A. No, sir, I did not.

Q. Did you know that it was not? A. Well, I supposed that if I took a share of it, I did not think there would be much fault found with me.

Q. Did you know from what he told you that that was not intended for you yourselves? A. No, I did not know, because I believed that he intended part of that for me.

Q. You believed he intended part of it for you? A. Yes.

Q. How much? A. A share.

Q. With whom? A. With the rest, the rest of the family.

Q. Is that what he told you? A. Yes.

Q. Then, why didn't you draw the will that way? A. He did not tell it that way. I drew it as he told me.

Q. But you say you knew from what he told you that he intended that to be divided equally amongst the brothers and sisters? A. He never told me what he intended.

Q. You said he did? A. No, I did not tell you.

Q. But at all events you knew at that time that he intended that to be divided equally amongst the brothers and sisters? A. I intended it at any rate if it came into my hands.

Q. Did he intend it? That is another question. I cannot answer you.

Q. Did you ask him? A. I did not ask him, but I told you.

Q. Did you have any idea of what he wished about that? A. I had no idea any more than my own view. I never asked him, but I can tell you who did, if you like me to tell you.

Q. Who did ask him? A. My brother, when I was writing that document, he asked him, not in my presence; I did not know he asked him; you ask him. He will come to the stand.

HIS LORDSHIP:—You do not know what he asked him? A. Only what he told me.

Q. You were outside writing? A. I was outside writing, and my brother, I understood, asked him this question, but I never asked him.

MR. WATSON:—But you understood that when you went in again? A. No, I did not understand it at any time; I never understood it.

Q. Not from your brother? When did your brother tell you? A. Here since this row commenced.

Q. You were examined about this? A. Yes.

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Idington J.

Q. What did you say? A. I don't remember. I said before just about as I said now, as near as I can remember.

Q. See if this is true, "He did not, I think, intend the property in the residuary clause for myself and my brother Martin or either of us?" A. Not altogether.

Q. Is that answer true or not? A. It is if it is put in a little fuller.

Q. It is not true without a qualification? A. It just wants a little qualification.

Q. Then this answer as it reads here is not correct? A. It is correct so far as it goes.

Q. The one I read was, "He did not, I think, intend the property in the residuary clause for myself and my brother Martin, or either of us?" A. I consider I deserve part of this as much as any man.

These two brothers chose to put themselves in the position they are of having no one to corroborate them.

They have not given such evidence as to my mind should enable us to say either were so absolutely honest as to constrain us to accept as undoubted fact all that they have said. Their evidence is of the most unsatisfactory character. They were discredited as witnesses by the learned trial judge, and reading the evidence impresses me with the correctness of his judgment with regard to the unreliability of them as witnesses.

I am driven to conclude that the suspicions still exist which the rules and principles I have adverted to required these executors to remove.

If that memory for detail, evinced by them in relation to the execution of this document, had been as serviceable in regard to everything connected with its preparation, suspicion might have been dispelled. Conviction might have been substituted for suspicion, but that conviction might still have supported the results the learned trial judge arrived at.

The Court of Appeal does not seem to have enter-

tained the opinion that if James Connell had died at the time the document in question was prepared it could have been upheld upon such testimony.

The judgment of that court seems rather to be that the onus is satisfied by the fact that the testator soon recovered his usual health and lived for sixteen years afterwards and allowed his will to stand without taking any steps to alter or revoke it. I am, with the greatest respect, entirely unable to accept this conclusion. I am unable after giving the matter the very greatest consideration to comprehend that mere lapse of time can dispel the suspicions that surround this transaction. The will, so called, remained with William Connell, and never was seen nor read nor any of its contents, in relation to its vulnerable points, mentioned directly or indirectly during all these sixteen years to the testator.

The Court of Appeal gives no reason why mere lapse of time should operate as they find.

Counsel for respondents were unable to give any reason in support of such a view, save this, that a testator or any one who had been defrauded when once free was entitled to rescind the bargain induced by fraud or to revoke a will which did not represent what its maker intended. I know of no law that restrains a man after the lapse of many years from complaining of a fraud immediately he has discovered it, if there be a reasonable explanation of why, by concealment or otherwise, he was prevented from sooner asserting his right. I apply the same doctrine to this will. The testator assumed, as his wife's evidence shews, that the provisions for her were entirely different from what they are. As he put them in telling her, they are just such provisions as men like him are apt to make. First, they provide a home; then the

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provisions for daily food and maintenance, without going into the market to buy it, and then the annuity to provide for clothing, medical attendance and general expenses.

Assume that deceased believed what he was saying he had provided, he would with his narrow views of life and regard for a woman's position, possibly be content to leave her in that way. He might not feel urged to reconsider that. Had he been told, however, that the provision was of the character it really was and stands in this will it is inconceivable that either he or his wife would have let the matter rest there. The same is true in regard to the residuary bequest. If the testator believed, as I have no doubt he believed, that his residuary estate would go amongst the most needy ones of the family as he expressly desired, then I might conceive him being satisfied. But had he been told that the residuary bequest was in an entirely different sense so that William Connell and Martin Connell would share therein and the brothers with whom the deceased had differed and who were also wealthy, would share therein equally with the most needy, he would undoubtedly have taken steps to see the will. All this assuming that the will had in his mind any existence as a will.

Possibly his inconsistent statements in that regard related to the failure to name those whom he thought most needy.

It is unnecessary in the view I adopt of the case to express any opinion upon the issue regarding the execution and attestation of this document, but I would in any such case be disposed to abide by the judgment of the trial judge on such a point.

I think the appeal should be allowed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Maxwell & Maxwell.*
Solicitor for the respondents: *J. T. French.*

1906
*April 9.
*April 14.

JANE GILMOUR (PLAINTIFF) .... APPELLANT;

AND

CELESTIN SIMON (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Principal and agent—Sale of land—Authority to make contract—Specific performance.

The defendant gave a real estate agent the exclusive right, within a stipulated time, to sell, on commission, a lot of land for $4,270, (the price being calculated at the rate of $40 per acre on its supposed area), an instalment of $1,000 to be paid in cash and the balance, secured by mortgage, payable in four annual instalments. The agent entered into a contract for sale of the lot to the plaintiff at $40 per acre, $50 being deposited on account of the price, the balance of the cash to be paid "on acceptance of title," the remainder of the purchase money payable in four consecutive yearly instalments and with the privilege of "paying off the mortgage at any time." This contract was in the form of a receipt for the deposit and signed by the broker as agent for the defendant.

Held, affirming the judgment appealed from (15 Man. Rep. 205) that the agent had not the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal.

Held, further, that the term allowing the privilege of paying off the mortgage at any time was not authorized and could not be enforced against the defendant.

APPEAL from the judgment of the Court of King's Bench for Manitoba(1) reversing the judgment of Mr. Justice Perdue, at the trial, and dismissing the plaintiff's action with costs.

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

(1) 15 Man. Rep. 205.

A real estate agent named Egan had an interview with the defendant, who had for sale a lot supposed to contain 106.63 acres of land, and asked him if he would take forty dollars per acre for it. The defendant replied that Egan could "sell it" for $4,270, $1,000 cash and the balance in one, two, three and four years, interest on the deferred payment to be at the rate of six per cent. per annum, and that he would give Egan $125 commission to sell it, with the exclusive right of sale until the third following day. Egan arranged for the sale of the property to the plaintiff, received from her a cheque for fifty dollars and set out the terms of sale in a receipt therefor as follows:

WINNIPEG, Dec. 5th, 1903.

$50.00.

Received from J. Gilmour the sum of fifty dollars, deposit on sale to her of the inner two miles of lot 15 in the Parish of Saint Vital, Manitoba, containing 106.63 acres more or less. Price, $40.00 per acre. Terms, $950.00 to be paid on acceptance of title, mortgage for about $1,300.00 to be assumed, balance payable in 1, 2, 3, and 4 years in equal payments with 6 per cent. interest, privilege to pay off at any time, taxes to be adjusted to date.

E. C. EGAN, Agent
for C. Simon.

Egan then told defendant he had sold the lot, gave him the cheque and a copy of the receipt. The defendant said that there was not 106.63 acres in the lot, but only about 104, but wished to get the even $4,270. The cheque and receipt remained in the defendant's possession for a couple of days when Egan reported that the plaintiff would not pay for more land than was in the lot, whereupon the defendant handed back the cheque and the copy of the receipt to Egan and refused to carry out the sale.

The plaintiff's action for specific performance was

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tried before Mr. Justice Perdue, who maintained the action, rendering his decision as follows:

"I find that Egan had authority from Simon to make the sale in the pleadings mentioned. If there were any variations in the terms, the defendant raised no question concerning them when they were communicated to him on Saturday evening. Simon simply wished to vary the price so as to get $4,270 instead of the $40 per acre, which he had asked when speaking to Egan on the 3rd, and giving the terms on which he would sell. I think Simon assented to what Egan had done but wished him to get Gilmour to vary the contract simply as to the price and pay the increased amount.

"I believe the testimony of Egan to be substantially correct. I attach no credibility to the defendant's testimony.

"I give judgment declaring that: (1). The agreement in the pleadings mentioned should be specifically performed and carried out; (2). That the plaintiff is entitled to have the agreement specifically performed, and do order and adjudge the same accordingly; (3). Abatement in price for deficiency in acreage; (4). Reference if desired by either party as to the title; (5). Liberty reserved to either party to apply to a judge as to any question that may arise in carrying out the relief given or in working out the provisions of the judgment; (6). On payment of purchase money, defendant to convey to plaintiff; (7). Defendant to pay plaintiff's costs.

The full court reversed this decision by the judgment now appealed from.

Nesbitt K.C. and *Coutlée K.C.* for the appellant.

Aylesworth K.C. and *Affleck* for the respondent.

SEDGEWICK J. and GIROUARD J. concurred in the judgment dismissing the appeal with costs.

DAVIES J.—The question to be determined is whether, upon a reasonable construction of the plaintiff's evidence, the defendant gave Egan an exclusive right to enter into a binding contract with any purchaser for the sale of the defendant's real estate, or whether such right was a limited one, confined to procuring intending purchasers and submitting their names and offers for approval.

In deciding this question the whole of the plaintiff's evidence must be considered. In his main examination and cross-examination I understand Egan to relate the conversation between him and the defendant exactly as it took place and, as nearly as he could recollect, in the very language used. When afterwards recalled and re-cross-examined I understand his repetition of the conversation to be rather a statement of his own conclusions of the result of his conversation than an attempt to amplify or enlarge what he had already twice sworn to.

Reading his evidence as a whole, I am of the opinion that the authority given was a limited one and did not confer the power, without further consultation, of entering into a binding contract.

I am also of opinion that the additional term incorporated in the contract entered into by the agent giving the purchaser the privilege of paying off at any time that part of the purchase money to be secured by mortgage was unauthorized and could not be enforced in this action against the principal.

The appeal should be dismissed.

IDINGTON J.—I do not find in this case that clear, express and unequivocal authority given by the re-

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spondent to Egan, which would enable me to hold the appellant entitled to the specific performance claimed herein.

I think, therefore, the appeal must be dismissed with costs.

MACLENNAN J.—I concur in the judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Tupper, Phippen, Tupper, Minty & McTavish.*

Solicitors for the respondent: *Bradshaw, Richards & Affleck.*

THE CUSHING SULPHITE-FIBRE COMPANY AND OTHERS .... } APPELLANTS.

1906
*May 8.

AND

GEORGE S. CUSHING AND OTHERS, LIQUIDATORS .... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK

Appeal—Jurisdiction—Winding-up order—Leave to appeal—Amount involved—R.S.C. c. 129, *s.* 76.

In a case under the Winding-up Act (R.S.C. ch. 129) an appeal may be taken to the Supreme Court of Canada by leave of a judge thereof if the amount involved exceeds $2,000.

Held, that a judgment refusing to set aside a winding-up order does not involve any amount and leave to appeal therefrom cannot be granted.

APPEAL by leave of a judge from a judgment of the Supreme Court of New Brunswick dismissing an appeal from the order made by Mr. Justice McLeod to wind-up the Cushing Sulphite-Fibre Company, Limited.

Respondents' counsel moved to quash the appeal on the ground that it should have been brought within 14 days from the date of the order of such further time as might have been allowed by a judge of the Supreme Court of New Brunswick if application therefor had been made. The court overruled this objection to its jurisdiction, but *suo motu* raised the question as to whether or not $2,000 was involved in

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

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CUSHING SULPHITE-FIBRE CO. *v.* CUSHING.

the appeal and called upon counsel for the appellants to support their right to appeal in that respect.

Powell K.C., and *Hanington* K.C., for the appellants.

Pugsley K.C., *Hazen* K.C., *Currey* K.C., and *Ewing*, for the respondents.

The judgment of the court was delivered by

SEDGEWICK J.—The only statutory provision by virtue of which we have jurisdiction to hear this appeal is contained in the Winding-up Act, R.S.C. ch. 129, sec. 76, which is as follows:—

> An appeal shall lie to the Supreme Court of Canada by leave of a judge of the said Supreme Court (from a judgment under the Act in any province) if the "amount involved" in the appeal exceeds two thousand dollars.

We are, I think, all of opinion that in the present case there is no *amount* involved, and, therefore, that we have no jurisdiction. This view is rendered, it seems to me, perfectly clear from the phraseology of section 74 of the Act which gives an appeal from the order or decision of a single judge. In that case, if the question to be raised on the appeal involves future rights, or if the order or decision is likely to affect other cases of a similar nature, or if the amount involved in the appeal exceeds $500, an appeal shall lie.

This shews conclusively that there is an appeal to this court only in cases where monetary questions are to be considered, as for instance, where the question is as to whether any one should be placed upon the list of contributories or should be held liable or not liable *quoad* his character as a shareholder or where some such similar matter is in controversy.

The following decisions of this court may be usefully referred to upon the point in question: *Stephens* v. *Gerth*(1); *O'Dell* v. *Gregory*(2); *Lachance* v. *La Société de Prêts et de Placements de Québec*(3); *Noel* v. *Chevrefils*(4); *Talbot* v. *Guilmartin*(5); *Bell* v. *Vipond*(6); *Donohue* v. *Donohue*(7); *Winteler* v. *Davidson*(8); *Tousignant* v. *County of Nicolet*(9); followed in *Leroux* v. *Parish of Ste. Justine de Newton*(10).

It perhaps may be a matter of regret that there should not be an appeal to this court upon all matters under the Winding-up Act, so that there might be a tribunal by which the practice in all the provincial courts should be made uniform. That is, however, a matter for Parliament to deal with and not for us.

The appeal is quashed without costs.

Appeal quashed without costs.

Solicitor for the appellants: *A. H. Hanington.*

Solicitor for the respondent Cushing: *Barnhill, Ewing & Sanford.*

Solicitor for the respondents, Liquidators: *J. Douglas Hazen.*

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(1) 24 Can. S.C.R. 716.
(2) 24 Can. S.C.R. 661.
(3) 26 Can. S.C.R. 200.
(4) 30 Can. S.C.R. 327.
(5) 30 Can. S.C.R. 482.
(6) 31 Can. S.C.R. 175.
(7) 33 Can. S.C.R. 134.
(8) 34 Can. S.C.R. 274.
(9) 32 Can. S.C.R. 353.
(10) 37 Can. S.C.R. 321.

1906
*Mar. 24-29.
*May. 1.

THE TORONTO RAILWAY COMPANY (DEFENDANTS) .... APPELLANTS.

AND

THE CITY OF TORONTO (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Breach of conditions—Liquidated damages—Penalty—Cumulative remedy—Operation of tramway—Construction and location of lines—Use of highways—Car service—Time-tables—Municipal control—Territory annexed after contract—Abandonment of monopoly—55 V. c. 99 (Ont.).

Except where otherwise specially provided in the agreement between the Toronto Railway Company and the City of Toronto set forth in the schedules to chapter 99 of the statutes of Ontario, 55 Vict., in 1892, the right of the city to determine, decide upon and direct the establishment of new lines of tracks and tramway service, in the manner therein prescribed, applies only within the territorial limits of the city as constituted at the date of the contract. Judgment appealed from (10 Ont. L.R. 657) reversed, Girouard J. dissenting.

The city, and not the company, is the proper authority to determine, decide upon and direct the establishment of new lines, and the service, time-tables and routes thereon. Judgment appealed from affirmed, Sedgewick J. dissenting.

As between the contracting parties, the company, and not the city, is the proper authority to determine, decide upon and direct the time at which the use of open cars shall be discontinued in the Autumn and resumed in the Spring, and when the cars should be provided with heating apparatus and heated. Judgment appealed from reversed, Girouard J. dissenting.

Upon the failure of the company to comply with requisitions for extensions as provided in the agreement, it has no right of action against the city for grants of the privilege to others; the right of making such grants accrues, *ipso facto*, to the city, but is not

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*PRESENT:—Sedgewick, Girouard, Davies and Idington JJ.

the only remedy which the city is entitled to invoke. Judgment appealed from affirmed, Sedgewick J. dissenting.

Cars starting out before midnight as day-cars may be required by the city to complete their routes, although it may be necessary for them to run after midnight or transfer their passengers to a car which would carry them to their destinations without payment of extra fares, but at midnight their character would be changed to night-cars and all passengers entering them after that hour could be obliged to pay night-fares. Sedgewick J. dissenting.

APPEAL from the judgment of the Court of Appeal for Ontario(1), which in part affirmed and in part varied the judgment of Mr. Justice Anglin(2), upon a special case stating questions of law for the opinion of the court in pursuance of the consolidated rules (Ontario) numbers 372, 373 and 374, and the proceedings thereon.

The City of Toronto, in 1891, acquired the Toronto Street Railway with its appurtenances and property from its former owners and called for tenders for the purchase of the same together with the right and privilege of operating surface tramways in the city for a specified term of years, subject to certain conditions and limitations as to the establishment of new lines and branches and respecting the operation of the entire system. An agreement was subsequently entered into between the city and the successful tenderers, in September, 1891, for the purpose of carrying out the sale and the contract in respect to the franchises and privileges granted, which had been assigned to the appellants, and this agreement was validated by legislation under the 99th chapter of the statutes of Ontario, 55 Vict., in 1892. The agreement, bye-law and conditions in question are set

(1) 10 Ont. L.R. 657. (2) 9 Ont. L.R. 333.

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CITY OF TORONTO.

forth in the schedules to the statute and the issues to be decided on the present appeal are stated in the judgments now reported.

By the special case the following questions were submitted for the opinion of the court.

"Is the city or the railway company, and which of them, on the proper construction of the agreement, entitled to determine, decide upon and direct:—

"1. What new lines shall be established and laid down and tracks and service extended thereon by the company, whether on streets in the city as existing at the date of the agreement or as afterwards extended?

"2. What time-tables and routes shall be adopted and observed by the company?

"3. Whether if so determined by the city engineer with the approval of the city council cars which start before midnight must finish the route on which they have so started, though it may require them to run after midnight?

"4. At what time the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heated?

"5. In the event of the decision of the court being in favour of the city on any of the above questions, is the city entitled to a decree for specific performance as to the matter so decided or in any and which of them.

"6. Is the privilege to the city to grant to another person or company for failure of the company to establish and lay down new lines and to open same for traffic or to extend the tracks and services upon any street or streets as provided by the agreement, the only remedy the city can claim?"

On hearing the special case Anglin J. decided, in effect, that the right to determine what new lines should be established was vested in the city, not only in respect to lines within its limits as constituted at the time of the contract but also in respect to lines in areas annexed to this city subsequently; that the remedy of the city was not restricted merely to the right of granting the privileges to others upon the failure of the company to construct new lines when required to do so; that the city could settle time-tables, fix the routes of cars, determine the seasons during which open cars might be used and how and when the cars should be heated, but that the city could not compel the company to continue to run, after midnight, cars which, having started before midnight, could not in due course finish their routes by that time. By the judgment appealed from the Court of Appeal affirmed the decision of Mr. Justice Anglin, except as to the running of day-cars after midnight, and decided that cars starting out upon their routes before midnight should finish such routes, even if it was necessary to run after midnight in order to do so.

Nesbitt K.C., and *Laidlaw* K.C., for the appellants.

Aylesworth K.C., and *Fullerton* K.C., for the respondent.

SEDGEWICK J.—This is an appeal by the defendants from the judgment of the Court of Appeal for Ontario affirming the judgment of Anglin J. in the special case agreed upon between the parties in the course of the action. The action was brought upon

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the agreements set forth as a schedule to chapter 99 of 55 Victoria (Ontario), 1892, between the plaintiffs and the defendants, relating to the purchase of the street railways and properties and street railway privileges, and involved, on one branch of the case, the questions: (1) Whether under the agreement the defendants were compelled to lay down new lines or extensions of lines in territory annexed to the city after the date of the agreement; (2) Whether the company had a right to choose the streets in the city upon which it would lay down its lines subject to the approval as to location, etc., mentioned in clause 12 of the conditions; (3) Whether the city also had the right under clause 14 of the conditions to require the company to lay down its rails and operate upon a street selected by the city, and if so required, could the company abandon such street or streets and so abandon its exclusive franchise to operate upon such street or streets, and thus allow the city to grant the franchise to another company, the Toronto Railway Company having no right to claim compensation by reason of such grant, or, could the city compel the company when so required to lay down its lines and operate its railway, or obtain any other remedy in addition?

In construing an instrument in writing, the court is to consider what the facts were in respect to which the instrument was framed, and the object as appearing from the instrument, and taking all these together it is to see what is the intention appearing from the language when used with reference to such facts and with such an object, and the function of the court is limited to construing the words employed; it is not justified in forcing into them a meaning which they

cannot reasonably admit of. Its duty is to interpret, not to enact. It may be that those who are acting in the matter, or who either framed or assented to the wording of the instrument, were under the impression that its scope was wider and that it afforded protection greater than the court holds to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret an instrument. The question is not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the parties if violence were done to the language in which the instrument has taken shape; but such a course would on the whole be quite as likely to defeat as to further the object which was in view.

Bearing in mind these observations, it is apparent that the City of Toronto owning the railway, then operated by horse cars, advertised the same to be sold to the highest bidder, together with and in addition to such railway, the exclusive privilege of operating surface street railways within the limits of the City of Toronto as is shewn by the bye-law, No. 2920, passed on 27th July, 1891, which recites the ownership by the City of Toronto of the Toronto Street Railway and all the real and personal property in connection with the working thereof, and that the city had asked by public advertisement for tenders from persons seeking to acquire the said railway and the privileges of operating surface street railways in the City of Toronto.

Certain conditions were made, numbered from 1 to 47, and the tender of Messrs. Kieley, Mackenzie and Everett was accepted, and the contract, contain-

ing some thirty clauses, was entered into on the 1st day of September, 1891, and subsequently, in 1892, an Act was passed validating the agreement and the conditions and tenders therein referred to, and declaring, by its first section, that under the said agreement the purchasers acquired

> and are entitled to the exclusive right and privilege of using and working the street railways in and upon the *streets* of the said City of Toronto (except certain portions) for the full period of thirty years from the first day of September, 1891, * * * subject, nevertheless, to all the conditions, provisoes and restrictions in the said agreement expressed or contained, and as hereinafter mentioned.

And by the fourth clause therein it was enacted that:

> (1) After the said agreement has been duly assigned to the company it shall, subject to the provisions and conditions contained therein, have full and exclusive power to acquire, construct, complete, maintain and operate * * * along all or any of the said streets or highways of the City of Toronto, subject to the exceptions and under the qualifications contained in the first section hereof.

And further providing by section 19, sub-section 4, for a special case of annexation to the City of Toronto of an outside municipality or any part thereof.

In my opinion the city clearly only purported to deal with streets within its jurisdiction. Outside municipalities into whose area the company might desire to extend its operations had independent powers in these respects, and the Act provides that with them the company could make separate arrangements, and without going in detail through the various provisions in the conditions, agreement and statute, it appears to me plain that by the special reference contained in section 19, sub-section 4 of the Act, the parties did not intend to provide for territory subsequently annexed and as to which the city,

at the time, had no right to give any franchise or make any contract.

On the second part of this branch of the case, it appears to me plain that the city granted the exclusive right to construct, maintain and operate their railway along all or any of the said streets or highways of the City of Toronto subject to the exceptions, etc., contained in the conditions and agreement, and, so far as the right of construction is concerned, I think the only over-riding exception to this power is that contained in clause 12 of the conditions, namely, that the gauge of the system was fixed and the location of the railway on any street should not be made by the company or confirmed by the council until plans thereof, shewing the proposed position of the rails, style of rail to be used, and the other works in each such street had been submitted to and approved in writing by the city engineer, and I think the language of the Privy Council in the case of *The City of Toronto* v. *The Bell Telephone Company of Canada* (1), is applicable. To this extent, this clause and clause 14 are derogations from the grant to construct and use and work a railway along any of the streets, and make plain the meaning of "subject to the conditions, provisoes," etc. I cannot understand how the right to use and operate street railways which has been conferred upon the company along all or any of the streets can be made effective unless they have a right to lay down the rails upon the street and to operate the cars upon them.

On the third part of this branch of the case, I am of opinion that clauses 14 and 17 must be read together, and that the city may require the company

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

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to extend its tracks and street-car service on such streets as may be from time to time recommended by the city engineer and approved by the city council, etc., but that the language does not import that the purchaser "*shall* build," but, upon such requisition being made, the company has the right to abandon the privilege which it had purchased, and that, on so abandoning, it had no right of action against the city for granting the privilege of laying down lines on such streets, and the city had the right to make such grant to another, and that these two clauses contain both the rights and remedies of the parties. In my opinion failure to comply with the requisition *ipso facto* creates the right of granting a privilege to another person or company, and that is the only remedy, and the remedy which the parties have themselves seen fit to provide. It has been stated in the Court of Appeal that this is an illusory remedy, but reference to *Winnipeg Street Railway Co.* v. *Winnipeg Electric Street Railway Co.*(1), and *The City of Toronto* v. *The Toronto Street Railway Co.*(2), at page 35, shews that it has apparently been a most effective remedy in the past.

The next question involves substantially the point whether the city engineer, under the 26th clause of the conditions, really has the management of the company, or whether, as one would have supposed, the company had the right of management of its own business subject to the express provisions in the public interest for the city engineer to regulate the number of cars and the intervals at which the same should run on the various routes, both as to day cars and night cars.

(1) [1894] A.C. 615. (2) 15 Ont. App. R. 30.

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In my opinion it is the legitimate rule of construction to construe words in an instrument in writing with reference to the words found in immediate connection with them. See *Robertson* v. *Day*(1), at page 69; also as explained in *Inglis* v. *Robertson*(2), at page 630. The headings must be read in connection with the groups to which they belong and interpreted by the light of them.

And, so construing the instrument, I think that having in mind the fact that at the date of the sale it had not been determined whether horse cars should be continued, or whether on main lines the use of electricity, either by overhead trolley (single or double) or storage battery, or by what is known as the slot system, or cable cars, should be adopted, the use of the word "service" in section 26 must be limited to its context and cannot be taken as an over-riding word destroying all meaning in the subsequent conditions, and rendering 27, 28, 36, 37, 38 and 39 substantially useless. The wide meaning given to the word "service" in the courts below would render wholly unnecessary the subsequent particular provisions. I think such a construction entirely destructive of the ordinary canons of construction adopted by the courts. I think the cardinal feature to be borne in mind is that the company were empowered to "use and work" the railway, which involves necessarily the idea of operation through its board of management. I view the fact that an existing system of nearly sixty-two miles in length, enabling the routing of cars through various streets, coupled with the fact that routes are assumed to exist by the wording of the conditions, is evidence that the ordinary

(1) 5 App. Cas. 63. (2) [1898] A.C. 616.

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management and routing of cars must be left to the company, and I find no word anywhere in the agreement which would justify the assumption that "routes" could be *created* by the city engineer, whose sole duty is to regulate, under 27 and 28, the time of starting of the cars on *such routes* as the company lays down, and to fix the intervals at which cars should run. Even if the word "service" is given an extended meaning under clause 26, that service is confined to what is necessary on each main line, part of same or branch, which in no sense confers a right of creating or fixing the routes, which it was admitted involved a *service* on various main lines or parts of same or branches and, therefore, a much greater scope than a mere service on a main line or branch taken by itself. The right of regulation in the city engineer which I have indicated, seems to me to conserve all the rights that any person could be reasonably supposed to have contemplated at the time. The company are bound under section 33 to give transfers and to so arrange the system that the transfers could be made effective. The company, not the engineer, is to "make the arrangements," that is, route the cars; the engineer is to approve. They are also bound to start the cars on their routes under 27 and 28 under the direction of the city engineer, and necessarily the engineer having the control of the interval between cars must control the *number of cars* and so conserve the rights of the public to the accommodation which was sought for, namely, to have as many cars in service as the engineer might determine, and to have those cars so routed that the transfer system would be effective. This seems to me to make a clear and harmonious

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document and to give effect to the *various conditions* under their various *headings*, and so read also gives effect to the language both of the statute and the conditions and leaves the company in the management of its business, subject to the qualifications that were intended.

Another branch of the case is as to the right of the city engineer to determine the time for running open and closed cars, heating, etc. The headings and the language of clause 36 seem to me to completely negative the suggestion that the city engineer can regulate these matters. It seems to me that the parties must have had in mind a rule of law that any passenger would have a right to complain of improper accommodation, and that it would be for a jury to determine in any case whether the company was complying with the provisions of clause 36, and it is not for the city engineer.

Another branch of the case dealt with the running of the cars up to midnight. It seems to me perfectly plain that the proper construction of the document is that the first day-car shall not be compelled to start before 5.30 a.m., and that no day-car can be compelled to run *after midnight*. The city engineer has a right to start night-cars at such hour as he deems necessary and he can in this way see to it that cars for the accommodation of passengers are kept running on the streets. It was admitted by both counsel that there was no dispute between the parties as to question of fares; that a person who entered a day-car up to midnight had a right to a ride in that car to the end of its route, and under clause 33 a right to transfer to a night-car, without extra fare, and that any person entering a car for the first time after midnight

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had to pay double fare. Be that as it may, it seems to me quite plain that no day-car can be compelled to run after midnight, and if the city engineer attempted to start day-cars upon a route fixed by the company which would compel any such day-car to run after midnight, the company has a right to so arrange its routes that the all day-cars may finish their run at midnight.

This covers the various questions which were submitted other than the fifth, and as to that it seems to me that granted that there may be some other remedy open, the remedy is certainly not open to the court of compelling the company to lay down the line so required, since that would entirely destroy the provision of the contract which permits the company to abandon the street upon which it is so required to lay down a line.

The appeal should be allowed with costs.

GIROUARD J.—I have come to the conclusion that the Court of Appeal has correctly answered the questions submitted for our determination. The answer to the first question might be open to some doubts, but they are not strong enough in my mind to cause me to dissent from the views they took. I am, therefore, of opinion that the present appeal should be dismissed with costs for the reasons given by Mr. Justice Osler.

DAVIES J.—The respondent corporation, having in the year 1891 acquired from its former owners the then Toronto Street Railway with its property and appurtenances, called for tenders for the purchase of the same together with the right and privilege of

operating surface street railways in the City of Toronto for a specified time, all tenders being subject to certain conditions of sale which had been previously agreed to by the city council and published with the call for tenders.

Certain parties successfully tendered and an agreement was made between them and the city in September, 1891, for the purpose of carrying out the sale and contract. The award under which the city had become the owner of the street railway, containing (*inter alia*) schedules describing the property, the conditions, the tender and the city by-law authorizing the execution of the agreement were each and all expressly incorporated with the agreement and made part and parcel of it.

The successful tenderers subsequently applied to the Legislature of Ontario for an Act of incorporation enabling the company to be incorporated to take over from them the contract and agreement they had made with the City of Toronto so that the company might carry out the agreement for the purchase of the street railway and own and operate the same.

The necessary legislation was passed by the Province of Ontario, 55 Vict. ch. 99.

The agreement was declared, in section 1, with all its schedules to be valid and legal and binding upon the parties and it was further declared that under it the purchasers acquired and were

> entitled to the exclusive right and privilege of using and working the street railways in and upon the streets of the said City of Toronto

excepting certain specified portions of such streets.

The 4th section of the Act, upon which much reliance was placed by the appellant in support of its

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argument for the right to lay down a street railway on any street it might select within the city, enacted that:

(1) After the said agreement has been duly assigned to the company it shall, subject to the provisions and conditions contained therein, have full and exclusive power to acquire, construct, complete, maintain and operate, etc., a double or single track street railway, etc., upon or along all or any of the said streets or highways of the City of Toronto subject to the exceptions and under the qualifications contained in the first section," etc.

The first question to be determined before proceeding to answer those submitted for our decision in this appeal is whether this Act of incorporation and the declarations it contains were in any way intended to alter, extend or enlarge and did in fact alter, extend or enlarge the rights, liabilities, obligations or privileges of the parties to the agreement or whether it was merely intended to validate the agreement and confer upon the company the rights and privileges of the individual parties who had successfully tendered and entered into the agreement with the city subject to the obligations and liabilities of these parties under that agreement.

I am of the opinion that the incorporating Act was not intended to do more than the latter and that to determine the relative rights, liabilities and obligations of the respective parties to this appeal we are relegated to the agreement and all its schedules and parts which were validated by the incorporating Act and must determine from them the extent and nature of these rights, liabilities and obligations.

Sections one and two of the agreement confer full and exclusive powers of constructing, completing, maintaining and operating street railways upon all or any of the streets of the city but they do not confer

any right to do so beyond the right prescribed by the agreement, conditions, etc.

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I have had the advantage of reading the judgments prepared by my brothers Sedgewick and Idington and for the reasons given by them I concur in the answer to the first question that there is no obligation on the part of the railway company, appellant, to lay down tracks and establish services on streets in territorial area added to the city since the date of the agreement.

I agree with the courts below and with my brother Idington that the railway company has not the right to build extensions of the main line or branches within the city as it existed at the time of the agreement excepting as it may be required to do so under the 14th clause of the agreement. That clause seems to be the only one expressly providing for the establishment and extension of new or additional lines on the streets.

It was contended that a further right was given by the statute to the company to build on any street they chose in their own uncontrolled discretion. A construction of the contract and legislation validating the same conferring such a right would, in my opinion, be a very startling one and would require very clear language to support it. The exclusive power to build and operate no doubt is given but the right to exercise the power is controlled by the agreement and can be exercised only when called into existence under and in manner provided for by the 14th clause. Even under the 11th clause of the agreement the city while conceding to the company the *right* to change the method of operating the street railway to electric power so far as *then existing tracks were con-*

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cerned reserved complete control as to when the change to electric cars should be made so far as *branch lines or extensions of the main line* and branches were concerned. To give the company the exclusive power to construct and operate street railways on any streets of the city and so prevent competition was one thing. To confer the uncontrolled right of building and operating on any street the company might from time to time select was quite another and different thing. On this branch of the question I concur with the Court of Appeal and my brother Idington.

I am also of opinion, answering the 6th question, that if the company should fail to establish any new line which it was required to establish under the 14th clause the remedy of the city for breach of the requirement is not confined to what in many if not in most cases would be the illusory one of granting the privilege to establish such line to some other person or company but that it may resort to its other remedies under the contract. The specific power to make such a grant might, in certain conceivable cases, be a desirable one for the city to possess while quite illusory as a remedy in others and was properly introduced into the agreement for the purpose of avoiding difficulties which the exclusive powers granted to the company would probably give rise to. But it was not intended as the only remedy the city might resort to arising out of the neglect of the company to carry out its obligations.

Then with respect to the time-tables and routes to be adopted and observed by the company I adopt the reasoning of Anglin J. He says:

Reading clauses 26, 27 and 28 of the conditions together and having regard to the tenor of the whole agreement, I think the con-

clusion is inevitable that both time-tables and routes are within their purview. The city engineer cannot satisfactorily or efficiently exercise his right to determine speed, service and intervals between cars unless he also possesses power to decide upon and fix routes. His right to determine, with the approval of the city council, the "service" necessary upon all lines is unrestricted and is quite wide enough to include the power to specify the routes to be established and maintained. Given the routes and condition No. 27, fixing the hours of starting and finishing the daily runs, the making of time-tables is nothing more than a convenient method of exercising the right to determine speed and intervals.

For these reasons and those given by the Court of Appeal I concur with the answer given by it to the second question.

Much was said at the argument before us as to the unreasonableness of such a construction with which I do not agree. It seems to me that to allot to the company the determination of the routes while giving the power and imposing the duty on the city engineer of determining alike the "speed" and the service necessary on each main "line" as also the "intervals" between which day-cars are to run would be more likely to create chaos than the construction I have concurred in as the proper one.

The contention put forward by the company as the proper answer to question 3, namely, that day-cars are not to be started at a later hour than would clearly enable them to finish their route before midnight is not I think the proper one. By this construction it was admitted that day-cars could not be started on any of the routes after 11 or 11.15 o'clock p.m. I think a fair answer to the question is that cars started before midnight as day-cars must finish the route on which they have so started though it may require them to run after midnight or transfer their passengers to a car which would carry them to their destination, but that at midnight they, *eo instanti,* change

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their character to night-cars and all passengers entering them after that hour must pay the *night fares.*

I concur in the answer proposed to question 4 by my brother Sedgewick and Idington and in the disposition made by them of the 5th question.

IDINGTON J.—This is an appeal from the judgment of the Court of Appeal for Ontario.

The case is reported in 10 Ontario Law Reports, page 657, maintaining in part and varying in part the judgment of Mr. Justice Anglin in 9 Ontario Law Reports, 333.

I am of opinion that the answer given to the first question by the Court of Appeal should be varied, so as to exclude the obligation of the railway company to establish and lay down tracks and services on streets in territorial area added to the city since the date of the agreement.

I am unable to see anything in the contract binding the railway company in respect of future extensions of the city, save so far as is expressed in clause 16 of the conditions of sale incorporated with the agreement and section 19 of the Act whereby the appellants became incorporated and bound to execute the agreement entered into by the purchasers.

I cannot see how these provisions may be so enlarged as to imply that all the rest of the contract must necessarily be held as intended to become operative in any new territory annexed to the city, whenever and wherever such additions might happen to be made.

To provide in express terms for such a contract, as operative and binding from the execution thereof, would have been beyond the powers of the municipal corporation.

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It is said, however, that it was unnecessary to have made any provision anticipating such extensions because the contracting parties well knew that the City of Toronto was likely to expand within thirty years from the date of the contract, during which the franchise created thereby was to exist, and must be taken to have contracted in light of that anticipation and in light of the provisions of the Municipal Act to continue the corporate existence, in such cases of addition to a municipality, so as to give the municipality the same powers over the new territory as it had over the old.

I am, after fully considering all these things, still unable to apprehend how any such implication must necessarily exist, in a contract such as we have to pass upon, as would make all the covenants between the parties that bound them in relation to the old territory operative upon the new.

The provisions for continuous existence of the city and all its corporate powers when its territorial limits have been extended are merely relative to jurisdiction. It would seem as if the necessity for expressly providing, as the Municipal Act does, that in the case of annexation of new territory the by-laws of the city shall be held to apply to the new territory, suggests that contracts of this nature, if to operate upon the new territory, must do so by express provision made therefor. There is none shewn in the Municipal Act or any other act. There is none in this contract.

Status and jurisdiction are not in any way the same thing as a contract, which either may enable to be made. The contract may, and generally must, remain valid even if the status be lost or the jurisdic-

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tion be increased or diminished. But can its operative field be *of necessity* affected by any such change and especially in a contract of this nature?

There seems to me to be a confusion of ideas in contending that this jurisdiction over a defined area and the inhabitants thereof must, of necessity, give such legal effect to a contract with a municipal corporation to do something to or in relation to its property as existent before extension as to bind the contracting parties to do or submit to have the things contracted for done to the new extension of property or domain.

But for what has been brought under our notice and stoutly maintained I would have said that such a case needed only to be stated to carry with it refutation. If it need, as it seems to need, refutation I may illustrate the distinction by something like unto what may come to be within the range of modern possibilities.

If a fire isurance company should undertake with a municipal corporation for a fixed compensation the fire risk for a number of years of all the houses within its bounds, or a life insurance company undertake in like manner for such a term to pay at the death of each of the inhabitants a certain sum of money, and the risks were in either case within the term without further consideration doubled or trebled simply by joining one municipality to another and the name and jurisdiction of the one, thus supposedly contracted with, extended to include the increased size, surely there could not be found any one to claim that such added risks in such a contract were within the terms of the contract or the reasonable intendment thereof.

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On the other hand, if, by an enactment, power were given to a municipality to insure the houses and inhabitants therein against fire and death respectively, and the defined area of the municipality were added to by legislation, it would not surprise or shock any one, if the defined area were then doubled, to find it contended that the power of insurance could be exercised within the increased district and for the added inhabitants.

Why are we likely to be surprised or shocked by the first proposition and undisturbed by the second? Plainly because the reasonable or probable intendment was obviously against the first proposition and yet might be within the second. And why? The first relates to a contract, the other to extended power or authority implied in extended jurisdiction.

Apply this to the case in hand.

When we look at the thing they are contracting about, the nature of the enterprise involved, the many uncertain factors in the operation of such a contract, even within a well-known and defined area, and we reflect how much more complicated the contract must be if projected into the future possibilities that might arise in relation to any added territory, we seem to be forbidden to entertain the thought that any such contracting parties could have intended to apply the terms agreed upon for thirty years to territory over which neither party had any domain or any security for the future condition thereof in any regard, and especially in regard to the value thereof for the purpose of constructing therein or extending therein a system of street railway.

We must bear in mind that the key note of this contract is an exclusive right for thirty years. We

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must also bear in mind that whilst the city could assure the company in regard to the exclusive right within the then existing boundaries that there was no power that could exclude any other railway system from existing or coming into existence in what was likely to become part of the territory to be added in course of time to the city.

Ambitious suburban towns might spring up, with municipal powers enabling them to construct such railways and form such alliances in regard to the transportation of their own people not only through and about their own town but to do business with and in the centre of the greater town. We might find existent railways, at the time this contract was executed, which in all probability would grapple with the situation and make accessory to their business the entire travel of such suburban towns. The chances were entirely, one would say, in favour of such development, rather than that the territory to be occupied by these suburban towns would remain and be in regard to railway service, for years before and at annexation, like a blank sheet of paper to have written over it the policy of the City of Toronto in relation to street railways.

To assume that such adjacent territory might possibly within thirty years be annexed might be reasonable; but to assume that it would be annexed in the same plight and condition in every way in relation to the development of street railway business as when this contract was entered into is something that the common knowledge of any one living upon this continent with observant eyes is unlikely to believe was assumed.

I can hardly comprehend how the varying and

variable conditions likely to arise, beyond the power of control of the contracting parties here, could have been adequately dealt with within their limited powers in any other way than that in which it was dealt with in section 19 of the incorporating Act or in something of a similar way.

The parties anticipated, as was likely, that the company might pave the way for future annexations and pave the way also for future accommodations and future extensions of the relation of the contracting parties hereto and encouraged the company to extend its tracks into the suburban district. Hence in relation thereto they provided for the junction of tracks by stipulating that the grade should be appropriate to such junction. And in the event of annexation such extensions of the company's lines were to become subject to the terms of this contract.

If we find that the contracting parties had no power to go beyond the then area of the city or right to assume the continuation of things beyond that in the same condition, how can we attribute to them any such purpose or intention as that of extending the contract thereto as within their contemplation? How can we under such a contract unless by express language seek to bind them? How can we where they have by express language partially dealt with this problem hold that there was any reasonable intendment to go beyond what they have so expressed? It seems to me, with every respect, that if ever there was a case in which the maxim *"expressio unius est exclusio alterius"* was applicable this must be one.

I do not read the judgment of the Privy Council (1), as deciding this question at all. The court was

(1) *Toronto Ry. Co.* v. *City of Toronto*, [1906] A.C. 117.

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dealing with one of those very extensions of a line which the contract expressly provided for as far as it could then provide for it.

The company having sought to take it out of the operation of this contract by maintaining they had built not by virtue thereof, but under another charter, refused to pay the mileage contracted for. That was decided against it and the decision upheld by the Privy Council. Needless to say that had the Privy Council judgment been otherwise than of this character and an express decision upon the point now in question we would not have been now troubled with it.

I am of opinion, further, that the power to direct the establishment and laying down of new lines within the city as it existed at the date of the agreement came entirely within the scope of clause 14 of the conditions of sale.

I agree with Mr. Justice Osler when he says that,

> one cannot read the contract between these parties without seeing how anxiously—I do not know how effectively—the city has attempted to provide in many respects for the control of their streets and for the protection and convenience of the public.

I will not labour with the question. It is to be gathered from the entire scope and purpose of the contract as a whole that clause 14 I have referred to was intended to be the governing authority in regard to the establishment of new lines.

There could be in the minds of those concerned in the business no doubt but that the city would prefer to have as many tracks and as much street car service as could possibly be got. The thing to be feared was not that the city would object to the rail-

way company laying down a new track, but that it might be tardy in doing so.

The company, on the other hand, had to fear lest the desire for new lines would go beyond the bounds of reason and justice and hence the provision that two-thirds of all the members of the council must assent before such an obligation could be imposed upon the company.

The social and commercial forces at work would solve the rest.

There need not and should not be two parties armed with authority to outline where new lines should be run. One authority, or source of authority, should suffice.

This interpretation of the contract will become more apparently correct by the application of the propositions that I am about to submit in relation to question 2.

If the city engineer had the right to direct which route should be taken, as I think he had, it would almost necessarily follow that effective operation could only be given to that power by the same remaining in the same hands that directed the placing of new lines.

It seems to me it would have been a manifest absurdity that the exercise of these powers so related if not absolutely dependent on each other should be in different hands.

Much has been said of the meaning of the word "service" as used in the 26th condition of sale. It is urged that it applies to and was intended to apply to the subjects, or some of the subjects, under the head of "Tracks, etc., and Roadways," of which clause 26 is the last.

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It has been especially urged that inasmuch as the electric or other new system of motor or a combined system were contemplated that a selection from the varieties of motive power or mechanical means of applying motive power might be what was referred to. I cannot accept any one of these suggestions; indeed I think that the application of clause 26 to such subject matters or any one of them would be strained. Paragraph 26 hardly seems germane to most of the paragraphs that precede it under this heading.

In almost everything provided for under the heading of "Tracks, etc., and Roadways" the city engineer and council, or both, are in each particular case, including selection of motive power, referred to as the determining authority. It was not necessary for the purpose of applying their authority to any of these subject matters to reiterate it in clause 26 or to connect it with the use of the words "the speed" as is done in the clause 26, which reads as follows:

26. The speed and service necessary on each main line, part of same or branch, is to be determined by the city engineer and approved by the city council.

What is the most obvious meaning that the word "service" can have in such a sentence in such a contract? What was the purpose of every appliance, track, car, motive power and the service of the men all combined but to furnish a *service?* What was that service? The transportation of passengers on these tracks, in these cars, by means of this motive power.

The transportation of the largest number of passengers that could possibly be induced to accept the use of these cars was the object of the entire contract and all that relates to the contract. But for the reiteration in detail of some particular parts of what

were covered by the words used in 26 there could not have rested a shadow of doubt in regard to what the word "service" here means.

The draftsman, like many others, has in the two following sections of these conditions seen fit to specify particulars as to day-cars and night-cars and thereby weaken the force of the general and comprehensive expression of the ideas present to his mind in framing clause 26. The power of generalization, the apt use of words to express a generalization when the idea has been once seized and the courage to leave such expression as first and best bodied forth are very often more or less wanting in the drafting of documents such as we are now dealing with.

Clause 13 of the agreement seems intended to rectify these defects in the agreement and conditions by adding,

it being understood that the reference to particular matters to be performed by the purchasers shall not diminish or limit the obligations of this agreement.

Making allowances for these considerations and having regard to the latter part of clause 13 just quoted, I have no hesitation in accepting the word "service" here as conclusively meaning all that is implied in fixing a route. Not only is the wise selection of routes necessary to maintain the service (that is, the transportation of passengers), in the highest degree of efficiency in working the railway but it is of the very essence of such service that it shall be so determined as to so meet the requirements of those using the streets that there will be accommodated the largest possible number that can be accommodated by means of a given mileage of track. The citizens would probably feel more promptly and acutely than

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the shareholders of the company the lack of the best possible service. The engineer would therefore be more responsive to new demands than the manager of the company.

When we couple routes with speed and what in both respects is to be done on the main line or part of same or branch we have almost everything that in relation to service can be advantageously determined by the city engineer and approved by the city council, including, of course, what sections 27 and 28 specially covered.

The manifest purpose was to control the lessees or contractors who might fail, as they do in such cases, to go to the expense of modifying a service as it becomes less efficient than it may have formerly been.

From time to time a spur is needed in every public service.

What we are asked here to do is to suppose that any and every efficient means of supplying this was omitted.

Speaking of the possible incompetency of a city engineer to discharge such a duty is beside the question. It would be equally to the purpose to speak of the manager of the company as possibly incompetent. We must assume both contracting parties intended to have efficient officers. We cannot overlook the facts that both parties to the contract were deeply interested in the best financial results being got, and that though this was the case the interest of the company was and is only temporary whilst that of the city is perpetual.

The engineer and manager in order to produce the best results should work harmoniously, each giving the best of his skill and knowledge and results

of his experience to the other. One would suppose in such kind of a partnership that the final decision ought to rest with those nominated by the parties who undoubtedly have the greatest and a continuous interest.

These considerations, of course, cannot decide the meaning of the contract if clearly expressed in a different sense; but such considerations are an obvious answer to so much of what was strenuously advanced in argument as needed to be borne in mind for the purpose of interpreting correctly this contract.

When we try to find how this word "service" has been applied in other parts of the same contract we see in every instance where it has been used, except in clause 41, it is applicable to, and can, I think, only be fairly read as being applied to the transportation of passengers.

In clause 14 it is contradistinguished from the tracks and properly described as a street car service. In condition 17 it is again used in contradistinction to the tracks, and in 33 it is used in harmony with the idea of transportation of passengers, when it provides for the transfer service as a means of carrying out the transportation. And when used in the condition 36 it is the car that is designed for what? For service in the transportation of passengers. The same may be said to be true of its use in condition number 40.

I do not think it derogates from the force of this to find that the word "service" is used in 41 in relation to the word "men" in its original sense.

Time-tables and routes are but incidental to the same idea of transportation of passengers. Stoppages may be also, but though referred to in argument they do not seem covered by any of these questions.

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As to the third question, I am unable to appreciate what this dispute is about. We have been assured by counsel for the appellants that there is not and has never been any claim to turn out a passenger who may have entered upon a car near midnight before that passenger was carried to his destination. We also are assured that no such passenger has ever had exacted or claimed from him the double fare payable after midnight.

I can conceive that the use of a day-car after midnight when passengers are few may entail extra expense upon the company and that the gradual introduction of the night-car instead of the day-car would be less burthensome for the company and quite as serviceable for the greater part of the time as carrying out the requirements of the city engineer. At other times this might not be so.

I am unable, however, to see how the requirements of the citizens and other passengers can be ensured, by any other means, within the specifications in this contract, than those the city engineer has adopted. I can conceive of a manager in the car-barn being able, from day to day, and night to night, to accurately determine whether or not the requirements of the travelling public would or would not be served by putting on night coaches earlier than midnight. I am unable, however, to see how the city engineer can foretell all this. If these parties cannot accommodate each other in any other way than by a rigid interpretation of the provisions of the contract in this regard it must be applied. I think undoubtedly the correct answer has been given by the Court of Appeal to this third question.

As to question 4 and the answer thereto, I am

unable to concur in the view expressed by the Court of Appeal.

I think it would be impossible to carry out by any hard and fast rule, consistently with the greatest degree of the comfort and convenience of the passengers, just what the city engineer has chosen to lay down. The requirements in spring months and fall months might vary from week to week, from day to day in changeable weather such as occasionally occurs in spring and autumn. Such an interference with the carrying on of the appellants' business is undesirable and ought therefore not to be inferred as intended. It does not form an essential part of the service and so necessarily come within clause 26 as I interpret it.

Clause 36 I think provides all that is to be looked at in this connection. The section on this point reads thus:

> Cars are to be of the most approved design for service and comfort, including heating, lighting, signal appliance, numbers and route boards.

Plainly the cars here spoken of are not those that are in the barn but those that are actually running, and they must be heated, lighted, as well as otherwise according to the most approved design.

That does not entitle a company to put out a summer car in winter weather or a winter car in summer weather. It leaves, as there is no power given to any one expressly or as I think impliedly to determine the matter, the parties complaining, either passengers or covenantees, to their respective remedies on this which by force of clause 13 of the agreement is part of a covenant.

A persistent defiance of the requirements of this

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covenant can be dealt with also upon the facts either in a case seeking to rescind the charter or otherwise quite as efficiently as the requirements of the engineer had he the power to specially direct in this regard as I do not think he has. That in the same section there are two objects committed to the determination of the city engineer and that the cars or heating thereof as described are not so intrusted to his direction is to my mind conclusive that it never was intended that anything further should be open to the respondents or others than the usual remedies for a breach, or for persistent breaches of contract on the part of such a corporation as the appellants'.

I would therefore answer question 4 in the negative.

I have no doubt of question 5 being properly passed over for the reasons given in the court below.

I have no difficulty in assenting to and upholding the answer of the Court of Appeal to the 6th question. But for the able and strenuous argument addressed to us I should have supposed the question was not arguable. There is to my mind as clear as can be a covenant to observe each one of the provisions in this contract and one of them is the obligation resting upon the company to obey the requirement of the city council and the city engineer when that is made known in the manner described in clause 14.

In effect we are asked to give the same meaning to the word "require" as if it were "request" or something that did not imply an obligation upon those subjected to it. I cannot assent to such a proposition.

The option rests with the city to accept this alternative of clause 17 or pursue their remedies on the

covenant or possibly (upon which point I express no opinion) do both.

I am of opinion that the judgment of the court below should be varied accordingly and the appeal to that extent allowed.

Appeal allowed in part with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin and Harcourt.*

Solicitor for the respondent: *W. C. Chisholm.*

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*May 8.
*May 14.

EMMA LEAHY (PLAINTIFF) ....APPELLANT.

AND

THE TOWN OF NORTH SYDNEY (DEFENDANT) .... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Watercourses—Riparian rights—Expropriation — Trespass—Torts—Diversion of natural flow — Injurious affection — Damages — Execution of statutory powers — Arbitration — Injunction — Mandamus—Construction of statute—59 V. c. 44(N.S.).

A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a watercourse may recover damages therefor and may also obtain relief by injunction restraining the continuation of the tortious acts so committed.

The powers conferred upon the town council of the Town of North Sydney, N.S., by the Nova Scotia statute, 59 Vict. ch. 44, for the purpose of obtaining a water supply give them no rights in respect to the diversion of watercourses except subject to the provisions of the fourth section of the Act, and after arbitration proceedings taken to settle compensation for injurious affection to property resulting from the construction or operation of the waterworks. *Saunby* v. *The Water Commissioners of London* ([1906] A.C. 110) followed.

APPEAL from the judgment of the Supreme Court of Nova Scotia reversing the judgment of Meagher J. and dismissing the plaintiff's action with costs.

The plaintiff brought the action against the Town of North Sydney on account of the injurious affection of her rights as a riparian proprietor and as the owner of privileges in a stream called Smelt Brook which is the only outlet of Pottle's Lake, in the County of Cape Breton, N.S., seeking to recover dam-

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

ages at common law and for an injunction, or, in the alternative, for statutory compensation and a mandamus to compel the town to proceed to expropriate the property affected and have the compensation assessed by appraisers under the provisions of chapter forty-four of the statutes of Nova Scotia for 1896. The plaintiff is the owner of lands on both sides of Smelt Brook a short distance below the lake and has also the right, acquired from riparian owners above her lands, to run a pipe two hundred feet in length up-stream for the purpose of getting a head of water. She built a laundry on her land, erected a dam, ran a pipe up to the dam, installed laundry machinery with a turbine wheel with a flume and raceway and operated the machinery by means of the water-power thus obtained.

By the above mentioned Act the town was authorized and empowered to provide for its inhabitants a good and sufficient supply of water for domestic uses, fire protection and other purposes and to construct the necessary works, lay pipes, build dams and reservoirs, acquire lands and to do all other necessary things in relation thereto. The provisions of the statute affecting the matters in issue are contained in the second, fourth and fifth sections, which are as follows:

"2. For the purpose of obtaining the said supply of water the town council are hereby authorized and empowered to enter upon all lands within the limits of the Town of North Sydney, and upon all lands in the County of Cape Breton outside the limits of the Town of North Sydney, and to enter upon the bed of any river, lake or stream whatsoever in the County of Cape Breton, and to build dams, reservoirs or other works wherever necessary, and to cause the

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water to overflow the land bordering on such river, lake or stream, and to take from such river, lake, stream or springs, such quantity or quantities of water as may be required; and in the construction, building or repairing of any dams or reservoirs, and in the laying down, constructing, repairing or alteration of any main or service pipe or other structure under the provisions of this Act, the mayor, councillors, or any or either of them, and their engineer, superintendent, servants or workmen, shall have full power, and they are hereby authorized, from time to time, as occasion may require, to enter upon any lands or tenements, inhabited or uninhabited, both within the said town or outside of the same, and may remain thereon as long as they may deem requisite for the proper execution of the work, and make all such excavations on the premises as may be expedient, and take up and remove any floors, timbers, planks, walls, fences or erections whatsoever, doing no unnecessary damage to the same, and carefully replacing the same, as far as can be, on the requisite work being performed.

"4. Whenever it shall be necessary for the securing the necessary supply of water, the laying down or placing of any reservoirs, tanks, fountains, pipes, leaders or tubes, or for any purposes whatsoever under this Act, that the town shall be invested with the title or possession of or in any lot or parcels of lands and premises, situated anywhere, either in the town or outside the corporation limits, it shall and may be lawful for the council, in case they cannot agree with the proprietors of such lands, respectively, for the purchase or lease thereof as may be required, to give notice in writing to the party whose lands are intended to be taken, or to his agent, that the said

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lands are required for the purposes of the town under this Act, and shall request the party or his agent, whose land it is proposed to take or occupy, to appoint one arbitrator, and the council shall appoint one arbitrator, and a judge of the Supreme Court shall appoint a third arbitrator, and the arbitrators so appointed shall proceed to determine the damages, if any, and award the same to be paid to the owner or occupier, as the case may be, whose award, or the award of any two of them, shall be final and conclusive, provided the town council decide to take such lands; and thereupon the town shall pay and satisfy within six months to those entitled to receive the same, the full amount of such award or valuation, and immediately upon the payment or tender of the sum awarded as aforesaid to the owners, or in case of dispute to such parties as a judge of the Supreme Court shall decide, the town shall be and be deemed the rightful purchasers and owners in fee simple of such lot or parcel of land with the appurtenances, if the said award be for the purchase thereof, or otherwise the tenant thereof for such time as in such award set forth, and in case the proprietor of such lands neglect or refuse to appoint an arbitrator within thirty days after due notice as aforesaid, or in case the proprietor cannot be found, or is absent and has no known agent residing in the province, a judge of the Supreme Court may appoint such arbitrator, who shall be disinterested and not a resident of North Sydney. If the town council have no reason to fear any claims of encumbrances, or if any party to whom compensation is payable cannot be found, or is unknown, or if for any other reason the council may deem it advisable, the council may pay such compensation into the office of the

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prothonotary of the Supreme Court of the County of Cape Breton, a judge of which court shall by order direct it to be deposited in some bank, there to remain until by him directed to be paid out to the party entitled thereto, and shall deliver to the prothonotary aforesaid a copy of the award, and such award or a certified copy thereof under the hand and seal of the prothonotary aforesaid, together with his receipt for the amount awarded, when registered in the registry of deeds office for the County of Cape Breton, shall thereafter be deemed to be the title of the town to the property therein mentioned.

"5. In the event of any damage being done in the execution of the work the party sustaining such damage shall be entitled to receive such compensation as shall be mutually agreed upon, and in case no such agreement can be made, three appraisers, one to be appointed by the party sustaining such damage, one to be appointed by the town council, and the third to be appointed by the two appraisers already so appointed, shall view the premises and determine the damages, if any, without hearing evidence in the matter, the decision of said appraisers, or any two of them, to be final and binding on the parties, and the amount so assessed to be paid within three months thereafter. In case the party sustaining such damage shall not appoint an appraiser as aforesaid within thirty days from the service upon him of a notice in writing requesting him to appoint such appraiser, the judge of the county court for district number seven may appoint such appraiser."

Under the powers conferred by the Act, the town constructed a system of waterworks obtaining all its supply from Pottle's Lake and the plaintiff complained that, thereby, such large quantities of water

were diverted and abstracted from their natural flow through Smelt Brook past and over her lands that the value of her property was greatly diminished and the effective operation of her water-power injuriously affected.

At the trial Mr. Justice Graham decided in favour of the plaintiff and adjudged that she was entitled to such damages as might be awarded by appraisers to be appointed under the provisions of the fifth section of the Act, and that she was entitled to a mandamus against the town directing the appointment of an appraiser on its behalf and for the proceedings therein provided. By the judgment appealed from this decision was reversed and the plaintiff's action was dismissed with costs, Russell J. dubitante.

Drysdale K.C. (Attorney-General for Nova Scotia), and *Burchell,* for the appellant relied upon the decision in *Roberts* v. *Gwyrfai District Council* (1); *McCartney* v. *Londonderry and Lough Swilly Railway Co.* (2); *The Commissioner of Public Works* v. *Logan* (3); *The Water Commissioners of London* v. *Saunby* (4); *Corporation of Bradford* v. *Pickles* (5), at pages 152, 153, *per* Herschel L.C. and on appeal (6), *per* Watson L.J. at page 596; *Wells* v. *The London etc., Railway Co.* (7), *per* Bramwell J., at page 130; *The Queen* v. *Vestry of St. Luke's* (8), *per* Kelly C.B., at page 153; *The Hammersmith and City Railway Co.* v. *Brand* (9); *City of Glasgow Union Railway Co.* v. *Hunter* (10); *The Great*

(1) [1899] 2 Ch. 608.
(2) [1904] A.C. 301.
(3) [1903] A.C. 355.
(4) 34 Can. S.C.R. 650; [1906] A.C. 110.
(5) [1895] 1 Ch. 145.
(6) [1895] A.C. 587.
(7) 5 Ch. D. 126.
(8) L.R. 7 Q.B. 148.
(9) L.R. 4 H.L. 171.
(10) L.R. 2 H.L. Sc. 78.

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Western Railway Co. v. *Smith*(1), at page 250; *Re Birely*(2), *per* Armour C.J.; *Gareau* v. *Montreal Street Railway Co.*(3); *The Duke of Buccleuch* v. *Metropolitan Board of Works*(4); *Cowper-Essex* v. *Local Board of Acton*(5); *Metropolitan Board of Works* v. *Metropolitan Railway Co.*(6); *Roderick* v. *Aston Local Board*(7), at page 333; *Canadian Pacific Railway Co.* v. *Parke*(8), at page 545; *Love* v. *Bell*(9), *per* Watson L.J. at page 298; *Webb* v. *Manchester and Leeds Railway Co.*(10) *per* Cottenham L.J.; *Scales* v. *Pickering*(11), *per* Best C.J. at page 452; *Scottish Drainage and Improvement Co.* v. *Campbell*(12), *per* Herschel L.C. at page 142; *Clowes* v. *Staffordshire Potteries Waterworks Co.*(13); and *Knowles* v. *The Lancashire and Yorkshire Railway Co.*(14), at page 255.

Newcombe K.C. and *W. F. O'Connor,* for the respondent. The legislature authorized the doing of the acts complained of and, in the absence of negligence, the appellant must either find in the Act some provision for compensation, or be content to be deprived of it in the general public interest. *Canadian Pacific Railway Co.* v. *Roy*(15); *Geddis* v. *Proprietors of Bann Reservoir*(16); *Mersey Docks and Harbour Board Trustees* v. *Gibbs*(17); Coulson & Forbes

(1) 2 Ch. D. 235.
(2) 28 O.R. 468.
(3) 31 Can. S.C.R. 463.
(4) L.R. 5 H.L. 418.
(5) 14 App. Cas. 153.
(6) L.R. 3 C.P. 612; 4 C.P. 192.
(7) 5 Ch. D. 328.
(8) [1899] A.C. 535.
(9) 9 App. Cas. 286.
(10) 4 Myl. & Cr. 116.
(11) 4 Bing. 448.
(12) 14 App. Cas. 139.
(13) 8 Ch. App. 125.
(14) 14 App. Cas. 248.
(15) [1902] A.C. 220.
(16) 3 App. Cas. 430.
(17) L.R. 1 H.L. 93.

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on Waters, pp. 112, 270, 271, 273, 290-291; Cripps on Compensation, pp. 10-11, 117, 123, 132, 133; *North London Railway Co.* v. *Metropolitan Board of Works* (1); *Galloway* v. *Mayor of London*(2); *Kennet and Avon Navigation Co.* v. *Witherington*(3), *per* Martin, B.; *Jones* v. *Stanstead, Shefford and Chambly Railroad Co.*(4); Mayer on Compensation (1903), pp. 56, 67; Brown & Allen on Compensation, 384.

The words of the Act are "damage *being* done *in* the execution of the work," that is damages done *during* the construction of the works as distinguished from damage arising *by reason of the operation* of the works. The Act does not contemplate, in any event, damage for loss of business or personal loss or inconvenience. *Beckett* v. *Midland Railway Co.*(1867) (5). Similar words in the English Lands Clauses Consolidation Act have been judicially construed as extending only to damage done during *construction,* as distinguished from *operation* of the works. *Hammersmith and City Railway Co.* v. *Brand* (1869) (6), at page 215; *Jones* v. *Stanstead, Shefford and Chambly Railroad Co.*(4), at pp. 117-120; *Caledonian Railway Co.* v. *Walker's Trustees*(7), *per* Shelborne L.J.; *Rex* v. *Pease* (1832) (8); *Vaughan* v. *Taff Vale Railway Co.* (1860) (9); *City of Glasgow Union Railway Co.* v. *Hunter* (1870) (10), *per* Hatherley L.C.; *Hopkins* v. *Great Northern Railway Co.* (1877) (11), *per* Mellish L.J.; *London, Brighton*

(1) Johns 405; 28 L.J. Ch. 909.
(2) L.R. 1 H.L. 34.
(3) 18 Q.B. 531.
(4) L.R. 4 P.C. 98.
(5) L.R. 3 C.P. 82.
(6) L.R. 4 H.L. 171.
(7) 7 App. Cas. 259.
(8) 4 B. & Ad. 30.
(9) 5 H. & N. 679.
(10) L.R. 2 H.L. Sc. 78.
(11) 2 Q.B.D. 224.

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& S. C. Railway Co. v. *Trumanin* 1885(1), *per* Lord Halsbury L.C.; *Attorney-General and Hare* v. *Metropolitan Railway Co.*(2), *per* Lindley L.J.

The Act does not provide for compensation either by action or by appraisement for such damages as are claimed. Section 4 deals with nothing but lands. Section 5, which provides for the case of damages caused by entries upon lands authorized by sec. 2 of the Act in the "execution of the work," but does not look upon the taking of water as the doing of damage, and cannot have been intended to provide compensation for value of impaired riparian rights. A riparian owner cannot convey away his riparian rights. Coulson and Forbes, pp. 118-131-132; *Stockport Waterworks Co.* v. *Potter*(3); *Ormerod* v. *Todmorden Mill Co.*(4).

The declaratory judgment asked for ought not to have been made nor the amendment providing therefor allowed. The court could not grant and superintend consequential relief, and so could not award the declaration. *Barraclough* v. *Brown*(5); *Baxter* v. *London County Council*(6); *Bunnell* v. *Gordon* (7); *Attorney-General* v. *Cameron*(8). The provisions of section 5 oust the jurisdiction of the court. *Crosfield & Sons* v. *Manchester Ship Canal Co.*(9); *Midland Railway Co.* v. *Loseby*(10); *London & Northwestern Railway Co.* v. *Donellan*(11); *Brierly*

(1) 11 App. Cas. 45.
(2) [1894] 1 Q.B. 384.
(3) 3 H. & C. 300.
(4) 11 Q.B.D. 155.
(5) [1897] A.C. 615.
(6) 63 L.T. 767.
(7) 20 O.R. 281.
(8) 26 Ont. App. R. 103.
(9) [1904] 2 Ch. 123.
(10) 68 L.J.Q.B. 326.
(11) 67 L.J.Q.B. 681.

Hill Local Board v. *Pearsall*(1); *Davenport Corporation* v. *Tozer*(2); *Grand Junction Waterworks Co.* v. *Hampton Urban Council*(3); *Pasmore* v. *Oswaldtwistle Urban Council*(4). The section requires a prior attempt at agreement, and in the event of failure to agree, the party sustaining damage must appoint an appraiser. The party sustaining the damage is first named in the Act. In a proper case, he must move first, and if he does not move, the Act provides compulsory process. It is necessary to prove a prior disagreement between the parties and a neglect or refusal to appoint an appraiser before the remedy by mandamus may be invoked. Cripps on Compensation, pp. 68-69, 143-4; *Caledonian Railway Co.* v. *Davidson*(5), *per* Lord Halsbury L.C.

Bodies of water, however large, which are of a temporary character, *i.e.,* dependent on the will or convenience of individuals for their volume or duration, are not the subject of riparian rights. *Briscoe* v. *Drought*(6); *Arkwright* v. *Gell*(7); *Broadbent* v. *Ramsbotham*(8); Coulson & Forbes on Waters, p. 58. Pottle's Lake is not flowing water, and the appellant has no right in the waters thereof. See Coulson & Forbes, p. 289-301; *Proprietors of the Staffordshire, etc., Canal Navigation* v. *Proprietors of the Birmingham Canal Navigation*(9), *per* Cranworth L.J.

Water may be appropriated before it reaches a stream. *Chasemore* v. *Richards*(10), *per* Chelmsford

(1) 9 App. Cas. 595.
(2) 71 L.J. Ch. 754.
(3) 67 L.J. Ch. 603.
(4) 67 L.J.Q.B. 635.
(5) [1903] A.C. 22.
(6) 11 Ir. C.L. 250.
(7) 5 M. & W. 203.
(8) 11 Exch. 602.
(9) L.R. 1 H.L. 254.
(10) 7 H.L. Cas. 349, at p. 376.

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L.C.; Angell on Watercourses, p. 6; *Holker* v. *Porritt* (1); *Acton* v. *Blundell*(2); *New River Co.* v. *Johnson*(3); *Greatrex* v. *Hayward*(4); *Wood* v. *Waud* (5); *Young* v. *Bankier Distillery Co.*(6); *Ballard* v. *Tomlinson*(7).

The appellant has no right to run a laundry by virtue of her riparian rights, but only by contract, if at all. Her deed entitles her to enough water for a tannery—not a laundry.

We would also refer the court to the decisions in *Bush* v. *Trowbridge Waterworks Co.*(8), *per* James L.J.; *Stone* v. *Mayor of Yeovil*(9); *Clark* v. *The School Board for London*(10); *Green* v. *Chelsea Waterworks Co.*(11); *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*(12), at pp. 236-7, and *Duke of Bedford* v. *Dawson* (13).

SEDGEWICK J.—The determination of this appeal depends upon the construction to be given to section two of chapter forty-four of the statutes of Nova Scotia of 1896, and of sections four and five of the same Act.

The majority of the court are of the opinion that while section two gives to the town council of North Sydney the power to divert the stream in question and to take water therefrom, such diversion and taking can only be done subject to the provisions of sec-

(1) L.R. 10 Exch. 59.
(2) 12 M. & W. 324.
(3) 2 E. & E. 435.
(4) 8 Exch. 291.
(5) 3 Exch. 748.
(6) [1893] A.C. 691.
(7) 29 Ch. D. 115.
(8) 10 Ch. App. 459.
(9) 2 C.P.D. 99.
(10) 9 Ch. App. 120.
(11) 70 L.T. 547.
(12) (1899) 2 Ch. 217.
(13) L.R. 20 Eq. 353.

tion four and that no entry or works done upon the lands through which the stream in question flows or any diversion of the waters thereof can be made until after the arbitration proceedings under section four are taken.

Section five, we think, relates only to cases where damage is done the property by the construction, as distinguished from the operation, of the work authorized to be done.

The Town of North Sydney was, therefore, a trespasser when it diverted the plaintiff's waters from their natural course and appropriated such waters for the purposes of the town and, under ordinary circumstances, would be compellable to pay damages for the trespass complained of. Counsel for the plaintiff, however, during the argument in this court expressly waived any claim for damages asking only a perpetual injunction restraining the town from continuing the tortious acts referred to. This she is entitled to upon the same principles that influenced their Lordships of the Privy Council in *Saunby* v. *The Water Commissioners of London*(1), a case which would doubtless have been followed had the judgment been given before the trial of the present action.

The result is that the appeal is allowed and that judgment is to be entered for the plaintiff as herein stated, she being entitled to costs in all the courts below and here.

GIROUARD J.—I concur for the reasons stated by His Lordship Mr. Justice Sedgewick. The appeal should be allowed and judgment should be entered for the appellant with costs in the courts below and in this court.

(1) (1906) A.C. 110.

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DAVIES J.—This appeal depends, in my judgment, entirely upon the construction to be given to the statute as a whole, chapter 44 of 59 Vict. of the statutes of Nova Scotia for 1896. This statute is, as one of the counsel for respondent observed, unique and unlike any other statute to be found in the province and, I might add, in any other province of the Dominion.

I doubt whether much assistance can be gained from any of the array of cases decided under the English Lands Clauses Consolidation or Railway Clauses Consolidation Acts or the many private Acts giving power to expropriate lands to private companies. These statutes are carefully drawn, apt and proper language is used and provisions introduced for the purpose of protecting all interests likely to be affected. The statute before us for construction is inartifically drawn, improper and inapt language is used and no general clause was inserted for the protection of interests likely to be affected or prejudiced by the exercise of the powers granted.

There are, however, several well known rules or canons of construction which may be drawn from the cases decided on these expropriation clauses of private Acts and which may with advantage be borne in mind while endeavouring to determine the full and true meaning of this crude bit of legislation. One of these rules is not to impute unnecessarily to the legislature the intention to confiscate private property and that in the absence of any clear language shewing the existence of such intention, the rights conferred on a private company or corporation compulsorily to take the lands or property of an individual, may well be held to be commensurate and cor-relative with the obligation imposed to pay compensation. I say such will be the general rule applied but of course

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if the statute is plain, clear and unambiguous nothing remains for the court but to give effect to it however unfortunate or unjust the Act of confiscation may be. If the language conferring powers of expropriation is, however, ambiguous and doubtful as to their extent and the compensation clauses are limited in their scope and definite in their extent the statute will have a construction put upon it which will avoid confiscation and the ambiguous language of the expropriation clause will be limited to cover such property and interests only as are provided for in the compensation clauses. And this is only another way of stating the proposition that the courts will not impute to the legislature an intention to confiscate private rights and interests.

If the statute is clear and authorizes the promoters to do any particular act or thing and it is done in a proper and reasonable manner even though it should work a special injury to a particular individual or his property, the only remedy he would have would be for compensation under the Act and if no compensation was provided he would be without a remedy.

As was said by Lord Macnaghten in delivering the judgment of the Privy Council in *East Freemantle Corporation* v. *Annois*(1), at page 217.

The law has been settled for the last hundred years. If persons in the position of appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do and do it in a proper manner though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute.

It was upon that principle the judgment of the

(1) [1902] A.C. 213.

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court below proceeded in dismissing this action, namely, that the works built and executed by the town council were within and not beyond those expressly authorized by the statute and were properly and reasonably done, and that the statute not having provided compensation the plaintiff was without a remedy. I agree with them that the statute does not provide compensation for such a case as the plaintiff's. I differ from them as to the works not being beyond or in excess of the statutory authority, and on this ground would allow the appeal and grant a new trial for the assessment of damages. The case of *Geddis* v. *Proprietors of Bann Reservoir*(1), is very instructive upon the question, as is also the judgment of Farwell J. in the case of *Roberts* v. *Charing Cross E. & H. Railway Company*(2). In his judgment amongst other statements pertinent to the case before us he says:—

> There may be questions of construction which are affected to some extent by the consideration whether compensation is or is not given by the Act, but the same principle applies to all. If the Act of Parliament has authorized the particular thing to be done then you cannot sue a man or a company for doing what is a lawful act. In my opinion this principle applies whether the powers are given to public authorities acting for the public benefit or to railway companies or others acting for their own profit.

The statute here in question was one intituled "An Act to provide for supplying the Town of North Sydney with water." The first section conferred upon the town in general terms the power so to provide either by contract or by itself constructing the works and doing all things necessary to be done to carry out the object. The second section for the pur-

(1) 3 App. Cas. 430. (2) 87 L.T. 732.

pose of obtaining the necessary supply of water generally empowered the council

to enter upon all lands in the County of Cape Breton and to enter upon the bed of any river, lake or stream in the county, and to build dams and reservoirs where necessary, and to cause the water to overflow the land bordering on such river, lake or stream, and to take from such river, lake or stream such quantities of water as may be required.

The fourth section enacted that

whenever it shall be necessary for the securing the necessary supply of water * * * or for any purposes whatsoever under this Act *that the town should be invested with the title or possession of or in any lots or parcels of land situated anywhere*

it should be lawful for the council in case it could not agree with the owners for the lease or purchase of the lands to take the same compulsorily. The section then goes on to specify the procedure to be adopted in the compulsory purchase and the mode or method of assessing the damages and declares that

immediately upon the payment or tender of the sum awarded * * * the town shall be and be deemed the rightful purchaser and owners in fee simple of such land with the appurtenances if the award be for the purchase thereof or otherwise the tenant thereof for such time as in such award set forth.

The section then goes on to provide for the payment into court of the money awarded in case the party to whom the compensation is payable cannot be found.

Now many difficulties, some of them perhaps insuperable, might be met in the attempt to apply such crude and ill drafted legislation to the purchase of many titles or interests.

The Nova Scotia Interpretation Act might, no

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doubt, help in some cases, because it says that the word "lands" shall, wherever used, include

> lands, tenements, hereditaments and all rights thereto and interests therein.

But putting a reasonable and fair construction upon these two sections I conclude that section two was intended generally to confer and did confer upon the town council the "authority and power" in addition to its municipal functions to enter upon lands, build reservoirs and dams upon them, dam up and back the water, overflow the lands bordering on rivers, lakes or streams, and to take from them such water as might be required. Such general power was no doubt given but the mode of its exercise, the procedure to be adopted in changing the power into a *right,* the limitations and obligations imposed upon the exercise of the right were, so far as they were set out and defined at all, set out in the fourth section from which I have quoted above.

Only such rights are given as could be gained by the exercise of the powers granted as prescribed by this fourth section. No other or greater are provided for. If under that section, in the exercise of the powers conferred, the town council amicably purchased the lands of an owner in fee it was authorized by the second section to do so and on the necessary documents being signed became the owner in fee itself. If the estate or interest so amicably purchased was other or less than the fee of course only the lesser estate passed. If the compulsory powers were resorted to under the section then the estate or interest of the person notified might be expropriated *but no more nor other estate than he possessed* no matter what it might be. And as the section does not provide

for the "injurious affection" by the town council of any lands, and it was not essential to the exercise of any of the powers conferred upon them that they should injuriously affect any other lands than those they took under their compulsory powers, the result follows that if they did so injuriously affect other lands, such for instance as those of the plaintiff by taking away or abstracting from her the natural flow of water which the trial judge and the appeal court held she had a right to flow over her land, they did so wrongfully and to the extent they did so are trespassers.

No one could successfully contend that either the amicable or compulsory purchase of certain property from third persons could in itself give the right contended for by the defendant here to destroy the right of the plaintiff which defendant did not purchase or treat for to the natural flow of water across and over her property.

Suppose the case I put during the argument. The bed of a lake is owned by ten or twelve several owners in ten or twelve several equal or nearly equal parts. Could it be seriously argued that the purchase, amicable or compulsory, of that particular owner's part of the bed of such lake nearest its outflow gave the town council the right to enter upon that portion and drain off all the water from the other parts of the lake and that without treating with the owners of such other parts and without compensation? Such a proposition need only be stated in order to refute it. No express power or right to divert the natural course or run of any stream is given by the Act.

I interpret the statute, reading it as a whole, to invest the town council with the power it did not other-

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wise possess of buying either amicably or compulsorily lands outside of the town, laying pipes, building dams and reservoirs on the lands bought, overflowing the banks of lakes and streams upon lands which they might buy, and taking from all these lakes and streams not only all such surplus or additional water which by their dams or works they might dam back and retain, but also all the water which the owners or persons from whom they bought might have of right taken or abstracted before any dams were built with the correlative obligation of compensation to each owner. I refuse to extend the right or power of the town council to take away or injuriously affect the valuable right of other parties without compensation. Such an extension would mean confiscation not expropriation, and would require much clearer language to justify it than is found in the statute.

I agree with the court below in its reasoning and conclusion that neither the fourth nor the fifth sections provides for compensation to the plaintiff in this case because neither her lands nor any right or interest in them have been taken by the respondent and the sections do not provide for damages caused by injuriously affecting lands. *Bush* v. *Trowbridge Waterworks Co.*, 1875, (1). I do not think the damage done a necessary incident of the powers conferred or that any authority under the statute existed to justify the injury caused the plaintiff. So far as the defendant has taken away the plaintiff's right to the natural flow of water over her lands it is a trespasser.

The case is one where damages will be a complete

(1) 10 Ch. App. 459.

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satisfaction for the injury and wrong. These damages can be assessed by the court once for all with or without the assistance of a jury as the practice of the province provides, and I think therefore the appeal should be allowed and the case remitted to the court below for the assessment of such damages as the plaintiff has sustained.

IDINGTON J.—The plaintiff who is appellant here was a riparian proprietress in a stream known as "Smelt Brook" and entitled, as such, and also by virtue of a grant to her of an easement, to use the waters of the said stream for divers purposes.

The respondent's town council were by the Nova Scotia Statute (1896) 59 Vict. ch. 44, sec. 1, empowered to provide for the town a supply of water.

Increased powers were given by later legislation to extend this supply to other places.

Section two of the first mentioned Act was as follows:—

For the purpose of obtaining the said supply of water the town council are hereby authorized and empowered *to enter upon all lands* within the limits of the Town of North Sydney, and upon all lands in the County of Cape Breton outside the limits of the Town of North Sydney, and to enter *upon the bed* of any river, lake, or stream, whatsoever in the County of Cape Breton, and to build dams, reservoirs or other works wherever necessary, and to cause the water to overflow the land bordering on such river, lake or stream, and to take from such river, lake, stream or springs, such quantity or quantities of water as may be required; and in the construction, building or repairing of any dams or reservoirs, and in the laying down, constructing, repairing or alteration of any main or service pipe or other structure under the provisions of this Act, the mayor, councillors or any or either of them, and their engineer, superintendent, servants or workmen, shall have full power, and they are hereby authorized, from time to time, as occasion may require, to *enter upon any lands or tenements*, inhabited or uninhabited, both within the said town or outside of the same, and may remain thereon as long as they may deem requisite for the proper execution of the

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work and make all such excavations on the premises as may be expedient, and take up and remove any floors, timbers, planks, walls, fences or erections whatsoever, doing no unnecessary damage to the same, and carefully replacing the same, as far as can be, on the requisite work being performed.

Section four of the same Act provides that:

> Whenever it shall be necessary for the securing the necessary supply of water, the laying down or placing of any reservoirs, tanks, fountains, pipes, leaders or tubes, or for any purposes whatsoever under this Act, that the town shall be invested with the title or possession of or in any lots or parcels of lands and premises, situated anywhere, either in the town or outside the corporation limits, it shall and may be lawful for the council in case they cannot agree with the proprietors of such lands respectively for the purchase or lease thereof as may be required, to give notice in writing to the party *whose lands are intended to be taken*, or to his agent, that the *said lands are required for the purposes of the town under this Act*, and shall request the party or his agent, whose land it is proposed to take or occupy, to appoint one arbitrator, and a judge of the Supreme Court, etc.

and following this at length provides details of an appropriate arbitration to fix an amount for compensation and gives the council the option of deciding to take such lands or not, and if accepting, that *then* the town

> shall be and be deemed the rightful purchaser and owner in fee simple of such lot or parcel of land with the appurtenances, if the said award be for the purchase thereof or otherwise the tenant thereof for such time as in such award set forth, etc.

The respondent pursuant to the powers thus conferred constructed the contemplated works, tapped the lake which fed the stream in question, and drew therefrom such quantities of water as to impair the supply plaintiff by virtue of the rights above mentioned was entitled to enjoy at about a mile below this lake.

The questions thus raised are, whether or not, respondent was entitled to do as it has done and if so

entitled must it compensate plaintiff? And if it must compensate can it so act as to invade appellant's rights, until it shall have made compensation, or at least taken such steps as to bind it to acquire and to compensate?

The learned trial judge found for plaintiff and awarded a mandamus requiring defendant to appoint an appraiser and proceed under section five of the said Act which provides that:

> In the event of any damage being done in the execution of the work the party sustaining such damage shall be entitled to receive such compensation as shall be mutually agreed upon, and in case no such agreement can be made, three appraisers, one to be appointed by the party sustaining such damage, one to be appointed by the town council, and the third to be appointed by the two appraisers already so appointed, shall view the premises and determine the damages, if any, without hearing evidence in the matter, the decision of said appraisers, or any two of them, to be final and binding on the parties, and the amount so assessed to be paid within three months thereafter. In case the party sustaining such damage shall not appoint an appraiser as aforesaid within thirty days from the service upon him of a notice in writing requesting him to appoint such appraiser, the judge of the county court for district number seven may appoint such appraiser.

He thought section four was not applicable.

The court *en banc* reversed this judgment and dismissed the action.

At first blush the suggestion that the claim of plaintiff may fall within section five is rather taking. But can what is now complained of be matter of "damage being done in *the execution of the "work?"*

The damages suffered do not arise from "the execution of the work" if we take that as the equivalent of the *construction* of the work and all incidental thereto.

The phrase is of ambiguous import. The subject matter provided for was clearly, to the mind of the

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draftsman, something entirely different from an implication of the acquisition of a title to lands or easements such as one would expect to be desirable and be provided for, to put an end to complaints such as now in question.

It is not, however, necessary here to determine more than that the appellant should not be confined to rights such as might rest upon that clause alone.

The respondent sets up the rather startling answer to appellant's claim that nothing was done to infringe upon her rights during the construction of the works, and that what has been done was the direct result of using, without negligence, the works after construction, and that the use was authorized by law, and hence no claim for damages. It is an extension of the principles upon which the well-known case of *Hammersmith and City Ry. Co.* v. *Brand*(1), rests, that seems to mean this; that if a municipality or company is authorized to carry on a business, not only is it protected against liability for damages arising from the necessary and unavoidable incidents of such a business, which, but for such necessity and unavoidability, so authorized, so legalized, would give rise to actions for damages; but also entitles such municipality or company to appropriate for the purpose of carrying on such business its neighbour's goods.

Such would seem to be the logical result of the maintenance of the respondent's position here.

Such results are not within any case or line of cases.

Nothing in this Act imposes upon the municipality here the duty or the necessity of taking from this Smelt Brook or Pottle's Lake anything.

(1) L.R. 4 H.L. 171.

If it does take therefrom that which would or may destroy another's property it must abide by the ordinary results of so doing unless it can shew express authority, for doing so without compensation, or that it has imposed by law upon it an imperative legal duty that presents no alternative possibility of discharging, unless by the taking or destroying.

The facts do not warrant any such conclusion as necessary. See *Canadian Pacific Railway Co.* v. *Parke*(1).

We are then driven to see if the statute has given the right of expropriation of the appellant's easement or riparian rights, or if the acts complained of are wholly unauthorized.

The answer to this inquiry must depend upon the meaning of the words "lands and premises" in section four of the Act.

The provisions of section two clearly contemplate the taking not only of lands but of waters.

They do not perhaps express clearly and definitely all that was intended to have been covered but they do beyond a possibility of doubt indicate the intention on the part of the legislature of authorizing the expropriation of the rivers and lakes needed by the municipality for the purpose in hand.

Where have they executed this intention if not in section four?

Is it conceivable that it was intended to compensate for lands but not to do so for water?

Is it possible that anybody could have intended whilst giving a method of paying for and taking land as such that it was intended to confiscate any and all rights in water and the valuable uses it might have been serving?

(1) [1899] A.C. 535.

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The answers to these questions must be in the negative, and the interpretation of the word "lands" given in the Revised Statutes of Nova Scotia then in force is as follows:—

"The expressions 'land,' 'lands,' 'real estate,' or 'real property,' include respectively lands, tenements, hereditaments and all rights thereto, and interest therein."

Are the words "interest therein" in this definition read into the word "lands" in the second and fourth sections by virtue of this statutory interpretation, as we must read them, sufficient to cover the appellant's rights?

Such words do not appear in "the Lands Clauses Consolidation Act, 1845," or "the Waterworks Clauses Consolidation Act, 1847," upon which the greater part of the numerous cases cited to us are founded.

The interpretation of the word "lands" in one of these statutes reads it so as to include "messuages, lands, tenements and hereditaments of any tenure," and in the other the same with the word "heritages" inserted before word "tenure." Questions as to easement have been dealt with under the provisions in these statutes for the "injuriously affecting," and thus obvious difficulty avoided. Hence the cases under those acts are for our present purpose almost wholly useless.

The case of *The Great Western Railway Co.* v. *Swindon & Cheltenham Railway Co.*, 1884,(1) is suggestive, if not instructive, in regard to this phase of the easement being a thing capable of expropriation within such legislation.

The case of *Clark* v. *The School Board for London* (2), which turned upon 33 & 34 Vict. ch. 75, sec. 19,

(1) 9 App. Cas. 787. (2) 9 Ch. App. 120.

where the words used were "and any right over land," resembles somewhat in the question raised what we have here.

The "Lands Clauses Consolidation Act" having been incorporated with this special act "The Elementary Education Act" so complicates the legal questions raised as to prevent us from having the benefit of a decision upon the exact point. The opinion of the eminent judges who dealt with the meaning to be attached to the words "any right over land" are, however, instructive. They suggest that such words might comprehend any easement. If so the words "and all rights thereto and interest therein" may also be well understood as covering such rights and easements as the appellant's case rests upon.

They are inapt words, if we are to view the real estate interests in question here from a legal scientific point of view. They are, however, in ordinary language, very comprehensive. And when we have regard to the many peculiarities of the wording of the Act we are considering, we must make due allowances and try to extract from it a meaning that will give effect to the purpose so clearly in hand without being too fastidious in the way of attaching to each word or phrase used its exact legal value, as if the document had been penned by a lawyer having regard to such things.

We find in every sentence of these clauses stumbling blocks unless we take the course that seems thus required of us to interpret this act. We may thus, without violating any canon of construction, best subserve the interests of justice and the true interests of all parties, by holding section four as applicable.

It would seem, therefore, that we can thus find the

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easement and riparian rights of the appellant as covered by the words "lands and premises" and as a consequence the subject of expropriation.

What then must we find the rights of these parties to be herein? The respondent had the right to expropriate this easement and these riparian rights, but did not proceed to do so. It gave no notice such as the Act contemplates it should do.

It had the right to retreat, if it had done so and found the burthen after arbitration greater than anticipated and practicable for it to bear.

These considerations seem to put the case entirely out of the class of cases where possession may be taken, the right be fully asserted, once and for ever, and the question of damages be remitted to a tribunal to fix compensation later on, upon the basis that all that had been done was lawfully and rightfully done.

The case seems rather to fall within the case of *Saunby* v. *The Water Commissioners of London*(1), where it was held the proceedings to arbitrate must precede the taking possession.

The result is that the appellant is entitled, as in that case, to an injunction restraining the respondent from further infringing upon the rights of the appellant in the premises until, as was provided there, such steps have been taken as will ensure a proper settlement between the parties pursuant to the provisions of the Act for fixing first the rights to be exercised and then the compensation to be paid therefor, and the assurance be given that respondent will abide by these findings.

All we need to determine is that injunction go

(1) [1906] A.C. 110.

and be continued until the court below has found these matters fully and finally determined or so adjusted to the satisfaction of the court below as may be done with least possible inconvenience to any one concerned.

The appeal will therefore be allowed with costs in all the courts below and here.

MACLENNAN J.—The plaintiff is the owner of a parcel of land through which a watercourse, the natural outlet of a lake of considerable area, flows. The defendant obtained, by provincial statute, 59 Vict. ch. 44, sec. 2, authority to take from the lake and stream such quantity or quantities of water as might be required by them for domestic, fire or other purposes. This the defendant has done, and has thereby diverted from the watercourse a very large proportion of the water which would otherwise flow over the plaintiff's land.

By another statute, 3 Edw. VII. ch. 87, the defendant has obtained authority to take a further large quantity of water from the same lake and stream to supply the Town of Sydney Mines, and the Nova Scotia Steel and Coal Company.

In this action the trial judge found that the plaintiff had suffered injury by the diversion of water from the stream and gave judgment for a mandamus to the defendant to appoint appraisers of the plaintiff's damages under the provisions of section five of the original Act.

That judgment was reversed on appeal, and the action was dismissed, and from that reversal the plaintiff appeals to this court.

It is impossible not to be very strongly impressed

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by the judgment of Meagher J. and the reasoning by which he has supported it. But, after very careful consideration, I am of opinion that it ought not to be allowed to stand and that the plaintiff's appeal should be allowed.

I think the plaintiff has a remedy under either section four or five, but preferably under section four.

The nature of the plaintiff's right as a riparian proprietor in the flow of the water of this water-course over her land is stated in Coulson & Forbes on Waters (2 ed.), p. 112, as follows:—

The right * * * is not what is called an easement, because it is inseparably connected with and inherent in the property in the land; it is parcel of the inheritance and passes with it.

That statement is abundantly borne out by numerous authorities.

I will take an extreme case. Suppose that a private person wished to take the whole outflow of the water of the lake, to divert it altogether, so that the old course over the plaintiff's, and other lands, should become dry. How could he obtain the right to do so? Plainly he must obtain a grant from all the proprietors down the stream. He must get a parcel of his inheritance from each of these proprietors, obtaining from each a freehold, or less right, according to the nature and extent of his title.

Now the defendant could not do anything of that kind, that is the diversion of streams, for want of corporate power, and so it obtained that from the legislature. But it also obtained power to do it compulsorily. It is authorized to take such quantity or quantities of water as may be required from

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any river, lake or stream. It can take all if required. Another power which has been given to it is that of laying down pipes upon any lands, doing no unnecessary damage, evidently without being obliged to buy or take the lands itself or more than the right to lay the pipes therein.

Now, having regard to these two powers, let us consider section four of the Act. It is as follows:—

> Whenever it shall be necessary for the securing the necessary supply of water, the laying down or placing of any * * * pipes, * * * or tubes, or for any purposes whatsoever under this Act, that the town shall be invested with the title or possession of or in any lots or parcels of land and premises, situated anywhere, either in the town or outside the corporation limits, it shall be lawful for the council in case they cannot agree with the proprietors of such lands respectively for the purchase or lease thereof, as may be required,

then follows provision for arbitration to ascertain the damages, upon payment or tender of which the defendant is to be deemed the rightful purchaser in fee simple or lessee, as the case may be, of such lot or parcel of land with the appurtenances.

This section is not very happily or clearly expressed, but, having regard to the subject of it, I think it means to say that whenever, for the purpose of securing a supply of water, or laying down pipes, it is necessary to obtain title to or possession of land, then there must be either agreement or arbitration with the owner.

It is evident that in order to obtain the water of this stream to the extent to which they have taken it it was necessary that the defendant should have obtained a *title* from the plaintiff, that is a title to the interest in her land which they required, namely, to stop either wholly or in part the flow of water over

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it. So, likewise, in order to lay down pipes in any land it is not necessary to take the land itself, or the whole title, but only a part of the freehold, that is just the actual space which the pipes necessarily occupy, with a right of entry for repairs. Section four provides for both these cases, the taking of water and the laying down of pipes, and I think it is plain that the *title* of *lots* or *parcels* of land mentioned in the section must include and mean the title of any limited interest in lots or parcels as well as the absolute interest.

The defendant having taken, as I think, an interest in the plaintiff's land without taking the steps prescribed by section four ought, I think, to be restrained by injunction from continuing the wrong and there should be a reference as to damages, if desired. The defendant should have a reasonable time to take the steps prescribed by the statute, until which the issue of the injunction should be suspended.

Appeal allowed with costs.

Solicitor for the appellant: *Charles J. Burchell.*

Solicitor for the respondent: *John N. Armstrong.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE YUKON TERRITORY.

1906
*May 1, 2.
*May 14.

JOHN GRANT (PETITIONER) ....APPELLANT.

AND

ALFRED THOMPSON (RESPONDENT .... } RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE CRAIG.

Controverted election—Petition—Preliminary objections—Status of petitioner—Evidence—Premature service—Return of member.

On the hearing of preliminary objections to an election petition the status of the petitioner may be established by oral evidence not objected to by the respondent.

A petition alleging "an undue election" or "undue return" of a candidate at an election for the House of Commons cannot be presented and served before the candidate has been declared elected by the returning officer. Girouard and Idington JJ. dissenting.

APPEAL and cross-appeal from the judgment of Mr. Justice Craig allowing one of the preliminary objections taken to the election petition filed by the appellant, and dismissing said petition.

Polling on an election for the House of Commons in the Yukon Territory took place on 16 Dec., 1904, and the respondent Thompson received the greater number of votes. On the 25 Jan., 1905, a petition against his return was filed by the appellant who delivered preliminary objections thereto which came

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

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on to be heard before Mr. Justice Craig in August, 1905.

The learned judge allowed preliminary objection No. 11, and dismissed the petition. That objection was that "the petitioner is not a person who had a right to vote at the election to which the said petition relates." The hearing on Aug. 15th was adjourned and leave given appellant to file a certified copy of the voters' list used at the election. When it was resumed a list of voters was produced headed "Polling Division No. 3(c)," but certified to be a true copy of the list in "Polling Division No. 36," No. 3(c) being the proper designation. This copy was filed without objection on respondent's part and the appellant testified, also without objection, that he had called on the enumerator and found his name on the list; that he had voted at the election; that on tendering his vote and being told that his name had already been voted on he took the oath required in case of personation; and that he was the John Grant named in the list. The trial judge held the certified copy to be, for several reasons, insufficient and the status of petitioner not proved. From that decision the petitioner appealed to this court.

Two other preliminary objections, Nos. 1 and 3, which were overruled by the judge, were that the respondent was not when the petition was presented a member of the House of Commons and a person against whose election or return a petition could be presented under the Election Act. The ground for this objection was that the respondent was not a member for the purposes of an election petition until he had been declared elected by the returning officer. Under the Act relating to elections in the Yukon Territory the date for declaring the result of the elec-

tion is fixed by the returning officer and in the present case said date was more than fifty days after polling day. As the petition had to be filed within forty days from polling day it was impossible to wait for the declaration.

The respondent gave notice of a cross-appeal from the judgment of Mr. Justice Craig dismissing said objections Nos. 1 and 3, and the appeal and cross-appeal were argued together.

Ewart K.C. and *Glyn Osler* for the appellant.
Travers Lewis for the respondent.

SEDGEWICK J.—I concur in the judgment of Mr. Justice Davies.

GIROUARD J.—I am of opinion, for the reasons stated in the judgment of Mr. Justice Idington, that the appeal should be allowed and cross-appeal dismissed.

DAVIES J.—These two appeals arise out of a controverted election petition filed by Grant who claimed to be a voter to avoid the election of Thompson, the member elected in the Yukon District.

Both appeal and cross-appeal come before us from a judgment on preliminary objections taken alike to the petitioner's status to prosecute the petition, and to the petition itself as having been filed before the returning officer made his return to the writ of election.

The trial judge maintained the objection to the petitioner's status holding, in accordance with previous decisions of this court, that the onus was upon

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Davies J.

the petitioner to prove that he was a person who had a right to vote at the election in question. He held that this must be proved either by the production of the original voters' lists used upon the day of election, or by the production of a copy properly certified. He further held that the certified copy produced in evidence from the Clerk of the Crown in Chancery was fatally defective not only because of the insufficiency of the certificate of the Clerk of the Crown in Chancery attached to the list, but also because the certificate of the enumerator appearing at the foot of the certified copy produced shewed that it was a "copy of the voters' list in polling division No. 36," and not No. 3(c), which was the poll where the petitioner claimed to have had the right to vote.

The latter objection when read in conjunction with the heading of the list which shewed it to be a "List of voters, Electoral District of the Yukon Territory, Polling Division No. 3(c)" might be difficult to uphold if the decision depended upon it.

I do not think however that it does, or that the production in evidence of the original list or copy duly certified is in all cases imperatively required. In the very case before us I find all the facts necessary to prove the petitioner's status duly proved by the oral testimony, not objected to, of the petitioner himself. Of course the primary evidence to shew whether petitioner's name was on the list actually used was the production of the list itself or of a duly certified copy under the statute, but if, as was the case here, oral testimony proving all the essential facts was allowed to be put in without objection, then it cannot be successfully contended afterwards that this proof is insufficient. If objection to the oral testimony had been taken that would of course have

called for the production of the list or of a properly certified copy. But in the absence of any such objection the oral testimony given was quite sufficient.

I am therefore of the opinion that the appeal *Grant* v. *Thompson* on the question of the petitioner having given sufficient proof of his status must be allowed.

The cross-appeal involves a most important point as to the construction of the Controverted Elections Act as amended in 1891, with respect to the date when petitions may be filed. Mr. Ewart for the petitioner contended that the polling day must be construed to be the "election" or the close of the election and that a petition may be filed under the Act any day after the polling day and that the summation by the returning officer of the votes polled on the declaration day appointed by him for such summation and the return to the writ made by him in consequence of such summation, are not necessarily part of the election as the word or phrase is used in the Controverted Elections Act.

As the Act was originally passed, and as it remained for many years upon the statute book, such a question as is here presented could hardly have arisen. By sub-sec. 6 of sec. 9 of the original Act the petition must have been presented not later than "thirty days *after* the publication in the Canada Gazette of the receipt of the return to the writ of election by the Clerk of the Crown in Chancery," unless it questioned the return or election upon grounds arising subsequently as specified in the section. It would be impossible, I would say, successfully to contend under this provision fixing a specified time after a specified event for the filing of a petition that it

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could nevertheless be presented before the specified event occurred. I would read that clause as undoubtedly providing thirty days after a specified official act (the publication in the Gazette of the return) for the filing of a petition and by irresistible inference prohibiting its filing before such event occurs. And I do so because, in my opinion, the petition itself provided for in the 5th section of the Act necessarily depends upon the facts of a return to the writ having been made in some way improperly or of the time for making it having elapsed and no return made, the special provision relating to a petition for disqualifying a defeated candidate necessarily being dependent upon the return, the words being "any candidate not returned." The importance of determining the proper construction of the Act as originally passed will be readily seen. In 1891, sub-sec. (b). of sec. 9 was amended by providing that the petition must be "presented not later than 30 days after the day fixed for the nomination in case the candidate or candidates have been declared elected on that day, and in other cases forty days after the holding of the poll," unless it questions the election or return upon grounds arising subsequently as therein specified. Now this amendment only had reference to the time within which the petition had to be presented. It did not in any way change or amend section 5 or the construction to be placed upon it.

Under the statute before it was amended the return to the writ of election or the failure of the returning officer to make it was, in my opinion, an essential prerequisite to the right to file a petition. The amendment merely altered the date from which the time allowed for the filing of a petition should be counted. It in no wise altered the jurisdiction of the

Election Court to entertain a petition or the essential pre-requisites to the right to file it. Before the amendment the 30 days allowed for filing were to be counted from and after the publication in the Canada Gazette of the return to the writ. After the amendment 40 days were allowed from the day of polling within which the petition must be presented. But that in no way changed the law that it should not in any case be presented until the return to the writ had been made. Generally speaking the practice had been to appoint a day from 7 to 10 days after the polling day as declaration day for the summation of the votes polled, the declaration of the result and the making of the return. And so when the day of polling instead of the day of publication of the return was selected by Parliament as that from which the time was to run, 40 days and not 30 days were given so as to permit of the making of the return to the writ and still allow the usual 30 days after that for the filing of a petition. But such change did not either expressly or impliedly change or amend the 5th section of the Act which authorises the filing of a petition, or permit of such filing before the return to the writ of election or the expiration of the time for making the return.

It is argued, however, that all candidates nominated are from the date of their nomination "candidates not returned" within the meaning of those words in the 5th and 9th sections of the Act and that there is nothing to prevent a petition being filed against any of them for unlawful acts "by which they are alleged to have become disqualified" *before* the return day or as I understand the argument, even before the polling day. But reading those two sections together, it seems to me clear that the "candi-

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date not returned" is the candidate not returned by the returning officer in his return to the writ of election. It would seem absurd to hold that a candidate afterwards duly returned by the returning officer as elected was a candidate "not returned" by him. These words evidently relate to the defeated candidate and not to the elected one, and no candidate can be truly said to be a "candidate not returned" until after the return is made, when for the first time it is officially ascertained and known who is the successful or elected candidate and who the defeated one. The error in the appellant's argument is in confounding the result of the polling with the return. It by no means follows that the candidate receiving the majority of votes is always returned. Experience has shewn that this is not so, and that sometimes returning officers either violating or neglecting their statutory duties have returned the minority candidate as elected or made a double return, or an undue return, or other return not the proper one. In all such cases the statute provides a remedy. But until the return is made or the time for making it expires no petition can be filed. So far as a petitioner complains "of the undue election or return of a member or that no return has been made or that a double return has been made or of matter contained in any special return made" it clearly has the return as the pivot or centre around which it revolves and without which it cannot be filed and where the same section speaks of "an undue return or election of *a member*" or any unlawful act "by *any candidate not returned*" it seems to me to have one meaning and that is to refer to the successful and the unsuccessful candidates as they appear by the return calling the one returned the "member" and the one defeated the

"candidate not returned," and to provide expressly for the presentation of a petition or cross petition against the defeated candidate personally to disqualify him.

The trial judge who expressed himself as doubtful upon the construction of the Act on the point in question, seemed to have his doubts removed because he thought such cross petition

was afterwards provided for by a separate and distinct section.

On this point I venture to think however he was misled. The subsequent section doubtless to which he had reference was sub-sec. (b) of sec. 9, but the cross petition provided for expressly in the latter part of that sub-section is one by the *sitting member* as he is called against his opponent who was not returned in the special case only where a petition had been presented against the sitting member for some

corrupt practice by such member or on his account or with his privity since the time of such return,

that is the return to the writ of election, in which cases the petition may be presented at any time within thirty days *after the date of such payment or corrupt act.*

Such a petition and cross petition might be filed weeks or months after the polling and the return and therefore cannot have any effect upon the construction of sec. 5 under which the petition in this case was filed and which the amended sub-section provides must be filed not later than 40 days after the holding of the poll.

The petition in this case was filed within such forty days but inasmuch as at that time the day for the summation by the returning officer of the votes

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polled and the making of his return had not been reached, there was not anybody or any return against whom or which a petition could be filed, or any want of return which could be complained of.

Clearly there was then at the time of such filing no official knowledge of the result of the polling; no summation of the votes had been or could have been made; no one of the candidates had been declared elected or returned, and no return had been made or could have been made by the returning officer. Neither of the candidates could then be properly said to be a "candidate not returned," within the meaning of the section so as to authorize even the filing of a disqualifying petition against him. And as for Thompson, against whom the petition was filed, so far from being a "candidate not returned," he was the candidate actually returned by the returning officer when the time came for him to make his returns.

The result is unfortunate no doubt, but it is caused entirely by the amendment to the Act of 1891 coupled with the fixing of the declaration day by the returning officer some 50 days after the polling. Under the circumstances no petition would lie under the Controverted Elections Act. Not before the expiration of the 40 days for there was then no return made to the writ and no one, and no act or return to petition against, and not after the return had been made because then the time within which a petition could be filed had elapsed. We cannot, however hard the case may be, construe the statute otherwise than according to its plain language and meaning. Parliament alone can by amendment prevent a repetition of such an unlooked for result. The court is powerless and as the election court had no jurisdiction to proceed upon such a petition as that filed in this case before

there had been any summing up, declaration or return, the preliminary objection should have prevailed and must now be given effect to, and the appeal allowed.

IDINGTON J.—The appellant who is a petitioner herein was held by the learned judge of the Territorial Court of the Yukon Territory to have failed to establish that he was entitled to petition.

The learned judge seems to have inferred from the *Richelieu Election Case*(1) and other cases in this court that the petitioner was bound to produce a properly certified copy of a proper list of voters which shewed thereon the name of the petitioner as a voter.

These cases were decided under statutes which provided that means of proof.

In the statutes that govern this case there is apparently no such provision. The petitioner is therefore driven to other means of proving his standing as an elector and consequent right to petition against a candidate.

He was sworn as a witness on the motion and gave what to my mind is *primâ facie* evidence, and for the present purpose, as it is uncontradicted, conclusive evidence of his right to vote. It is this. He swears that he was put by the enumerator on the voters' list for the division in question.

He presented himself as a voter. He was told another had personated him. He claimed then the right to tender his vote and was sworn accordingly to prove his identity.

It forms an essential part of this particular oath that the list there being used must by the deputy re-

(1) 21 Can. S.C.R. 168.

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turning officer be shewn the voter and he be thus enabled to see the name and description to identify himself. When satisfied of that he can take the oath but not before. This man says he was thus satisfied and took the oath. He, speaking of this incident, says there was only one name John Grant on that voters' list.

It is just as plain as if in express words he had said to the learned judge on this inquiry, I am one of the voters named in the list which was used at the polling place in question.

If he had been allowed to say so and no objection made to such secondary evidence on the grounds that it was such, how could it be gainsaid in law or in fact?

The objection taken a month or so before to an order to open the matter up is not of the nature of such an objection as called for here. It savoured not of an objection to giving of secondary evidence but something else and was entirely at the wrong time to be effective in securing the rejection of secondary evidence.

When counsel fails to object at the proper time to secondary evidence it stands, and when he goes further and elicits as he did here the very facts that made the secondary evidence conclusive, he has no right to complain.

If the petitioner had not been personated he never could have been in the position to give this proof. He would not have been tendered any oath of identity and never have been shewn the voters' list.

I have some doubt if the apparently wide provisions of the Canada Evidence Act, 1893, would have helped, if proper objection had been taken when the

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exhibit of the certified list was produced. The ten days' notice is not the trouble I conceive possible. I also doubt if a subpoena could have brought the clerk on this motion with the documents to the court. I need not enlarge, for I think the exhibit being presented without protest and accepted without the objection as to mode or form of certificate thereto was good evidence and can if need be relied on here. I do not read it as raising doubts or difficulties. I think there are none.

The ordinary legal presumptions supply all else needed, beyond this evidence of the petitioner, to maintain his right.

The appeal should be allowed.

As to the cross-appeal that presents two alternative questions for consideration.

If the petition can be presented before the declaration of the result of the election then the appeal fails. If it cannot be presented as an attack on the election as well as against a candidate it may possibly be upheld as a petition against a candidate within the alternative of section 5 relative to candidates not elected.

In such case also the appeal must fail.

I think that we can without stultifying Parliament, or doing violence to its language, or denying justice or doing any injustice to any one, find ample grounds within recognized canons of construction to hold that in such a case as this the petition as against an election may be presented before the declaration.

The settled policy of Parliament has been for a long time past to relegate all questions relative to elections to the courts of justice. Whether Parlia-

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ment can entirely divest itself of its constitutional powers in that regard or may have power yet remaining to deal with any unprovided cases is beside the question.

The settled policy stands expressed in section 68 of the Controverted Elections Act, as follows:

> All elections shall be subject to the provisions of this Act and shall not be questioned otherwise than in accordance therewith.

Such imperative language binds us to find if we can in the statute as it stands amended a meaning that will execute this purpose.

> That which upon the whole is the true meaning shall prevail, in spite of the grammatical construction of a particular part of it

says one high authority; and another says

> if the grammatical sense would involve any absurdity, repugnance or inconsistence, the grammatical sense must then be modified, extended or abridged so far as to avoid such an inconvenience but no further.

See quotations in Hardcastle, (3 ed.) p. 97. Apply that here. The limitation in section 9 is that the petition must be presented

> not later than * * forty days after the *holding* of the poll.

The word "election" may have a technical meaning in some parts of this Act.

The interpretation clause is vague but gives a meaning which the context in other parts of the Act may call sometimes for a technical sense reading. In itself the interpretation clause does not necessarily imply more than the usual acceptation of the word election in relation to members. Nothing appears in the Act to take away from the word "election" its plain ordinary meaning and reduce, as sought here, the use of it in section 5 to an absurdity. The phrase

there is "an undue election of a member" as contradistinguished from "an undue return" and other alternatives. This clearly distinguishes the election from the return. Again, why should the time for the presentation run from the date of the poll if it never could be presented before the declaration? And especially why so when in so very many obvious cases (of which this is one) it might be an impossibility to comply with such a limitation? Take the word "election" here to mean nomination and the polling of the votes, which are commonly and popularly known as the election, and a petition could be framed to meet all that and be presented at any time after the poll—within forty days—and there is no difficulty in the matter. But the suggestion is urged that notice of the petition must be given the member. Once the petition is filed the court could extend the time for service of notice and no difficulty exist. And in this connection too much importance is attached to the use of the word "member." A man is not technically speaking a member until the return is in the hands of the Clerk of the Crown, if then.

Appellant's counsel did not shrink from supporting his client's position, though recognizing, properly, this logical result.

I fail to see any right to draw the line at the declaration. It must be at the time when ready for gazetting or as judgment appealed from holds.

Of course if the express language were that the petition could not be presented until after declaration we would be bound by it. But short of the most express language I would not feel constrained to so interpret the Act as to defeat its purpose.

When we find not only in section 5 distinctly

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separate causes for petition such as "undue return" and "undue election," etc., but also elsewhere throughout the Act many cases of distinguishing the return from the election and that the Act's interpretation of the word "election" permits of a double sense, we will not be astray in accepting the plain ordinary meaning of the word election to which I have already referred. I prefer that to the absurd result we are asked to bring about by allowing this cross-appeal.

It must moreover be observed that section 9, subsection (b), prescribing the time of forty days from the poll for presenting a petition repeals and is substituted for one which postponed the time until, or at least prescribed it within a time running from, the gazetting of the return of the member. This radical change accounts for many inconsistencies in the Act as it now stands amended.

These inconsistencies must yield to the application of the rules of construction I have adverted to, rather than that the Act become an absurdity. And so far as necessary to give full effect to this amendment, that which still stands unrepealed by express enactment must be held to have been thereby modified, and if, and so far as, need be impliedly repealed.

If we must proceed by such a narrow method of interpretation as appellant seeks then it should be followed to the end and the petition allowed to stand as literally within the meaning of section 5, a good petition against one who was then a candidate but not elected.

We are not concerned as to its form for section nine is obviously intended to avoid all difficulties of form and it suffices to have any substance covering and comprehending what is appropriate to the

facts and possible issue within the Act as subject matter of a petition.

I think this cross-appeal fails and must be dismissed.

MACLENNAN J.—I concur for the reasons stated by Mr. Justice Davies.

Appeal allowed without costs and cross-appeal allowed without costs.

Solicitors for the appellant: *Black & Black.*
Solicitor for the respondent: *Frank T. McDougal.*

1905
*Nov. 21.

ELLEN KIRKPATRICK (RESPONDENT) .... APPELLANT.

AND

ROBERT MORRIS BIRKS AND OTHERS (PETITIONERS) .... RESPONDENTS.

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

Appeal—Jurisdiction — Successions — Security by beneficiary—Controversy involved—Future rights—Interlocutory order.

An application for the approval of security on an appeal to the Supreme Court of Canada from an order directing that a beneficiary should furnish the security required by article 663 of the Civil Code of Lower Canada was refused on the ground that it was interlocutory and could not affect the rights of the parties interested.

APPLICATION for approval of a bond for security on an appeal from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, sitting in review at Montreal, which ordered the appellant, as beneficiary under the last will and testament of the late Richard Birks, deceased, to furnish the security required under article 663 of the Civil Code of Lower Canada upon the petition of the respondents. The judgment, thus affirmed, reversed a former judgment in the Superior Court, District of Montreal (Pagnuelo J.), dismissing the respondents' petition with costs.

*PRESENT:—Mr. Justice Idington, in Chambers.

(1) Q.R. 14 K.B. 287.

Brosseau K.C. for the motion.
Hibbard contra.

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KIRK-PATRICK
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Idington J.

IDINGTON J.—It seems to me that the order made by the Superior Court, sitting in review, herein and from which appeal was taken to the Court of King's Bench, appeal side, and dismissed, is of such an interlocutory nature that leave should not be given to appeal to the Supreme Court of Canada as desired, even if such leave would give that court jurisdiction to hear such an appeal.

It can hurt no one to give the security the order directs. There is no final result affecting the rights of the parties in either acceding to the requirements of the order or refusing to do so.

I therefore dismiss, with costs, the application made to me for the approval of the security bond filed on the proposed appeal to the Supreme Court of Canada.

Application refused with costs.

Solicitors for the appellant: *Brosseau & Holt.*
Solicitors for the respondents: *Hibbard & Orr.*

1906
*Feb. 23.

THE TOWN OF DARTMOUTH

v.

THE COUNTY OF HALIFAX.

Assessment and taxes—County School Fund—Contributions by incorporated towns—Construction of statute—3 Edw. VII. c. 6, s. 7.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1), on a special case stated pursuant to Order XXXIII., Rule 6, of the Nova Scotia Judicature Act, holding the Town of Dartmouth liable to contribute proportionately towards the School Fund of the County of Halifax for the year 1904.

After hearing counsel on behalf of the appellant and without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Harris K.C. for the appellant.

Newcombe K.C. for the respondent.

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

(1) 38 N.S. Rep. 1.

THE WINNIPEG ELECTRIC STREET RAILWAY CO.

v.

BELL.

1906
*April 6.

Negligence—Operation of tramway—Precautions for safety of passengers—Crossing cars—Sounding gong — Slackening speed at dangerous places—Neglect of rules—Passenger alighting from front of car—Contributory negligence.

APPEAL from the judgment of the Court of King's Bench for Manitoba(1) affirming the judgment by Perdue J., at the trial, in favour of the plaintiff for $750 damages for injuries sustained, with costs.

The plaintiff, a passenger on a crowded tram-car, operated by the company on a street in the City of Winnipeg, being near the front of the car, on reaching his destination, made his way past several persons standing in the aisle and front vestibule and alighted from the front steps on the side next the parallel track upon which another of the company's cars was coming at considerable speed in the opposite direction to that in which he had been travelling. He was, almost immediately, struck down and injured. The space between the crossing cars was about forty-four inches and there was no rule of the company to prevent passengers alighting from the front steps. The passenger was not aware of the car

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

(1) 15 Man. R. 338.

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approaching from the opposite direction when he alighted on the strip between the tracks and the motorman of the car which struck the plaintiff had neglected to observe a rule of the company requiring that speed should be slackened and the gong rung continuously while cars were passing each other on the double tracks.

The courts below held that the company was liable in damages on account of the motorman's negligence; that the plaintiff had not been guilty of contributory negligence, under the circumstances; and that the company was obliged to take proper precautions for the safety of passengers, even after they had alighted upon the street beside the tracks.

After hearing counsel on behalf of the appellants and without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Ewart K.C. for the appellants.

Hudson for the respondent.

THE MINERAL PRODUCTS CO., AND OTHERS
v.
THE CONTINENTAL TRUST CO.

1906
*May 2, 3.
*May 28.

Equitable mortgage—Mines and minerals—Lease of mining lands—Sheriff's sale—Purchase by judgment creditor of mortgagee—Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B. c. 30, s. 139.

APPEAL from the judgment of the Supreme Court of New Brunswick(1), affirming a decree founded upon a decision of Barker J., as judge in equity(2), in favour of the plaintiffs, respondents.

By the judgment appealed from it was, in effect, held that mining leases of lands in the Province of New Brunswick and of the minerals therein, issued by the Crown to the appellant company, subsequent to a mortgage executed by it in the State of New York in favour of the respondent, a company incorporated under the laws of that state, which do not reserve the minerals to the state, were subject to the mortgage; that a judgment creditor of the mortgagor (who purchased the leases at a sherriff's sale in execution of his own judgment and afterwards obtained new leases in his own name from the Crown), took the new leases subject to the mortgage; that the mortgage, though not registered under the "General Mining Act," C.S.N.B. (1903) ch. 30, sec. 139, was not void as

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

(1) 37 N.B. Rep. 140. (2) 3 N.B. Eq. 28.

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against a judgment creditor who had actual notice of the mortgage and whose judgment was not registered under that section at the time of the commencement of the suit, and that the judgment creditor was not entitled to a prior lien for rent paid to the Crown on the licenses declared to be held in trust for the mortgagee.

After hearing counsel for the parties, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs, for the reasons given by Mr. Justice Barker upon the rendering of the judgment appealed from. His Lordship Mr. Justice Maclennan dissented, as follows:—

MACLENNAN J. (dissenting).—I am of opinion that the decree appealed from ought to be varied. It declares that the mining leases in question are subject to the plaintiff's mortgage. I think that is right so far as those leases cover the freehold lot, containing 150 acres; but that so far as they cover the leasehold lots, containing 100 acres and 300 acres respectively, they cannot be held to be subject to the mortgage.

The learned judge in his judgment at the trial has, I think, misconstrued the mortgage. He is of opinion that the words

> and also all and singular the coal, albertite, etc., and all other minerals whatsoever which can, and shall, or may be found in or upon the herein particularly described premises,

refer to the whole of the parcels, the leasehold as well as the freehold. With great respect I do not think that is so. In my opinion those words relate solely to the freehold lot previously described, and not to the leasehold lots described afterwards. The mortgage first grants the freehold lot, and all the

estate therein, and all the minerals to be found therein, and the privileges and appurtenances belonging thereto. And, when it comes to deal with the two leaseholds, what is granted is the mortgagor's *right, title* and *interest* therein, and that only. That the first grant of the minerals is to be confined to the freehold lot is put beyond doubt because there is an express grant relating to the leasehold minerals, and it is not of the minerals but only of the mortgagor's *right, title* and *interest* therein.

There is, therefore, as I think, a clear distinction between the grant of the minerals in the freehold lot and in the leasehold parcels. As to the first the grant is absolute, but as to the other it is of the grantor's *right, title* and *interest* only.

In his judgment in the Supreme Court the learned trial judge seems to abandon and no longer to rely on the clause on which he rested his first judgment. He says:

> It is true that in the case of the latter (the leaseholds), the mortgage, as well as the conveyance to the Products Co., professes to convey *only the right, title and interest* of the parties to the lots and minerals. But if the parties thought that conveyed a right to the minerals under the lease, and they intended to convey that interest, and were paid for it, why should they escape making good a defective title in the one case more than in the other?

It is true the mortgage contains a covenant by the mortgagors to deposit a sum with the mortgagees as a redemption fund, per ton of *manganese* shipped from the premises, and that this covenant is wide enough to be applicable to the leaseholds, as well as to the freehold lot. But, in my opinion, neither this covenant nor the covenant for further assurance, nor any other circumstance disclosed in evidence, can enlarge the grant of the leaseholds so as to give the mortgagees an equity to claim the benefit of the

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Maclennan J.

Crown leases so far as they apply to the leasehold lands. So far as the leaseholds are concerned the mortgagees got exactly everything the mortgagors could then give, and that is carefully expressed and limited in the mortgage, and there is no ground of equity on which they can claim what was subsequently required.

For these reasons, I am of opinion that the relief granted by the judge should be confined to the freehold lot of 150 acres.

Appeal dismissed with costs.

Pugsley K.C. and *Ewing* for the appellants.

Hazen K.C. for the respondents.

LAFOREST *v.* BABINEAU.

1906
*May 8.

Promissory note—Deposit receipt—Notice—Demand for payment—Action.

APPEAL from the judgment of the Supreme Court of New Brunswick(1), reversing the verdict for the defendant by McLeod J. at the trial, and ordering a verdict to be entered for the plaintiff with costs.

The action was on an instrument, signed by the appellant, in the following form:—

"$1,200 EDMUNDSTON, N.B., July 12th, 1899.

"Received from the Reverend N. P. Babineau the sum of twelve hundred dollars, for which I am responsible, with interest at the rate of seven per cent. per annum, upon production of this receipt and after three months' notice.

"FRED. LAFOREST."

The declaration contained six counts, the third count, claiming as on a promissory note, being the only one in question on this appeal. To this count the defendant pleaded, (1) that he did not make the note as alleged, (2) that the note was never presented for payment and (3) that payment was never demanded. By the judgment appealed from the court below, in effect, held that the plaintiff could recover

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

(1) 37 N.B. Rep. 156.

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upon the instrument above set out as a promissory note and that a demand for immediate payment made by the plaintiff more than three months before the action was brought was a sufficient notice under the terms of the receipt.

After hearing counsel on behalf of the appellant and without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Hazen K.C. for the appellant.

Currey K.C. and *Stevens K.C.* for the respondent.

O'CONNOR v. HALIFAX TRAMWAY CO.

1905

*Dec. 1, 2.
*Dec. 22.

Street railway—Carriage of passengers—Contract—Continuous passage.

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

The plaintiff, O'Connor, with friends, wished to proceed to a certain part of Halifax and when a car came along labelled as going in the required direction they boarded a trailer attached to it which, however, was not so labelled. Owing to a regatta there was an unusual amount of travel on the street cars that day and when the car containing plaintiff had proceeded a certain distance it was stopped and the passengers informed that it would not go farther in that direction. The plaintiff insisted on his right to be carried to his destination in that car, refused a transfer and hired a cab. He then brought an action against the Street Railway Co. for damages.

The trial judge and the Supreme Court of Nova Scotia sitting *en banc* held that there was no obligation on the company's part to carry him to his destination on that particular car, that it was his duty to inquire of the conductor and ascertain where such car was going and he could not recover.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) 38 N.S. Rep. 212.

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O'CONNOR v. HALIFAX TRAMWAY Co.

Newcombe K.C. and *W. B. A. Ritchie K.C.* for the appellant.

Mellish K.C. and *Lovett* (*Murray* with them) for the respondents.

The appeal to the Supreme Court of Canada was dismissed, Idington J. dissenting, and the following judgments were delivered.

DAVIES J.—For the reasons given by Townshend and Graham JJ. in the court below I think this appeal should be dismissed.

I merely wish to guard myself against being committed to the opinion that all the rules applicable to the carriage of passengers on ordinary railway trains are applicable to passengers carried on city electric cars, or that the American cases cited in the elaborate opinion of Graham J. on this point are necessarily applicable to the facts of this case.

IDINGTON J. (dissenting).—The name of the respondents indicates their business. It is carried on in Halifax.

The appellant, accompanied by his wife and a friend, desiring to return home, some considerable distance from where they found themselves, saw on that part of the respondents' track which was beside them, and formed part of a belt line, two cars standing to receive passengers. The front car had inscribed on front and in rear thereof the words "Quinpool Road." The rear car attached thereto was a trailer. The appellant was a resident of the city, and knew that cars so marked were accustomed to carry passengers by a continuous journey along the

company's track, on what was known as the belt line of the system.

Appellant's home was within a short distance of this belt line and was passed by the cars marked "Quinpool Road." The appellant with his wife and friend got into this trailer. They were drawn for a mile and a quarter along this belt line in the direction they expected to go, but away further from their home and from Quinpool Road than when they started, and then turned out, as the company desired the cars to return to the point these cars and people had started from.

The appellant had bought tickets for himself and party, and on each of these tickets were the words "Halifax Electric Tramway Company, Limited, F. A. Huntress, manager."

It is admitted these tickets entitled him to ride all round the belt line in question. Obviously the whole contract—and it is admitted there was a contract—was not contained in the words written on the ticket or formed by the purchase of a ticket. Some tickets conferred one, and others another right when used. That right depended on facts outside the ticket.

Then where do we find the necessary evidence beyond the ticket to shew the contract?

The obvious answer is, in the invitation by the company to ride and the acceptance thereof by the passengers.

How is the invitation extended? It is universally found to exist, in street railway traffic, in the shape of some word or words or sign to indicate the destination or the particular part of the line a car is proposed to be run over. This abbreviated or sign language is highly useful, is well understood by the

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Idington J.

masses of the people desiring to travel by such cars, and facilitates the use of such means of transportation.

Its adoption and long continued use by the respondents and recognition by the appellant and others gives to the interpretation of it, when acted upon by any one possessed of a ticket, as binding and definite a contract as can possibly be framed.

The interpretation of the words "Quinpool Road" are not in the slightest doubt in this case. It was as plain in its meaning, to those daily accustomed to its use, as if a long contract had been written out signifying that the car on which it was inscribed was intended to run, and should run, along the belt line, from the starting point at which a passenger entered it, till it returned there, and to pass Quinpool Road in its journey.

It never was intended to mean anything else than that.

Its use by the company on a car, not intended to go round the belt, not intended to get a foot nearer Quinpool Road than where it started from, should have been guarded against.

They seek to excuse themselves by saying that there was by reason of a regatta attracting a large crowd more than usual travel. They therefore used this "Quinpool Road" car to help to handle the crowd by taking them by means of these cars to the distributing point a mile and a quarter from where the appellant got on board.

It became the duty of the respondents in such a case before using this car purely for such local purpose to have taken down their sign.

If immovable, the price of a ticket, spent in buy-

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ing a strip of cotton, and a few cents more in writing thereon the direction and distance of the car's intended run, for that day, would have served, when properly used, to keep off the car gentlemen like appellant, who had no desire to expose himself and wife to the pelting rain then falling.

Of course its use might also have lessened the receipts. I assume it was not for a fraudulent purpose, but through pure neglect this trouble was not taken.

The idle pretext, that the company set up, of appellant's knowledge that such uses had been made by the company of such cars on former occasions when the crowd to be carried was great, should not, on this evidence, avail anything. There is no evidence to support it.

Evidently the appellant had not the slightest suspicion that such was to be the course on this occasion or he would not have set foot in the car. What could he gain? To get on a car to be dumped off it, and wait where so dumped off till the right car caught up, instead of getting on a right one at the start seems unlikely to have been done intentionally.

Appellant swears he was about to take a cab when his wife saw and pointed out this "Quinpool Road" car, and on her proper and natural suggestion they entered.

It does not seem to me to be possible to attribute to the appellant any negligence or any improper motive. He was a man of such intelligence in the midst of such surroundings, as to forbid us assuming either to have been the cause of the mishap.

So plain, so palpable, a neglect of duty, on the part of the respondent company, and so liable to mis-

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Idington J.

lead, was met only by offering a transfer to another belt line car leaving the parties to stand in the rain until one came.

The contract was broken when the appellant was turned out of the car.

If the appellant had not been misled and had known that he had to face the inconvenience in question he, presumably, never would have taken a seat in the car. He was probably better off waiting for one that really was a belt line or Quinpool Road car at the starting place than where he was left, further from Quinpool Road than when he had started.

It seems, in all the discussion relating to a transfer, to be forgotten that in the ordinary course of things, there were no transfers for such a service as going round the belt, and that it was because appellant did not want to be troubled with transferring in such weather, that he took a "Quinpool Road" car, on the invitation of the company, as security against any need for a transfer.

I do not in this view need to follow the matter further. In regard, however, to the allegation of the company that trailers are not used with Quinpool Road cars it is met by the oath of the plaintiff that he had seen them and it is only partially denied, and it was much more reasonable to expect that for an occasion needing extra effort it would be put in use by a trailer attached to a Quinpool Road car serving for the whole length of the belt line than that so misleading a sign would be kept up only to run a fourth of the distance and never come within miles of the Quinpool Road district.

The trailer moves where the motor car goes and not elsewhere. The appellant is just as much entitled

to bring his action as if he had seated himself in the motor car. If the financial condition of the respondents is so distressing that they cannot keep a sufficient supply of properly marked cars to meet the exigencies of a crowded day just as well as poor people keep rain coats for the exceptional day, they are much to be pitied. We cannot, however, allow such natural sympathy as poverty evokes to interpret this contract.

The contention that any intending passenger, seeking a car marked with a sign that means, according to the usual language of the locality and the ordinary custom of the road, that it is running to or past a well-known point, is negligent, unless he ask some conductor or other authority, is a proposition that is not, I think, maintainable in law, and I venture, with great respect, to say not in accord with the average sense of those of the reasonably intelligent people who are expected to be guided by the sign.

The safety of the travelling public requires that the conductor of these cars be assisted, as much as possible, by an intelligent use of those signs, by all intending passengers, so that he be not too much distracted, by such inquiries, from his other duties.

I think the appeal ought to be allowed with costs and the judgments below set aside and judgment entered for the plaintiff for $1 with full costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. C. Borden.*

Solicitor for the respondent: *R. H. Murray.*

1906
*March 19.

THE CHAMBERLAIN METAL WEATHER STRIP CO. ET AL.

v.

PEACE ET AL.

Patent of Invention—Infringement—Prior foreign patent.

APPEAL from the judgment of the Exchequer Court of Canada(1), dismissing the plaintiffs', appellants', action with costs.

The action was for an alleged infringement of a Canadian patent of invention held by the plaintiffs for improvements in weather strips and guides for windows. It appeared that the defendants had manufactured metallic weather strips in Canada which were more nearly similar to those described in an American patent of a date prior to the Canadian patent owned by the plaintiffs than it was to any of the forms shewn and described in the Canadian patent. The court below held that, if the plaintiffs' patent was good, it was good only for the forms of weather strips particularly specified therein of which the evidence failed to shew any infringement by the defendants, and the action was dismissed with costs.

After hearing counsel on behalf of the appellants and without calling upon counsel for the respondents,

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

(1) 9 Ex. C.R. 399.

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the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Masten for the appellants.

Staunton K.C. and *Logie* for the respondents.

1906
*May 3, 4.

BUSTIN v. W. H. THORNE & CO., LTD.

New trial—Judgment in court below on motion—Equal division—Appeal—Jurisdiction—Charge to jury—Misdirection—Bias.

APPEAL from a decision of the Supreme Court of New Brunswick(1) refusing, by equal division, to set aside a verdict for the plaintiffs and order a new trial.

The W. H. Thorne & Co. brought action to recover from Bustin the price of goods sold on his alleged guarantee to one Segee. Bustin had given a guarantee to pay for goods so sold to the extent of $1,000 and had paid over $900, thereunder. The first of the goods sued for were supplied some six months after those paid for by Bustin had been delivered and were charged in plaintiffs' books to Segee to whom all the accounts were rendered. On the trial the secretary of the W. H. Thorne & Co. swore that Bustin had authorized the further supply to Segee on his account and had requested that they be charged to Segee to keep them separate from his own account with the company. This the defendant denied and testified that he had notified the company that he would no longer be responsible but neither the notice nor a copy of it was produced nor any proof except a stenographer's notes on dictation by defendant.

The jury answered questions submitted by both counsel and the court on which a verdict was entered

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

(1) 37 N.B. Rep. 163.

for the plaintiff company for the amount claimed. Motion was made for a new trial on numerous grounds of improper reception and rejection of evidence, misdirection and improper direction and remarks by the presiding judge. The court being equally divided the motion for a new trial failed and the defendant appealed to this court.

The formal rule or judgment appealed against drawn up by the clerk of the court on the motion for new trial, after the formal portion as to hearing counsel, stated that "the court having taken time to consider, and being equally divided, the said rule drops and the verdict entered for the plaintiff on the trial stands."

On the appeal being called *Hazen K.C.* and *W. H. Harrison* for the respondents moved to quash on the ground that the said formal rule or order was not a judgment from which an appeal would lie.

Pugsley K.C., Attorney-General for New Brunswick, was not called upon to support the jurisdiction of the court and the motion to quash was overruled.

Counsel were then heard on the merits after which the court gave judgment ordering a new trial, on the ground that the charge of the trial judge to the jury shewed passion and bias and was improper. Davies J. dissented as follows:

DAVIES J. (dissenting).—I have carefully read the charge to the jury of Chief Justice Tuck and while some remarks relating to the several counsel engaged in the case might have been better unsaid I cannot

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BUSTIN
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Davies J.

find anything in the charge taken as a whole to justify a new trial being granted.

It is not now open to the Attorney-General to complain that a particular question was not put to the jury relating to the delivery of a letter from the defendant to the plaintiff company's manager terminating any further liability on his part for goods supplied to one Segee. It was open to him to have had the question put at the trial. He did not elect to do so and cannot now complain of its not having been put.

The evidence while conflicting was fully sufficient to justify the findings and the findings ample enough to justify the entering of the verdict.

I would dismiss the appeal.

Appeal allowed with costs.

Solicitor for the appellant: *J. Joseph Porter.*

Solicitor for the respondents: *W. H. Harrison.*

1906

*June 8.
*June 12.

THOMAS LEOPOLD WILLSON (DEFENDANT) ..... APPELLANT.

AND

THE SHAWINIGAN CARBIDE COMPANY (PLAINTIFFS) ..... RESPONDENTS.

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

Appeal—Jurisdiction — Declinatory exception — Interlocutory judgment—Review of judgment on exception—Practice.

The action was dismissed in the Superior Court upon declinatory exception. The Court of King's Bench reversed this decision and remitted the cause for trial on the merits. On motion to quash a further appeal to the Supreme Court of Canada:—

Held, that such motion should be granted on the ground that the objection as to the jurisdiction of the Superior Court might be raised on a subsequent appeal from a judgment on the merits.

Per Girouard J.—The judgment of the Court of King's Bench was not a final judgment and, consequently, no appeal could lie to the Supreme Court of Canada.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of Taschereau J. in the Superior Court, District of Montreal, and remitting the cause to the Superior Court to be tried upon the merits.

The action was brought by the company for a declaration that certain letters patent of invention should be declared invalid, to have a contract in respect thereto resiliated and for the return of the consideration paid by the company to the defendant under said contract. The defendant, by declinatory

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

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exception, objected to the jurisdiction of the Superior Court to hear or adjudicate upon the plaintiffs' demand on the grounds that the defendant's election of domicile, in accordance with the provisions of the "Patent Act" was outside the jurisdiction of the courts of the Province of Quebec, that he never had a domicile in the said province, and that, by the 34th section of the "Patent Act," the jurisdiction of the Superior Court in regard to matters of patents of invention is limited to such cases only as impeach their validity by a direct action where domicile has been elected in the Province of Quebec under the provisions of that Act.

In the Superior Court, Mr. Justice Taschereau maintained the declinatory exception and dismissed the action with costs. On appeal, the Court of King's Bench dismissed the exception and ordered that the case should be proceeded with in the Superior Court and disposed of upon the merits. The respondents moved to quash an appeal by the plaintiff from the latter judgment to the Supreme Court of Canada on the ground that the judgment complained of was not a final judgment within the meaning of the Supreme and Exchequer Courts Act.

Erroll Languedoc for the motion. We rely upon the following authorities: *Auger* v. *Magann*(1) and authorities there cited, also, on the appeal in the same case, *Magann* v. *Auger*(2) at pages 187-8; *Connolly* v. *Armstrong*(3); *Hamel* v. *Hamel*(4); *Griffith* v. *Harwood*(5). See also *Shannon* v. *Turgeon*(6),

(1) 2 Q.P.R. 161.
(2) 31 Can. S.C.R. 186.
(3) 35 Can. S.C.R. 12.
(4) 26 Can. S.C.R. 17.
(5) 30 Can. S.C.R. 315.
(6) 4 Q.P.R. 49.

where Würtele J. defines an interlocutory judgment as one which is rendered in a case between the institution of the suit and the final judgment therein and as given in an intermediate state of the case on some intermediate question before the final decision. Also *Renaud* v. *Denis*(1); *Kandick* v. *Morrison*(2); *Reid* v. *Ramsay*(3), 5 Rosseau & Laisney, Dict. de Proc. Civ. p. 550, n. 27.

Aylen K.C., contra, referred to sections 11 and 34 of the Patent Act, as amended; sec. 2, sub-section "e" and sec. 60 of the Supreme and Exchequer Courts Act, *Chevalier* v. *Cuvillier*(4); *Shaw* v. *St. Louis* (5), *per* Taschereau J., at page 400 *et seq.; Shields* v. *Peak*(6), *per* Strong J., at page 592; *Mackinnon* v. *Keroack*(7), at pages 119, 122, 126 and 140; *Magann* v. *Auger*(8); *The Grand Trunk Railway Co.* v. *Perrault*(9); Arts. 164, 166, 170, and 171, C.P.Q.; *Forbes* v. *Atkinson* (10), *per* Sewell C.J., at pages 110 and 111.

The following French authorities are in point: 1 Carré & Chauveau, p. 565, n. 4; 4 Carré & Chauveau, p. 60, n. 3; 8 Carré & Chauveau, p. 421, n. 49, and also page 422, n. 52; *Boudonville* v. *Tarbouriech-Nadal* (11); *Ville de Nice* v. *Baudoin*(12); *Vincens & Barrière* v. *Jurié*(13); *Durocher* v. *Pillot*(14); *Ali-ben-Amor* v. *Salvo Sapiano*(15).

(1) 4 Q.P.R. 65.
(2) 2 Can. S.C.R. 12.
(3) Cout. Dig. 87.
(4) 4 Can. S.C.R. 605.
(5) 8 Can. S.C.R. 385.
(6) 8 S.C.R. 579.
(7) 15 Can. S.C.R. 111.
(8) 31 Can. S.C.R. 186.
(9) 36 Can. S.C.R. 671.
(10) Stu. K.B. 106, note.
(11) S.V. 1844, 1, 180.
(12) S.V. 1876, 1, 168.
(13) S.V. 1888, 2, 58.
(14) S.V. 1889, 1, 120.
(15) S.V. 1893, 1, 29.

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The Chief
Justice.

THE CHIEF JUSTICE.—I agree that the appeal should be quashed upon the ground simply that if, as pleaded by the defendant, the jurisdiction of the Superior Court is ousted by section thirty-four of the Patent Act, it will not be too late for him to take the objection if the case should come to this court on appeal from the judgment to be rendered on the issues as now settled by the judgment of the Court of King's Bench.

GIROUARD J.—We are called again to determine what is a final judgment and what is an interlocutory one. A final judgment (*jugement définitif*) is not necessarily the last one of the court, for we have held frequently, and more particularly in the recent case of *Johnson's Co.* v. *Wilson,* that the whole issue between the parties might be finally disposed of by a judgment which is not the last one. Here we have only a judgment dismissing a declinatory exception, and we do not know what the trial of the merits has in store. It is not therefore a *jugement définitif,* which disposes of the whole case.

Fuzier-Herman, vol. 25, p. 296, No. 382, says:

> On entend par jugement définitif celui qui statue sur toute la cause et qui la termine.

He quotes the following authorities: Bioche, vo. cit. n. 57; Boncenne, t. 2, p. 360 *et seq.;* Bonnier, n. 1071; Boitard et Colmet-Daage, t. 1, n. 240; Rousseau et Laisney, vo. "Jugement," n. 2.

The same interpretation has been given by the English and American Courts; 13 Am. & Eng. Encycl. of Law (2 ed.), p. 23; 2 Cyc. 586-591; 19 Cyc. 533.

Evidently the judgment appealed from does not

dispose of the whole case, but merely of an incident raised by a declinatory exception which was maintained by the trial court and rejected by the court of appeal. Of course in both the trial court and the court of appeal the question cannot be raised again; it is there *chose jugée;* but it can be raised here if, after being disposed of on the merits, the case comes up again before this court. The reason for this ruling is that an appeal on the merits opens all the interlocutories, especially if a reservation or an exception be filed immediately after the rendering of the interlocutories. Such has been the well settled practice and jurisprudence of the Province of Quebec. *Renaud* v. *Tourangeau*(1); *Jones* v. *Gough*(2); *Goldring* v. *La Banque d'Hochelaga*(3); *Benning* v. *Grange*(4); *Archer* v. *Lortie*(5); *Metras* v. *Trudeau*(6).

This court expressed the same views on several occasions, and especially in *Molson* v. *Barnard*(7); *Hamel* v. *Hamel*(8); *Griffith* v. *Harwood*(9).

It must be noticed that our court has no discretion in the matter like the court of appeal of Quebec, which may grant leave to appeal from interlocutory judgments. By the statute which constitutes this court our jurisdiction *ratione materiæ* is limited to appeals from final judgments, and the motion to quash must therefore be granted with costs. If, however, as I have observed, the defendant ever comes before this court upon the merits, he will be at liberty to take up the point again and have it revised by this

(1) 5 Moo. P.C. (N.S.) 5.
(2) 3 Moo. P.C. (N.S.) 1.
(3) 5 App. Cas. 371.
(4) 13 L.C. Jur. 153.
(5) 3 Q.L.R. 159.
(6) M.L.R. 1 Q.B. 347.
(7) 18 Can. S.C.R. 622.
(8) 26 Can. S.C.R. 17.
(9) 30 Can. S.C.R. 315.

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Davies J.

court, should the judgment of the court of appeal be erroneous.

DAVIES J.—I agree that the appeal should be quashed for the reason given by the Chief Justice.

IDINGTON J. also concurred in the judgment quashing the appeal with costs.

MACLENNAN J.—I agree that the appeal should be quashed for the reason stated by the Chief Justice.

Appeal quashed with costs.

Solicitors for the appellant: *Aylen & Duclos.*

Solicitors for the respondents: *Greenshields, Greenshields, Macalister & Languedoc.*

1906
*Oct. 8.
*Oct. 10.

THE CANADIAN NORTHERN RAILWAY COMPANY.......... } APPELLANTS;

AND

T. D. ROBINSON & SON...........RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Traffic accommodation—Restoring connections—3 *Edw. VII. c.* 58, *ss.* 176, 214, 253.

On an application to the Board of Railway Commissioners for Canada, under the provisions of the "Railway Act, 1903" for a direction that a railway company should replace a siding, where traffic facilities had been formerly provided for the respondents with connections upon their lands, and for other appropriate relief for such purposes;—

Held, that, under the circumstances, the Board had jurisdiction to make an order directing the railway company to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch and receipt of freight in carloads over, to and from the line of railway.

APPEAL, by leave of His Lordship Mr. Justice Maclennan, from an order of the Board of Railway Commissioners for Canada, which directed the appellants to restore certain spur-track facilities for the carriage, despatch and receipt of freight in carloads, over the railway and the connection for those purposes on the lands of the respondents.

On the application of the respondents, who are coal and wood merchants, in the City of Winnipeg, in Man-

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

1906

CANADIAN NORTHERN RY. CO. v. ROBINSON.

itoba, under sections 214 and 253 of the "Railway Act, 1903," for an order to direct the railway company to replace a siding wrongfully taken up by them from the respondents' property immediately adjoining the station, main-line and yards of the railway company in the said City of Winnipeg, or any such other part of the respondents' yard as to the Board might seem proper, or, in the alternative, that general delivery of all freight consigned to the respondents should be made at a siding constructed conveniently near the respondents' yard, and for such other relief as to the Board might seem just, the Board made the order appealed from, as follows:

"It is ordered—That the said railway company be, and it is hereby, directed to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch and receipt of freight in carloads over, to and from the line of the said railway company, and the connection for that purpose between such spur-track and the railway siding on the land of the applicants; the said railway company to have the option of constructing the siding on the applicants' land, at the expense of the applicants, or of allowing this to be done by the applicants, who shall bear the expense of making the necessary connection; and the said company to have the further option of constructing the track from such point on its line and to such point on the applicants' property as it shall think proper, said siding or spur-track to be constructed within four weeks from the date of this order, the plans of the completed work to be filed with the Board.

"This order, and the construction and use of the siding or spur-track herein provided for, are not to affect the rights of the railway company upon or to

any expropriation of the applicants' property authorized by law or by any order to be hereafter made by the Board."

The reasons given by the Board for making the said order were as follows:

"The Board is of opinion that, in taking from the applicants the sidings and rail connection formerly enjoyed by them the railway company deprived the applicants of reasonable facilities which the company should be directed to restore.

"The applicants do not apply under section 176 of the 'Railway Act,' as owners of an industry, for an order to compel the railway company to construct a branch or spur-line. Their land adjoins the railway yards of the company, and it does not appear to the Board that any order is necessary to enable the railway company to construct a line upon its own land up to the boundary line between its property and that of the applicants or to make connection at such boundary with a siding upon the applicants' land and transfer cars to and from such a siding.

"The Board is of opinion that it may properly regard the siding and connection, and the privilege of loading cars and delivering goods for carriage on such a siding, and of receiving and unloading goods by means thereof, as facilities within the Act.

"By its notice of the 16th November, 1904, the company stated its intention 'to discontinue the spur-track facilities.'

"The Board has carefully examined the yards of the railway company in Winnipeg, and the sidings and spur-tracks furnished for the use of those engaged in various kinds of business; and while the Board does not desire to be understood as holding that the railway company should be made to furnish

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similar facilities to every applicant, it considers that, in view of the previous supply of the same to the applicants and of the company's practice in so freely furnishing such accommodation to those engaged in the same and other branches of business, as well as the other facts and circumstances observed and those disclosed by other evidence, these facilities should be regarded as reasonable and proper ones, which the company should afford to the applicants.

"Under all these circumstances, the discontinuance of the former service seems to the Board to have been unreasonable. In the opinion of the Board railway companies should not be allowed to furnish and cut off such facilities capriciously.

"It does not appear to the Board that an order directing the railway company, in the general terms of section 253, to afford to the applicants all reasonable and proper facilities for the receiving, etc., would be sufficient, or that the authorities cited by counsel for the company are conclusive against the jurisdiction of the Board to direct specifically the continuance of previous facilities which seem to the Board to have been unreasonably discontinued."

Chrysler K.C. and *G. F. Macdonell* for the appellants. The Board has no power to order particular works to be done nor to interfere with the discretion of the railway company as to providing facilities: *South-Eastern Railway Co.* v. *The Railway Commissioners*(1); *Darlaston Local Board* v. *The London & North-Western Railway Co.*(2). The "Railway Act, 1903," prescribes a method, by section 176, to compel the construction of branch lines and thereby excludes

(1) 6 Q.B.D. 586. (2) (1894) 2 Q.B. 694.

jurisdiction on the part of the Board to order such construction otherwise than as there prescribed. Coal merchants are not owners of such an "industry" as is referred to in that section; no case of discrimination has been shewn; the Board cannot order constructions to be made by the railway company upon lands which do not belong to it, and, as the occupation of the premises in question is deemed dangerous, the railway company is unwilling to place a siding there which may have to be removed should it be deemed necessary to expropriate the land for their own protection.

Ewart K.C. for the respondents.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This appeal should be dismissed with costs. The court is of opinion that the Board of Railway Commissioners had, in the circumstances, jurisdiction to make the order complained of.

Appeal dismissed with costs.

Solicitor for the appellants: *G. F. Macdonell.*

Solicitors for the respondents: *Howell, Hudson, Ormond & Marlatt.*

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*June 5.
*Oct. 11.

JAMES J. RUTLEDGE (DEFENDANT) .... APPELLANT;

AND

THE UNITED STATES SAVINGS AND LOAN COMPANY (PLAINTIFFS) .... RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Cause of action—Limitation of actions—Contract—Foreign judgment—Yukon Ordinance, c. 31 of 1890—Statute of James—Statute of Anne—Lex fori—Lex loci contractûs—Absence of debtor.

Under the provisions of the Yukon Ordinance, ch. 31 of 1890, the right to recover simple contract debts in the Territorial Court of Yukon Territory is absolutely barred after the expiration of six years from the date when the cause of action arose notwithstanding that the debtor has not been for that period resident within the jurisdiction of the court.

Judgment appealed from reversed, Girouard and Davies JJ., dissenting.

APPEAL from the judgment of the Territorial Court of the Yukon Territory, *in banco,* affirming the judgment of Mr. Justice Craig, at the trial, which maintained the action of the plaintiffs with costs.

The action was based upon a judgment recovered in the United States of America, by the respondents against the appellant, on the 19th December, 1894, and was instituted in the Yukon Territorial Court in

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

1902, more than six years after the foreign judgment had been rendered. The questions raised upon the appeal are fully stated in the judgments now reported.

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Ewart K.C. for the appellant.

Chrysler K.C. for the respondents.

THE CHIEF JUSTICE.—The plaintiff in this case sued to recover the amount of a judgment debt due under a judgment dated 19th December, 1894, of a superior court of the State of Washington, U.S.A., together with interest from the date of the said judgment. That the said judgment debt was the cause of action in the present suit cannot be questioned, and in this country it is an action of simple contract.

It is disputed within what period after the cause of action has arisen the action will be barred by the Statute of Limitations.

The ordinance of the Yukon Territority, ch. 31 of 1890, provides that

all actions for recovery of merchants' accounts, bills, notes and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within six years after the cause of such action arose.

It is not disputed on this appeal that the action was not brought until after the expiration of six years from the 19th December, 1894, when the cause of action arose.

The terms of the ordinance are express and the meaning of the language unmistakeable. I do not think therefore anything is to be gained by considering either what the law is elsewhere or what it was formerly in the Yukon Territory.

It is necessary to give the ordinance its effect, and

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The Chief Justice.

it is an absolute bar to the present action. It follows that the appeal should be allowed and the action be dismissed with costs to the appellants, both here and in the courts below.

GIROUARD J. (dissenting).—I think it is a well settled rule of English law, whatever may be the law on the continent or in Quebec, that in matters of limitations of personal actions the *lex fori* must prevail, except when the debt has been absolutely extinguished by the Statute of Limitations of the *locus contractûs*. Here it is admitted that the debt was not there extinguished, and that prescription was not even acquired. It is also conceded that the action in the Yukon was taken within six years after the arrival of the debtor in that country.

In the Yukon country an ordinance has been passed which provides that,

> all actions for recovery of merchants' accounts, bills, notes and all actions of debt grounded upon any lending or other contract without specialty, shall be commenced within six years after the cause of such action arose.

I quite agree with the learned Chief Justice that this ordinance governs the case, but, with due deference, I am not prepared to say that the foreign judgment was the whole cause of action. The cause of the action is not only the undischarged indebtedness of the defendant, but his default to pay the same and his presence in the territory of the court where the action is taken, or property within its reach, in fact everything that is necessary to complete the remedy of the creditor and make it efficient. Until his presence in the forum of the court no action is possible there. The default of the debtor to satisfy the judgment,

wherever he may be found—for it was his personal duty to satisfy the same—constitutes the right of action, but is not the whole cause of the action as I read the statute. The removal of the debtor to the forum of the Yukon court completes the remedy. That statute covers the whole case without taking into consideration the statutes of James and of Anne.

For these reasons I submit that the judgment appealed from should be confirmed, and the appeal dismissed with costs.

DAVIES J. (dissenting).—At the time of the passing of the Yukon ordinance, ch. 31, sec. 1, of the Consolidated Ordinances of the Yukon Territory, 1898, the English statutes as to limitations of actions and also all other English law as of the 15th July, 1870, were introduced into the Yukon by a statute of the Dominion and were in force in that territory.

The ordinance referred to, upon the construction of which this appeal turns, reads as follows:

> All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within six years *after the cause of such action arose.*

The trial judge held that this ordinance did not repeal the Statute of Anne regarding disabilities, and only repealed such part of the Statute of James as was re-enacted by the ordinance, and that consequently as against the defendant, a foreigner, the time did not begin to run until he had first entered the Yukon Territory. On appeal this judgment was sustained by a divided court.

The appellant here contends that so far as the actions specially named in the ordinance are con-

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cerned, the ordinance is absolute and complete repealing all then existing English law on limitations, whether relating to disabilities or to acknowledgments of the debt and making an arbitrary period of six years after the cause of action arose within or without the Yukon Territory as the limit within which an action should be commenced in the Yukon courts under any and every condition and circumstance. And that the cause of action arose within the meaning of the words in the ordinance when the debt first became due.

The respondent in addition to supporting the reasons of the court below, contended that under the Statute of James, as also under this ordinance, the cause of action only arose in the Yukon Territory against this defendant when he came within the jurisdiction of the courts of that territory, and not before, in which case the six years' limitation had not expired.

I am of opinion that this contention is sound and that the authorities cited in support of it are conclusive. In *Douglas* v. *Forrest*(1), Chief Justice Best, in delivering the judgment of the Court of Common Pleas, is reported, at p. 703, as follows:

> Upon the second question we are of opinion that the replication is an answer to the plea of the Statute of Limitations. The words of the 21 Jac. I.; ch. 16, sec. 3 are that the action shall be brought "within six years next after the cause of such actions or suits and not after." Although the injury of which the plaintiffs complain has existed more than six years, yet they had no cause of action until there was some person within the realm against whom the action could be brought. Cause of action is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue.

If the law as here laid down is correct it is conclusive of this appeal. It was suggested that the lan-

(1) 4 Bing. 686.

guage was *obiter* only, and must in any case be confined to the facts of the case in which it was used. I think, however, it is a correct statement of the law generally, and was used not as mere *obiter dicta,* but as the basis and ground of the judgment rendered.

In the case of *Musurus Bey* v. *Gadban*(1), Wright J. in delivering the judgment of the court (Lawrence and Wright JJ.) expressly cites the language of Chief Justice Best above quoted as the law, and applicable to the case before him, and A. L. Smith L.J. in delivering the judgment of the Court of Appeal before which that case afterwards came, says(2), at pp. 357, 358:

There is another ground which is also fatal to the contention of the plaintiff. It has been held that as on the one hand there cannot be a cause of action within the meaning of the Statute of James from which the six years will commence to run unless there be a person in existence capable of suing(3), so on the other hand there can be no such cause of action unless there is somebody who can be sued.

He then cites from *Douglas* v. *Forrest*(4), at p. 704:

Cause of action, says Best C.J., is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue.

These authorities for me are conclusive that the six years' limitation specified in the ordinance did not begin to run until after the defendant had gone into the Yukon, within the jurisdiction of the courts of that territory.

The American authorities collected in 19 Am. & Eng. Ency., at pages 193 and 219, are generally to the

(1) (1894) 1 Q.B. 533.
(2) (1894) 2 Q.B. 352.
(3) *Murray* v. *East India Co.*, 5 B. & Ald. 204, at p. 214.
(4) 4 Bing. 686.

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same effect. The law is at the latter page stated as follows:

> The rule is, therefore, well settled that the statute does not begin to run until there are in existence some one capable of suing and some one who may be sued.

See also 1 Cyc., title, Actions, at p. 644.

While stating the grounds as above on which I think this appeal must be dismissed, I do not wish to be understood as expressing any opinion upon those on which judgment in the courts below proceeded.

The broad construction of the ordinance contended for by the appellant ignores alike the disabilities excepted by the Statute of Anne from the Statute of James, and the provisions of Lord Tenterden's Act with respect to acknowledgments of the debt. It would bar the recovery of a debt in the Yukon, though neither the debtor nor creditor were ever within that territory and even though it might not be barred by the *lex loci contractûs*. Such a construction would make the ordinance applicable to persons and things over which the legislature had at the time no jurisdiction.

I am glad to have been able to reach the conclusion that the limitation upon the time for bringing actions for the recovery of debts in the Yukon Territory prescribed by the ordinance has application only to parties who have brought themselves within the jurisdiction of the courts of that territory, and only runs from the time they have so brought themselves.

IDINGTON J.—The respondents sued appellant in the Territorial Court of the Yukon Territory upon a judgment recovered in one of the United States.

The appellant set up as his defence the Yukon ordinance, ch. 31. It is as follows:

All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within six years *after the cause of such action arose.*

The trial judge found as fact that the appellant had not been in the Yukon until within six years preceding the bringing of this action, and that fact is not disputed. It is admitted also, that unless the date of the respondent's coming into the Yukon is to be taken as the time from which the six years is said to run, the claim was barred when action began.

The learned judge held that in some way or other, in which I cannot agree, the provisions of 4 & 5 Anne, ch. 16 (1705), sec. 19, saved to the respondents their right of action for at least six years from the date of the appellant's coming into the territory.

On appeal to the court *in banco* of that territory the court, though divided, dismissed the appeal, and hence the appeal here.

There seems to be radical error alike in the result and the reasoning by which it is arrived at.

Suppose the statutes of James and Anne blotted out before the enactment quoted from the Yukon ordinance was passed, then the common law would have given a right of action at any distance of time from the breach of contract.

Now, if the Yukon ordinance has been passed in that state of the law, surely no one could pretend that the wide and comprehensive provision of the ordinance could be read in any other sense than as a bar to any action rested upon any of the contracts named therein, and brought six years after a breach.

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The Statute of James barred the right of action after the lapse of time therein specified.

All that the Statute of Anne did was to restore partially the common law right of action.

If the Yukon ordinance would have been an effective bar to the unlimited common law right, how much more must it have been a bar to the partial restoration of that right which the Statute of Anne furnished.

The right, restored and thus reserved by the Statute of Anne, was not urged as a special right within the meaning of those cases covered by the maxim *generalia specialibus non derogant.*

Even if it had been, it is hard to see how full effect could be given to the words of this ordinance if both were to stand, and if they could not stand together the special provision must yield to the latter, so as to give it any effect.

It seems as if, accepting the contention of respondents, some of the provisions of the Statute of James had been re-enacted to no purpose whatsoever.

All this seems a complete answer also to the plausible argument that the words (in the ordinance) "cause of such action arose" must be read as if there were added thereto the words *"within the territory of the Yukon."*

The words in the Statute of James are

within six years next after the cause of such action or suit.

They are substantially the same in meaning. They were clearly not interpreted in construing the Statute of James as we are asked to interpret them here, or the Statute of Anne need never have been enacted.

I can find only two reported cases directly bearing upon the question raised here, as to the meaning of

such words in the Statute of James before it was amended by the Statute of Anne.

These are, however, important and significant.

They are important, as the only judicial interpretation anywhere to be found of these words, unfettered by any amendments or other legislation bearing directly on the points in question here.

The last of these authorities has this significance, that it was almost immediately after the Statute of James being so interpreted therein that the amendment in the Statute of Anne was passed.

The first case is *Hall* v. *Wybourn*(1), (Trin. 1 W. & M. Rot. 130 B.R.), and is as follows:

> In bar of the Statute of Limitations, the plaintiff replied that the defendant was beyond sea, and it was held no plea, for the plaintiff might either file his original, or outlaw him; and in one *Bynton's Case*, it was held by Bridgman C.J., that though the courts of justice were shut up so as no original could be filed, yet this statute would bar the action, because the statute is general, and must work upon all cases which are not exempted by the exception.

The next is *Dupleix* v. *De Roven*(2) (of Hilary Term, 1705). The plaintiff and defendant (intestate) were merchants at Lyons, in France, where judgment was recovered by plaintiff. The bill filed in England was, to follow this up, some years later, and it was answered by a plea of the Statute of Limitations.

The judgment of the Lord Keeper was as follows:

> Although the plaintiff obtained a judgment or sentence in France, yet here the debt must be considered as a debt by simple contract. The plaintiff can maintain no action here, but an *indebitatus assumpsit*, or an *insimul computasset*, etc., so that the Statute of Limitations is pleadable in this case; and although both parties were foreigners, and resided beyond sea, that will not help the

(1) 2 Salk. 420. (2) 2 Vern. 540.

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plaintiff. The statute provides where the party plaintiff, he who carries the action about him, goes beyond sea, his right shall be saved; but when the debtor or party defendant goes beyond sea, there is no saving in that case. It is plausible and reasonable that the Statute of Limitations should not take place, nor the *six* years be running until the parties come within the cognizance of the laws of England, but that must be left to the legislature.

The editor's note is that the plea was allowed *and again on a rehearing.*

I am unable to trace who re-heard the case, but we know that Lord Cowper was sworn in as Lord Chancellor 23rd of October of that year; and that this Statute of Anne which contained a great many valuable amendments besides this one we are concerned with, was the work of Lord Somers, to whom no doubt both these cases were well known. We are told truly that for him nothing was too vast or too minute.

Possibly the re-hearing convinced him or Lord Cowper or both that the plain words could not be so strained as we are asked to, but that to accept the Lord Keeper's invitation to legislate was the proper course to adopt.

Whether any of these surmises be correct or not it would be eminently fitting the probable facts that some of them should be.

The Statute of Anne being abrogated, and thus obliterated, as indicated above, these precedents seem conclusive unless we conjure up some distinction between the words here "arose" and there "accrue." I will not try.

I found American cases of which the statement in text books seemed to maintain the respondents' proposition as to the meaning of those words which I have quoted from the Statute of James.

I find, however, in looking into a very great number of the cases so cited, that they all rest upon the

Statute of Anne or explicit legislation of a like character. And the statement is broadly made by some judges that in almost every state such provisions have been enacted.

It is thus obvious why we have to go so far back for precedent exactly in point.

All that has ever since transpired, I venture to say, when properly read, supports these early interpretations.

A cause of action arises from, and upon, the breach of a contract, no matter when, or where, that may have occurred.

The cause of action "accrued" and then or there time began, or was to begin, to run, or is not to run, such is the language used. The accruing of the action happens once only, is one thing, and not many happenings from time to time.

It accrued when the duty to be done had failed to be rendered where it ought to have been rendered.

Such is the plain ordinary meaning of the words, and to read into such words the far fetched meaning we are asked to place upon them would not only do violence to a fundamental rule of construction, but would also conflict with the reasoning upon which the courts have for so long a time proceeded in dealing with similar legislation.

In the numerous cases and statutes I have seen in the investigations I have adverted to there is, in not one single instance that I have found, any attempt to deal with the words "cause of action" in other sense than this.

The cases of *Douglas* v. *Forrest* (1), and *Musurus Bey* v. *Gadban* (2), relied on are clearly distinguishable.

(1) 4 Bing. 686. (2) (1894) 1 Q.B. 533.

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In the former the debtor was beyond the seas and so continued till his death and the action was brought against executors in England within six years from the grant of probate. It expressly rests on the Statute of Anne, though unnecessary language in the judgment suggests something beyond what was necessary. In the latter the defendant was held within the Statute of Anne as always beyond seas, first by the fiction of law, or courtesy of nations, by which an ambassador is treated as within his own country, though resident in England, and even after his return home was actually beyond seas. The statute of 7 Anne, ch. 12, expressly forbade any such action against an ambassador. See *Magdalena Steam Navigation Co.* v. *Martin*(1).

Test the matter by the plea which uniformly has been used, that the alleged cause of action did not accrue within so many years, etc.

And as early as *Snode* v. *Ward*(2), Trinity Term, 1 W. & M., it was held that the plea was good, though exceptions might exist; or as there an addition had been temporarily made to the statute. And it was held such exceptions might, and must, come by way of reply.

Fancy a reply such as would be appropriate here to plaintiff's contention.

We have then what was tried ineffectually in *Hall* v. *Wybourn*(3), but has not been tried since.

The fact is that in England, and in the United States with its numerous jurisdictions, the relief to be got by means of such a reply has never been tried. Instead thereof the numerous legislators who have come to face the problem have chosen to legislate.

(1) 2 E. & E. 94.
(2) 3 Lev. 283.
(3) 2 Salk. 420.

The reasoning upon which the cases of *Cornill* v. *Hudson*(1), and *Pardo* v. *Bingham*(2), at page 740, turn, in applying the mercantile amendment law, 19 Vict. ch. 97, sec. 10, is entirely destructive, not only of the contention set up by counsel for the appellant, but also of the other features of the case relied upon in the court below. In the first of these cases the contract was made and both parties were in Venezuela till the death of debtor.

The appeal should be allowed with costs both here and in the courts below, and the action be dismissed.

MACLENNAN J.—Appeal from the Territorial Court of the Yukon Territory *in banco*.

Action upon a judgment for $2,471.45 recovered by the respondent against the appellant and others on the 19th December, 1894, in a superior court in the State of Washington, one of the United States of America; the only defence now relied upon being the territorial Statute of Limitations.

The first question is upon the construction of the ordinance of the territory respecting the limitation of actions, passed in 1890. At the date of the passing of that ordinance both the statute 21 Jac. I. ch. 16, fixing the limitation in such a case at six years next after the cause of such action, and not after, and the statute 4 & 5 Anne ch. 16, giving six years after return from beyond the seas, when the defendant was beyond the seas at the time of the cause of action, were in force in the territory, and had become the law of the territory at the same instant of time.

The ordinance is as follows:

All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract

(1) 8 E. & B. 429. (2) 4 Ch. App. 735.

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without specialty, shall be commenced within six years after the cause of such action arose.

To my mind there is no room for the contention that the exception enacted by the Statute of Anne is still in force in this class of actions. The ordinance had no effect at all unless it did away with that exception. I think it was intended to do that very thing. As the law stood before the ordinance there was an enactment, with an exception. That is now superseded by an enactment without an exception. I therefore think that in this case the time began to run when the cause of action arose. The action was commenced on the 15th July, 1902, more than six years after the judgment was recovered, and it was argued very strenuously that inasmuch as the plaintiffs are a company domiciled abroad, and that neither they nor the defendant had come into the Yukon Territory until within six years before action, the time limited by the statute had not run. The contention in other words was that the judgment being a foreign one, it was not a cause of action within the territory, or within the meaning of the statute, until there was some one within the territory who could sue or be sued. I do not think that contention can be maintained. When the judgment was recovered in the State of Washington, both the appellant and the respondents were in that State, and the judgment not having been paid on being entered, immediately became a cause of action in favour of the respondents. It is the cause of action now sued upon, and the plaintiffs claim interest on it from the 19th of December, 1894, the day on which it was entered up.

The respondents relied very strongly on two cases

in the English courts, the first being *Douglas* v. *Forrest*(1), in which, at page 704, Best C.J. says:

> Although the injury of which the plaintiffs complain has existed more than six years, yet they had no cause of action until there was some person within the realm against whom action could be brought. Cause of action is the right to prosecute an action with effect. No one has a complete cause of action until there is somebody that he can sue.

In that case the plaintiffs had recovered two judgments in Scotland against a defendant resident there, in 1802. Before these judgments were recovered, but after the debts had accrued, the debtor left Scotland and went to India, where he died in 1817. Probate of the debtor's will was taken in England in March, 1824, and the action was brought within three or four years afterwards, and was held to be in time. These facts explain the language of the learned Chief Justice. While the judgment debtor was in Scotland and in India, time did not run against the plaintiffs in the English courts by reason of the Statute of Anne. And between the death of the debtor and the probate of his will it did not run, for there was no one in whose favour it could run.

The other case relied on by the respondent is *Musurus Bey* v. *Gadban*(2), a counterclaim for a debt incurred in England by the Turkish ambassador, Musurus Pasha, in which the language of Best C.J. in *Douglas* v. *Forrest*(1) was quoted with approval. It was held that while the ambassador was in England no writ could be issued against him, and that after he had gone to his own country the time would not run against his creditor in England by reason of the Statute of Anne. The counterclaim was

(1) 4 Bing. 686. (2) [1894] 1 Q.B. 533.

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brought within six years after probate to the pasha's estate taken in England, and the language of Best C.J. was, and was held to be, as applicable to this case as to the case of *Douglas* v. *Forrest* (1).

In the case before us the Statute of Anne being out of the case, there was nothing to prevent the plaintiffs from suing the defendant, wherever he happened to be, at any time after default in paying the judgment. In other words, although this action is brought in the Yukon court, the cause of it arose in the State of Washington on the day the judgment was recovered.

I am therefore of opinion that when the action was brought it had been barred by the Yukon ordinance, and that the appeal should be allowed, and the action dismissed.

Appeal allowed with costs.

Solicitor for the appellant: *C. W. C. Tabor.*
Solicitor for the respondents: *J. K. Sparling.*

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(1) 4 Bing. 686.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF ST. ANN'S.

1906
*Oct. 2, 3.
*Oct. 11.

DANIEL GALLERY (RESPONDENT) ... APPELLANT;

AND

WILLIAM DARLINGTON AND OTHERS (PETITIONERS) .... } RESPONDENTS.

ON APPEAL FROM THE DECISION OF DAVIDSON AND ROBIDOUX JJ.

Controverted election — Personal corruption — Charge in petition —Judge's report—Adjudication—Amendment—Evidence.

On a charge of personal corruption by the respondent if the adjudication by the trial judges does not contain a formal finding of such corruption this court may insert it if the recitals and reasons given by the judges warrant it.

Respondent, the night before the election, took a sum of over $4,000 and divided it into several parcels of sums ranging from $250 to $1,500. He then, after midnight, visited all his committee rooms and gave to the chairman of each committee, personally and secretly, one of such parcels. His financial agent had no knowledge of this distribution and no evidence was produced of the application of the money to legitimate objects:—

Held, that the inference was irresistible, that the money was intended for corruption of the electors and respondent was properly held guilty of personal corruption.

Allegations in the petition that respondent had himself given and procured, undertaken to give and procure money and value to electors and others named, his agents, to induce them to favour his election and vote for him, for the purpose of having such monies and value employed in corrupt practices were sufficient to cover the offence of which the respondent was found guilty.

APPEAL from the judgment of Davidson and Robidoux JJ. sitting for the trial of a petition against the return of a member to the House of Commons for the

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

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electoral district of St. Ann's in the City of Montreal which judgment found the respondent personally guilty of corrupt practices at said election.

The facts upon which the judgment appealed from was founded are stated in the above head-note and in the judgment of Mr. Justice Davies on this appeal.

E. F. B. Johnson K.C. and *Perron K.C.* for the appellant.

Bisaillon K.C. and *Carmichael* for the respondent.

GIROUARD J.—The appeal is dismissed with costs for the reasons stated by Mr. Justice Davies.

DAVIES J.—At the hearing of the argument on this appeal I was inclined to think that as there was no express finding or determination by the election judges of the personal disqualification of the successful candidate against whom the petition was fyled, but a formal determination only that he was not duly returned and that the election was void, and as the appeal was limited to the supposed finding of personal disqualification there was no jurisdiction on our part to hear the appeal at all. After a careful reading of the formal judgment of the election judges and also of their report to the Registrar of this court which, by the 14th section of 54 & 55 Vict. ch. 20, amending the Controverted Elections Act, is in cases of appeal substituted for the report which under the Act as originally passed was to be made to the Speaker of the House of Commons, and which substituted report is expressly declared together with the decision and findings (if any) to form part of the record, I have reached the conclusion that there is enough on the face of the record to enable us to amend it by insert-

ing the necessary formal finding and thus make the record conform not only to the recital in the formal adjudication that such a finding was arrived at, and to the statutory report to the Registrar to the same effect, but also to the reasons for judgment given by both the trial judges.

The 13th section of the amended Act above referred to gives this court express power to

> confirm, change or annul any decision, report or finding of the court that tried the petition appealed from upon the several questions of law as well as of fact *upon which the appeal was made.*

while the Controverted Elections Act enacts that this court

> shall pronounce such judgment upon questions of law and fact, or both, as in the opinion of such court ought to have been given by the court or judge whose decision is appealed from.

The omission of the personal condemnation of the appellant from the *dispositif* of the formal judgment therefore can, it seems to me, be rectified by this court, sufficient matter appearing upon the face of the record to justify such rectification.

The appeal then being properly before us it does seem to me that the questions for our determination are reduced to these: Do the particulars delivered cover the charges and offences for which the appellant has been personally disqualified, and, secondly, does the evidence given by the appellant (Gallery) and his chairmen of committees as to the personal payments by Gallery to them of sums of money amounting to about $6,000 between nomination day and election day, raise an irresistible inference that such money was paid for the corrupt purpose of inducing the voters in the several wards of which these committees had charge, to vote for Gallery or refrain from

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voting against him or for having so voted or refrained from voting? And was that money so used in whole or in part? I am of opinion that paragraph 10 of the particulars delivered, and especially sub-sections 5° and 6° of that paragraph, are sufficient to cover the charge and offence with which the appellant was personally charged and for which he was found guilty and disqualified.

Mr. Gallery is a politician of some experience, having run other elections before the one in question. He cannot and does not plead ignorance of the law. He had a regular agent, through whom he knew that all legitimate expenditure should be made in order to ensure that publicity which is a cardinal principle of the Election Act. He organized his committees after nomination day and there was consequently only a week within which to do such work as committees had ordinarily to do. He went around to these committees a few nights after their organization and paid to their several chairmen a small part of the $6,000. On the eve of the election day and before leaving his home he carefully made up into packages at his own house, and as he himself says in his own room and by himself, the remaining portion of the money amounting to over $4,000, in sums ranging from $250 to as high as $1,500; placed them on and about his person and distributed them to his various chairmen taking care to deliver the money personally and secretly, and so that even his own financial agent who accompanied him on his rounds is alleged to have known nothing about his acts.

The financial agent who by law was to have sole control over his disbursements, and through whom alone they could be legally made, had the transaction carefully screened from his knowledge, although he

accompanied his principal up to midnight before election day in the latter's visits to the committee rooms. We are asked to believe that this money was intended to be honestly paid to "locators" so called, for *bonâ fide* and necessary work to be done by them, while in the same breath we are told that at least one-half of those to whom the money was to be paid, and actually was paid, were electors whom the receipt of these moneys for alleged services in connection with the election would actually disfranchise.

The moneys paid to these chairmen of committees were not counted, no receipt was taken, no memorandum of payments made, no account kept by those to whom it was paid of those electors and others to whom they paid the money, and no evidence or the slightest possible that any actual *bonâ fide* work was done by those to whom it was paid, or if and where any work was done by any or by which of them. The moneys paid to Francis McCabe, a relatively small amount, do not appear to be open to these observations, and were not apparently used for corrupt purposes. His case appears to be an exception to the general rule. About one-half of the moneys paid to these chairmen was admitted in the argument to have been paid to electors on the ostensible ground that they were employed as locators. Some of the chairmen admitted that every one attending the committee room expected to be paid and Guilfoyle (one of the chairmen) says, he *thought* the persons to whom he paid out the money on election day had been acting personally and that he should pay them, and *he supposed* they had worked, and he paid them $10 or more according to his own judgment not having anything to determine the amounts they should severally receive.

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During the argument I asked repeatedly whether there was any evidence shewing that these locators actually did *bonâ fide* necessary work and reported the results, and where such evidence could be found if it existed at all. But such references as were given were to evidence of the flimsiest and most unsatisfactory kind.

I do not wish to be understood as saying that *bonâ fide* payments made through the proper agent to persons for the purpose of locating electors in the congested districts of large cities might not be defended as being within the Act, or that even if made improperly by the candidate they would necessarily under all circumstances, however necessary their work might be and however well it might prove to have been done, gave rise to an irresistible inference that the payment was a "corrupt practice."

But in the face of such evidence as we have here, to ask us to assume that the payments were *bonâ fide* and made for a *bonâ fide* purpose, is to ask us to abdicate our common sense. I think the only and the irresistible inference which can be drawn from the evidence is that these moneys were paid to the several chairmen of his committees by the appellant colourably for the purpose of paying locators so called for work done or to be done, but actually for the corrupt purpose of improperly influencing electors to whom they were to be paid and in order to induce them to vote or refrain from voting, or for having voted or refrained from voting, and that the moneys having in large part at any rate been paid over by these chairmen to electors and others on election eve and election day in pursuance of such corrupt purpose such payments constituted "corrupt practices" on appellant's part within the meaning of the statute.

Mr. Johnstone contended that the same particularity was required to make a legal finding of the personal guilt of a candidate for corrupt practices and so disqualify him as was necessary in ordinary penal actions.

I do not, however, concur in this view. The reason for the application to findings under the Controverted Elections Act (the penalty for which is personal disqualification) of the rule applicable to penal actions, does not exist. That rule is necessary in penal actions to prevent a party sued from being put in peril twice for the same offence and to enable him to plead his prior conviction or acquittal or discharge as the case may be to any second action. Certainty in the particulars of the offence must therefore appear on the conviction or judgment. But in trials under the Controverted Elections Act while the party incriminated and sought to be punished is entitled on every principle of justice to have full and clear particulars given him of the offence he is charged with and is also entitled to have the evidence confined to the charge so made, the same reason does not exist for the particular certainty in the statement of facts in the findings of the election court as does exist in a conviction or judgment in a penal action.

There must, of course, be reasonable certainty in the finding of the statutory offence and the different elements necessary to constitute the offence must be found by the election court. But in the case of the "corrupt act" of bribery that fact may depend upon one proved case as well as upon one hundred, and the penalty of disqualification follows alike in the one case as the other. The offence may be proved and found even though the name or names of the elector or electors bribed may not be able to be given. Several

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acts of personal bribery do not for the purpose of personal disqualification constitute different offences.

Where large payments of money are made by a candidate to electors by the score either directly or through the hands of his chairmen of committees and the courts find they were so made corruptly and for the purpose of inducing those electors to vote or refrain from voting as in the case before us has been found, it surely would make the Act practically inoperative in this important point if the court, having clearly found the offence committed, had to stay its hand and not pronounce judgment because owing to the faulty memory of the candidate or his agents through whom he paid the money or from other causes the names of the electors could not be given. Nor is there any sufficient reason why the names must appear in the finding to make it a good one. It is quite sufficient if it is proved that the recipients of the bribe money were electors. The *mens rea* must be shewn, the fact of payment pursuant to the guilty intent to actual electors proved and that is sufficient. One court alone, the election court, can make the finding and that finding can only be made by it once after trial of the petition; one penalty alone, disqualification, flows from the finding. The candidate found guilty cannot before any other court or before the same court in any other proceeding or at any other time be put in peril for the same offence. It is true he may be indicted for the crime of bribery in each specific case where bribery can be proved against him. But the penalties under the Election Act and those for the crime for which he may be indicted are entirely different, and in no case could the proof of conviction under the Election Act with its penalty of disqualification avail to defeat any indictment which might be

brought against him for bribery or be received as evidence of his guilt.

In my opinion the appeal should be dismissed with costs and proceeding to give the judgment which in our opinion the court appealed from should have given with respect to the particular and limited part of their judgment appealed from to this court with which limited appeal we alone have the right to deal, we should adjudge and find the appellant to have been guilty at the election aforesaid of paying large sums of money to the several chairmen of his committees between the day of nomination and the day of election corruptly and with the intent that these moneys should be paid and disbursed by these chairmen or some of them in large part at least to electors of the said electoral district for the purpose of inducing such electors to vote for him (the appellant) or refrain from voting against him, or for having so voted or refrained from voting, and that such moneys or a large part thereof were by such chairmen or some of them so paid and disbursed to such electors for the corrupt purpose aforesaid, and that in so acting and doing the appellant had committed a corrupt act within the meaning of the Dominion Elections Act and was in consequence personally disqualified as prescribed by that Act.

IDINGTON J.—I agree in the result that appellant be or stand disqualified by reason of his having violated the Dominion Elections Act, 1900, sec. 108, subsec. (*e*).

I am unable to accede to some of the propositions of law and part of the procedure involved in the judgment of the majority of the court.

The learned trial judge failed in their order of

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2nd January, 1906, to comply with the provisions of section 43 of the Dominion Controverted Elections Act.

For the reasons set forth in the case of *Norwich Election Case; Stevens* v. *Tillett*(1), and followed in *South Oxford Election Case*(2), by the late Chief Justice Draper, I am clearly of the opinion that the subsequent report of the trial judges made on the 15th January in discharge of their duty under section 44 of the said Act, can give no assistance to the interpretation of the previous order, and that such previous order cannot receive any force or vitality from the report which is only made for the consideration of Parliament, and has no final or binding effect.

However anomalous the proceedings may be, to amend, on an appeal by the man to be convicted, if not already convicted, so that he of a certainty shall stand convicted, yet I think, under section 51, sub-section 3 of the Act it becomes our duty in a clear case, to amend.

I am of the opinion that the defects in form and in much of the procedure in the court below sprang from the respondents presenting a case of "general corruption" which is not known to the law, instead of adhering to the obvious course that they ought to have followed, of having regard to section 10, sub-section 5° of the particulars, and being as specific as possible in the trial of the accused. Any necessity for amendment, that has arisen in this case, is the result of the respondents failing to observe these requirements.

The accused in these election cases is entitled to have the charge made as specific as possible, and to

(1) L.R. 6 C.P. 147.

(2) Hodgins' Elec. Cas. 238.

have due regard paid to such specification in the taking of evidence, and when that is concluded, to have the consideration thereof dealt with as a separate issue, and reported upon free from trammels of anything else. With due submission I think this was not adhered to in this case as closely as is desirable in a trial of this kind.

I think it is a matter of regret, if there was the extensive corrupt expenditure which the court below has found, that the trial was not so conducted with due regard to the necessities for the specific charges being adhered to, for in that event the report usually made to the Speaker, but in this case made to this court, as the result of the appeal, would have doubtless contained a very large number of names that are omitted therefrom.

I think a certain duty devolves upon petitioners in cases of this character to see that there is not such a failure in carrying out the provisions of the Act in regard to the reporting of people *primâ facie* guilty of corrupt practices as this case does plainly exhibit. I think that duty was neglected in this case, and that and the want of specification giving rise to the irregularities, and the mistake in the form of the judgment requiring it to be amended, were such that the respondents ought not to get their costs of this appeal.

I am the more impressed with this view that the petitioners specially prayed that all persons who might be found guilty might be dealt with, yet let the guilty escape, and in the case of one man at least, McCabe, permitted him to be reported without evidence justifying such report.

The reporting of Francis McCabe, who does not seem to have committed, according to any evidence I have been able to find, any offence save receiving from

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the appellant part of the money, which it is said was designed by him to be partly used for improper purposes, suggests that others of those reported may not, any more than he, have been guilty of any corrupt practice. The receiving of such money is not in itself made a corrupt practice by the Act. The receiver's transgression of the law begins only when he uses the money entrusted to him for a corrupt purpose. The acceptance and an express undertaking with the candidate to spend improperly might place such a receiver in a difficult position, morally, and in the eyes of the law, and yet he might not be guilty of corrupt practices within the meaning of this Act.

There was nothing expressly corrupt or improper in anything that passed from the appellant to McCabe, or indeed many others, that would place him or some of them in this light I have just adverted to. The money paid out was not all designed even by appellant for improper purposes.

It is said that we have nothing to do with that phase of this case, because the only questions we have to consider are those arising out of this appeal which has been limited to the question of the appellant's disqualification. Sub-section 4 of section 51 as it originally stood, and until amended by 54 & 55 Vict. ch. 20, sec. 13, would, if we were acting under it, amply justify this contention. All that the Registrar under the section as it originally stood certified as the judgment of this court was that which touched upon the decision on the appeal.

By the amending section I have just referred to, however, the following is what is now required:

4. The registrar shall certify to the Speaker of the House of Commons the judgment and decision of the Supreme Court, confirming, changing or annulling any decision, report or finding of the

court that tried the petition appealed from, upon the several questions of law as well as of fact upon which the appeal was made, and *therein shall certify as to the matters and things as to which, by section forty-four of this Act, the court would have been required to report to the Speaker, whether they are confirmed, annulled or changed, or left unaffected by such decision of the Supreme Court; and such decision shall be final.*

What is the meaning of the words at the end declaring *"such decision shall be final?"* I submit that it is possible to interpret this amended section so as to give to the report, going from this court to the Speaker, and dealing with persons guilty of corrupt practices, a meaning not found to exist in the report to the Speaker when made by the trial judges; in other words, a meaning it had not in law, as above cases shew, when it reached us. It may or may not be the true meaning to hold that it has the effect of making that report final and conclusive as to the status of the persons reported. It is to be observed, however, that it is upon the use of these words at the end of a section that enabled the courts in the cases I have cited to hold candidates' status affected finally and conclusively by virtue of a report under a section so worded. Lest such signification should be given to the report to the speaker from this court, I think we ought to guard ourselves and make clear that such is not our intention, and not our judgment.

I do not think that we escape responsibility by saying that it is something with which we have nothing to do. There being a duty cast upon us by this amended sub-section, I think, as to the whole report, in the case of any appeal whether specially directed to the terms of the report or not, leaves the matter in such a condition that I cannot think we are free from responsibility and ought to so amend the form of report as to remove a doubt. We ought at least to

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say, if we feel we are not responsible, that the report is not to be taken as our judgment.

MACLENNAN J.—I concur in the judgment of His Lordship Mr. Justice Davies, and am of opinion that the appeal should be dismissed with costs.

DUFF J.—I agree that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Archer, Perron & Taschereau.*

Solicitors for the respondent: *Bisaillon & Brossard.*

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*Oct. 17.

THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC (INFORMANT) .... APPELLANT;

AND

KENNETH GORDON FRASER AND OTHERS (DEFENDANTS) .... RESPONDENTS.

THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC (INFORMANT) .... APPELLANT;

AND

IVERS WHITNEY ADAMS (DEFENDANT) .... RESPONDENT.

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

Rivers and streams—Navigable and floatable waters—Obstructions to navigation—Crown lands—Letters patent of grant—Evidence — Collateral circumstances leading to grant — Limitation of terms of grant — Title to land — Riparian rights—Fisheries— Arts. 400, 414, 503 *C.C.*

A river is navigable when, with the assistance of the tide, it can be navigated in a practicable and profitable manner, notwithstanding that, at low tides, it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth. *Bell* v. *The Corporation of Quebec* (5 App. Cas. 84), followed.

Evidence of the circumstances and correspondence leading to grants by the Crown of lands on the banks of a navigable river cannot be admitted for the purpose of shewing an intention to enlarge

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the terms of letters patent of grant of the lands, subsequently issued, so as to include the bed of the river and the right of fishing therein.

The judgment appealed from (Q.R. 14 K.B. 115) was reversed and the judgment of the Superior Court (Q.R. 25 S.C. 104) was restored. *Steadman* v. *Robertson* (18 N.B. Rep. 580) and *The Queen* v. *Robertson* (6 Can. S.C.R. 52) referred to; *In re Provincial Fisheries* (26 Can. S.C.R. 444; (1898) A.C. 700) discussed.

APPEALS from judgments of the Court of King's Bench, appeal side(1), reversing two judgments of the Superior Court, District of Quebec(2), by which the informations of the appellant against the said respondents, respectively, were reversed.

Upon the hearing on the merits the judgment in the Superior Court (Larue J.) maintained the contentions of the Attorney-General, conformably to the informations, respectively, and declared that the River Moisie, opposite the riparian lots A, B, C, D and E, North, on the north bank of the river, in the Township of Moisie, in the County of Saguenay, and the riparian lots A, B, C, D and E, South, on the south bank of the river, in the Township of Letellier, in said county, was navigable and floatable, and that the right of fishing for salmon in the said river, opposite the said lots, was vested in the Crown, in the right of the Province of Quebec, and not in the respondents, and prohibited them from fishing for salmon opposite the said lots.

The material circumstances in respect of which the dispute arose are referred to in the judgment now reported and are more specially stated in the reports of the judgments in the courts below. The substance

(1) Q.R. 14 K.B. 115, *sub nom. Lefaivre* v. *Attorney-General of Quebec*.

(2) Q.R. 25 S.C. 104.

of the decisions of the Court of King's Bench, in relation to the issues raised upon the present appeals, is summarized, as follows, in the judgment appealed from, as formally entered in the court below:—

"Considering that the defendant, Fraser, in support of his right to such fishing and against the claim of the Crown to the same, in addition to invoking the non-navigability and non-floatability of the said river and the letters patent issued by the Crown for the said lots, also invokes other documents and facts, already declared by this court relevant and admissible in the case, and particularly the written application of the 13th December, 1880, * * * made to the Crown, for the purchase and acquisition of said lots and right of fishing, by John Holliday, acting for the firm of Fraser & Holliday, in whose rights defendants * * * were and are, the assent to and acceptance by the Crown of the said application, as made and the action of the parties thereon and specially the possession and enjoyment of the said fishing right for twenty years by the said Fraser & Holliday and their representatives.

"Considering that it is established that the Crown and the said Fraser & Holliday, in January, 1882, concluded an agreement between them by the assent to and acceptance of and according by the Crown of the said application of the 13th December, 1880, as made, without change or modification except to fix by mutual consent the extent of the grant along said river and the price, and by the payment by said firm and acceptance by the Crown of the consideration for said agreement so entered in; whereby the said Fraser & Holliday acquired the right to have, own, possess and enjoy the said lots of land and the said right of

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fishing in the said river opposite to the same, and, in fact, the said firm and their representatives have for and during a period of twenty years before the filing of said informations publicly and peaceably possessed and enjoyed the said lands and right of fishing conformably to the said concluded agreement between said firm and the Crown.

"Considering that the subsequent issue of letters patent, in June, 1883, for the said lots to the said Fraser & Holliday and their *prête noms* ought not to and did not deprive the said Fraser & Holliday and their representatives of the said right of fishing acquired by the said firm by said agreement concluded between them and the Crown, as aforesaid, in January, 1882.

"Considering that the said right of fishing at all times, since January 21st, 1882, was and is vested in the said Fraser & Holliday and their representatives * * * and not in the Crown; and that the appeals herein taken are well founded and ought to be maintained * * *.

"**This Court,** without pronouncing on the navigability and floatability of the said river, doth declare that there is error in the judgment appealed from rendered by the Superior Court, at Quebec, on the 16th February, 1904, doth maintain the said appeals and annul and set aside the said judgment and, proceeding to render the judgment which the said Superior Court ought to have rendered, doth declare;

"That the right of fishing in the said Moisie River opposite the said lots (except the right of fishing reserved by the Crown in front of the small portion of lot A North, three chains wide and thirteen chains deep) to have belonged at all times since the 21st

January, 1882, to the said Fraser & Holliday and their representatives and to now belong to the appellants (now respondents) and not to the Crown, and doth dismiss the informations herein filed and doth recommend that the Crown pay the costs, etc."

The application referred to was in the form of a letter addressed to the Commissioner of Crown Lands, as follows:

"Sir,—In view of the late decision of the Supreme Court of Canada to the effect that the right of angling for salmon in the fresh water portion of rivers above tidal waters belongs to the land on either side of the river when sold or patented to individuals, I beg to apply for a portion of land of each side of the River Moisie beginning at the foot of the first rapids and extending downwards for seven miles with such limited width on either side as the Government will consent to sell.

"I particularly desire to acquire this land and these fishing rights as I have establishments on the side of the main river on the land applied for for the artificial propagation of salmon, also as being the lessee from the Federal Government of the netting portion which I have held for the last twenty years."

Mr. Justice Hall, one of the judges of the Court of King's Bench, while concurring in the judgment appealed from, stated that, in his opinion, the River Moisie was not, in a legal sense, a navigable and floatable river.

The letters patent granted the lots, in free and common socage, describing them as having frontage on the River Moisie, and did not, in terms, mention any rights in the waters or bed of the river or as to fishing therein.

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Stuart K.C. and *Lafleur K.C.* for the appellant. The grant is of land only—bounded by the River Moisie; if that river be navigable and floatable the boundary is high water-mark; if non-navigable, it no doubt is the centre of the river.

Two principles of law have been violated by the judgment appealed from: 1st. That all the negotiations which precede the execution of a written contract are merged in that contract itself; and 2ndly. That, when a contract is clear and unambiguous, no evidence as to the negotiations which preceded the execution of the contract, whether oral or written, can be admitted to construe it. Art. 1234 C.C.; *Ulster Spinning Co.* v. *Foster*(1); *In re Mullarky*(2); *O'Mally* v. *Ryan*(3); 8 Aubry & Rau, Dr. Civ., p. 319 § 763; 16 Laurent, Nos. 501 & 502; 19 Laurent, Nos. 469, 470, 471, 479, 481.

A title given in pursuance of an agreement is the final expression of the agreement and overrides and controls all previous communications; *McBain* v. *Wallace & Co.*(4), at pages 602 and 614; *Leggott* v. *Barrett*(5). Moreover, the evidence does not justify the conclusion that there was any concluded agreement for the sale of fishing rights; the holding is, in fact, at variance with the evidence.

There can be no need for interpretation of a contract unambiguous in every respect; no estoppel runs against the Crown, and no laches of any officer of the Crown can in any way impair the Crown rights. Chitty, Prerogative of the Crown, p. 381; *The King* v. *The*

(1) M.L.R. 3 Q.B. 396.
(2) M.L.R. 4 S.C. 89.
(3) Q.R. 21 S.C. 566.
(4) 6 App. Cas. 588.
(5) 15 Ch. D. 306.

British American Bank Note Co.(1); *The Queen* v. *Black*(2); *Black* v. *The Queen*(3); *Humphrey* v. *The Queen*(4); *Burroughs* v. *The Queen* (5); *The Queen* v. *The Bank of Nova Scotia*(6); *City of Quebec* v. *The Queen*(7).

The court of appeal did not expressly deal with the question whether the Moisie River is a navigable river or not, but Mr. Justice Hall denies the navigable and floatable character of the river. The question of navigability was fully discussed by Mr. Justice Larue, who decided, upon the testimony of a number of witnesses heard by him at the trial, that the river was navigable, at least to the place in dispute opposite the defendants' land. It is true the defendants adduced evidence as to the difficulties of navigation in the estuary at low tide, the difficulty of getting over the bar at the mouth of the river at low tide and in certain conditions of wind and weather, and further, as to the nature of the upper part of the river, starting from the rapids above the American Camp northwards. This evidence appears to be wholly irrelevant; the navigability of the river cannot be decided by its condition at low tide, nor can the question whether or not it is navigable opposite the defendants' lands be decided by the difficulties of navigation further north. The evidence which relates to the river opposite the lands in question, admits the navigability of the river below, when the tide has flowed to some extent. The whole evidence not only justified the finding of the trial judge, that the river from the foot of the rapid near the Grand Portage to

(1) 7 Ex. C.R. 119.
(2) 6 Ex. C.R. 236.
(3) 29 Can. S.C.R. 693.
(4) 2 Ex. C.R. 386.
(5) 2 Ex. C.R. 293.
(6) 11 Can. S.C.R. 1.
(7) 2 Ex. C.R. 252.

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its mouth is navigable and floatable, and, in consequence, a dependency of the Crown Domain, but rendered such finding imperative.

This fact being established, the propositions of law applicable to the case and the principal authorities in support of them may be summarized as follows:—The right of fishing in navigable waters is exclusively vested in the Crown, unless specially granted. Arts. 400, 414 C.C.; Answer of the Seigniorial Court to Questions 26, 27, 29 and 30(1), opinion of Sir L. H. Lafontaine, at p. 345*a*, opinion of Judge R. E. Caron(2); 18 Vict. ch. 3, sec. 16, sub-sec. 9 (Can.); 63 Vict. ch. 23 (Q.), amending R.S.Q. arts. 1374, 1376, 1379. According to the old law of France the right of the riparian proprietor does not extend to the banks and bed of a navigable or floatable river without a special grant from the Crown. *In re, Provincial Fisheries*(3), *per* Girouard J. at pp. 542 and 549; *Lavoie* v. *Lepage*(4); *Hurdman* v. *Thompson* (5); 2 Duparc-Poullain, p. 398, No. 577; 10 Laurent, Nos. 8, 9, 12.

A river is navigable when boats susceptible of use for commercial purposes can be moved up and down for at least a part of the year and it is floatable when rafts can be brought down it. *Hurdman* v. *Thompson*(5), at pp. 434 and 445; Daviel, Cours d'Eaux, No. 35; 1 Gaudry, Traité du Domaine, No. 118; 2 Polcque, Cours Eaux, No. 4; Dalloz Répertoire, "Eaux," Nos. 39, 42, 43, 52, 58; *Oliva* v. *Boissonnault*(6).

A river is deemed navigable when it is actually

(1) L.C. Dec. Vol. A., 68*a*, 71*a*, 72*a*.
(2) L.C. Dec. Vol. B, 43*d*.
(3) 26 Can. S.C.R. 444.
(4) 12 Q.L.R. 104.
(5) Q.R. 4 Q.B. 409.
(6) Stu. K.B. 524.

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capable of navigation. *Attorney-General* v. *Scott*(1); *City of Hull* v. *Scott*(2), at p. 171; *Bell* v. *Corporation of Quebec*(3).*

Flynn K.C. for the respondents. We contend, 1st. That the fishing rights in question were conceded by the Crown to Fraser and his associate, and Fraser became and was the sole owner thereof; and 2ndly. That the river is neither, as a whole nor as regards the part opposite the lots in question, navigable, floatable or tidal.

The statutes, orders in council, regulations, correspondence and proof of record clearly shew that it was the intention of the Crown to grant, and the object of the grantees to secure, the exclusive rights of fishery in that part of the river which has its course between the riparian lots conveyed by the letters patent. The contract was completed quite irrespectively of the letters patent, which are merely a convenient method of supplying evidence of the grant of the riparian lands necessary to be used in connection with and for the protection of the fishing rights bargained for. We refer to the judgments of their Lordships Justices Hall and Trenholme, in the court below, in this connection.

The instructions for the survey and examination of the lands were merely for the purpose of having a report as to their unfitness for agricultural purposes in order to permit of their be-

(1) 34 Can. S.C.R. 603.
(2) Q.R. 13 K.B. 164.
(3) 2 Q.L.R. 305; 7 Q.L.R. 103; 5 App. Cas. 84.

* The arguments in respect to making the respondent Adams a party are not mentioned as the question is not discussed in the judgment now reported.

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ing made the subject of a special grant in connection with the fisheries. They can have no other effect in regard to the dealings between the Crown and the respondents; the lands are shewn to be valueless, save in so far as they were to be utilized in connection with the fisheries. The Crown is shewn to have been dealing with this river upon the view that it was, by its nature, neither navigable nor floatable; as a matter of fact, it is not so at any point opposite the lands granted, and, as a consequence, the bed of the river is included in the grants *usque ad medium filum aquæ*. We are owners of both banks, consequently of the whole of the bed of the river flowing between them; arts. 414 *et seq.*, 503 C.C. The mouth of the river is shewn to be so obstructed by reefs and sandbars that it is impossible for even very small craft or light boats to enter it, except at high tides and with favourable conditions of the wind. There are but a few inches of water on the shallows at low tides, and, even at high tides, with a contrary wind, the channel cannot be safely or profitably navigated. The fact that a few vessels have been able, with much difficulty and at great risks, to enter the river, does not affect the general non-navigability of its character. Navigation is, moreover, rendered absolutely impossible from the lowest point opposite our lands by the condition of the channel and rapids; see report of the case in the court below, at pages 130-131, *per* Hall J., and cases collected in Bouvier's Law Dict.(1), p. 471; Coulson & Forbes on Waters, pp. 9, 12, 13, 14, 62, 94, 96, 360-1, 479; Angel on Watercourses, p. 731, No. 544; *Reece* v. *Miller*(2); 1 Fuzier-Herman, Nos. 122-124; Beaudry-Lacantinerie, "Rivières Flottables," p. 174; 2

(1) Ed. 1897.

(2) 8 Q.B.D. 626.

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Plocque, Nos. 4 and 5; 1 Gaudry, Traité du Domaine (1), No. 121; 14 Bequet, "Eaux," Nos. 567, 574, 575; 2 Beaudrillart, "Eaux et Forêts," p. 739; 2 Daviel, p. 23; 3 Proudhon, pp. 726, 727; 3 Proudhon, Nos. 857, 859, 860; *Bell* v. *Corporation of Quebec*(2); *Thompson* v. *Hurdman*(3), pp. 59-69; *Attorney-General* v. *Scott*(4), at p. 615; *Leboutillier* v. *Hogan*(5).

The letters patent can be explained and interpreted with the aid of the contemporaneous dealings and writings which passed between the parties, and by the manner in which the contract was executed: 16 Laurent, Nos. 503, 504, 508; 7 Huc, No. 176; 25 Demolorube, Nos. 7-10 and 36; 5 Marcadé & Pont, p. 116; Beaudry-Lacantinerie, Nos. 558, 559; Fusier-Herman, art. 1341 C.N., Nos. 207, 208; *Chad* v. *Tilsed*(6); 1 Greenleaf on Evidence, No. 243.

The judgment of the court was delivered by

GIROUARD J.—This appeal involves important questions of law, although not entirely new. They have been considered by this court on several occasions, and were it not for their practical consequences, it would be sufficient to refer to *Re Provincial Fisheries*(7), and the elaborate opinion of Mr. Justice Larue in this case, where all the authorities are collected. Although mere opinions, not binding, have been expressed in the *Provincial Fisheries Case* (7), on a reference by the Governor-General-in-Council, the questions with regard to fisheries and the right of fishing, navigable and floatable rivers, have been so

(1) Ed. 1862.
(2) 5 App. Cas. 84; 7 Q.L.R. 103.
(3) Q.R. 4 S.C. 219.
(4) 34 Can. S.C.R. 603.
(5) 17 R.L. 463.
(6) 2 Brod. & Bing. 403.
(7) 26 Can. S.C.R. 444.

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carefully considered that they are entitled to very great weight, more especially in view of the fact that these opinions, at least with regard to the subject matter under consideration, were confirmed on appeal to the Judicial Committee of the Privy Council (1), and that in the present case the parties have not alleged any reason why they should not prevail.

The substantial facts, free from irrelevant details and extrinsic matters, which form at least three-fourths of the immense volume (700 pages) of the case, are simple enough. By information of the Attorney-General for Quebec, His Majesty the King claims fishing grounds and the right of fishing opposite certain lots of land granted to the respondent, Alexander Fraser, and his associates, on both sides of the Moisie River, in the County of Saguenay, alleging that the said river is "a public, navigable and floatable river." The respondent met this action by pleading that he was a riparian proprietor of the said lots of land by virtue of letters patent from the Crown, in right of the Province of Quebec, and, as such, had the

> exclusive right of fishing in the said River Moisie opposite or appertaining to the lots.

He adds that for years before and after said grant, and at the time it was issued, the Government of Quebec, by the acts, letters and writings of its ministers and officials, always considered and represented the said lots as

> including fishing rights in the said River Moisie, opposite said respective lots *usque ad medium filum equæ.*

and finally, that the said river was not navigable nor floatable.

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

The Attorney-General demurred to that part of the respondent's pleas, paragraphs 14-20, in which facts are alleged tending to explain, contradict, vary, supplement or add to the letters patent. The demurrer was maintained by Chief Justice Casault, but in appeal that judgment was reversed. The court has left no notes of this judgment, but from the *considérants,* it is based upon the following ground:

Considerant que ces paragraphs sont pertinents et contiennent des faits qui tendent à supporter la prétention de l'appelant que la concession que lui a faite la couronne inclut le droit de pêche dans la rivière Moisie, en face des lots concédés, etc.

In consequence of this decision, the parties were sent back to the first court, and had to go through a very voluminous *enquête,* as there was no further appeal to this court or any other tribunal, the judgment being only interlocutory. But as we decided quite recently in the case of *Willson* v. *Shawinigan Carbide Co.*(1), it is now open to the appellant to shew that the judgment of the first court was right. At all events, we hold that the evidence adduced under this branch of the case is illegal.

The trial judge, on the merits, found: 1st. That the evidence outside the letters patent did not contradict, and was, moreover, insufficient to override their clear language; and 2ndly, that the river was navigable and floatable. The action of the Crown was, therefore, maintained with costs. In appeal, this judgment was reversed as to the first ground only, the question of the navigability remaining undecided. From this final judgment the Crown appeals to this court.

We entirely agree with Chief Justice Casault

(1) 37 Can. S.C.R. 535.

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that the matters struck off by him are no answer to the information. In the Revised Statutes of Quebec respecting Crown lands, the commissioner is vested with very large powers; he may cancel a grant of land under certain circumstances. Art. 1283 R.S.Q. He may even cancel letters patent which have been surrendered, and order correct ones to be issued in their stead; art. 1299; but he cannot supplement or add to the same. I do not mean to say that ambiguous letters patents cannot be explained like any other contract. I mean that letters patents, clear in their terms, cannot be varied; *Massawippi Valley Railway Co.* v. *Reed*(1); except by the same parties who caused them to be issued, that is, the Lieutenant Governor in Council, by supplementary letters patent, or fresh letters patent, or, at least, orders in council delivered to and accepted by the grantee; and here I cannot do better than quote the language of Chief Justice Strong in the case of *Bulmer* v. *The Queen*(2):

> The orders in council authorizing the Minister of the Interior to grant the licenses to cut timber on the timber berths in question, did not, on any principle which has been established by authority, or which I can discover, constitute contracts between the Crown and the proposed licensees. These orders-in-council, as similar administrative orders in the case of sales of Crown lands in the Provinces of Ontario and Quebec have always been held to be, were revocable by the Crown until acted upon by the granting of licenses under them.

In this case the respondent cannot even produce an order in council. Art. 1207, of the Civil Code, says that letters patent, issued by the Government of Quebec, are authentic writings, and art 1210 adds that

> an authentic writing makes complete proof between the parties to it,

of the obligation expressed in it, etc. Under these

(1) 33 Can. S.C.R. 457, at p. 470.

(2) 23 Can. S.C.R. 488, at p. 491.

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articles I cannot see how any evidence of the nature allowed by the court of appeal can be legal. But there is more in the case.

Whatever may have been the correspondence and other acts of certain officials, the substantial documents (outside the letters patent) support the appellant's contention. In the application for a patent, dated 13th December, 1880, to the Commissioner of Crown Lands, Mr. Flynn, a demand is made only

> for a portion of land on each side of the River Moisie, beginning at the foot of the first rapids and extending downwards for seven miles, with such limited width on either side as the Government will consent to sell.

True, a reference is made to fishing rights opposite that land, but it is only with regard to his desire or motive for the application. Finally, on the 20th January, 1882, the assistant commissioner recommends that a sale of 200 acres of land be made to the respondent and his associates, and that letters patent be issued accordingly. The report was approved by the commissioner, Mr. Flynn, on the 21st February following. The respondent contends that these documents complete the agreement and the court of appeal agrees with him.

I cannot see how a complete agreement can be found in face of the very terms of the letters patent and of the memorandum of commissioner Flynn. I must confess I cannot conceive how a "concluded agreement" can be presumed from the above documents. First, the report of Mr. Lemoine, of the 20th January, 1882, purports to grant only lots of land; 2ndly, no right of fishing is mentioned; 3rdly, if the latter was only contemplated, why order in 1881 a survey "as to the nature of the soil"? In 1882, Mr.

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Lemoine again orders a regular survey. And finally letters patent are to be issued.

Now let us look at the terms of the letters patent which were issued more than one year after, in 1883. They do not purport to transfer fishing grounds or fishing rights, but only tracts of land situate on both sides of the River Moisie. It cannot be doubted that the Crown never expressly intended to grant by these letters patent the right of fishing in front of the said lands. It is now well settled law that, without such special grant, the fisheries in public or navigable rivers do not pass from the Crown. The authorities are all collected in *Re Provincial Fisheries*(1). We therefore reverse the judgment of the court of appeal which, quite irrespective of the navigability of the River Moisie, construed the negotiations and correspondence leading up to the granting of the letters patent as, in themselves, constituting a collateral or independent contract establishing the patentees' right to a fishing grant, although at variance with the plain and unambiguous language of the letters patent themselves.

Undoubtedly the respondent, under the belief that the river was not navigable, expected to acquire the fishing grounds and the right of fishing on both sides of the river. He says so in the application of the 13th December, 1880, and some of the representatives or officials of the Crown, if not all, seem to have been under the same impression. In his application the respondent says:

In view of the late decision of the Supreme (he meant the Exchequer) Court of Canada to the effect that the right of angling for salmon in the fresh water portion of rivers above tidal waters

(1) 26 Can. S.C.R. 444; [1898] A.C. 700.

belongs to the land on either side of the river when sold or patented to individuals, etc.

The applicant evidently had in mind the recent decisions in *Robertson* v. *Steadman*(1), by the New Brunswick court, in 1879, and *The Queen* v. *Robertson*(2), decided in 1880 by Mr. Justice Gwynne, one of the judges of the Supreme Court, sitting in the Exchequer Court, both reviewed by this court in 1882, in *The Queen* v. *Robertson*(2). The courts held that the *locus* in question in the Miramichi River, where no tide was felt, was not a public or navigable river, and that, therefore, the grant of the land on each side of the river carried with it, *ipso facto*, the fisheries in the river, and the right to fish from shore to shore, although for many miles lower down the river is tidal and navigable.

The law of the Province of Quebec with regard to navigable rivers is very clear. No attention is paid to the tide element. Art. 400 of the Civil Code says that

all the roads and public ways maintained by the state, navigable and floatable rivers and streams and their banks, etc., are considered as being dependencies of the Crown domain.

The respondent, the Commissioner of Crown Lands, and all the officials, may possibly have been acting under an erroneous impression of the law; there is evidence that, at that time, the Crown in right of the Dominion of Canada claimed the fisheries of all navigable rivers; it was not until 1896 that the question was settled in favour of the provinces by this court, and in 1898 by the Judicial Committee of the Privy Council. If there be an error on either side, or

(1) 18 N.B. Rep. 580. (2) 6 Can. S.C.R. 52.

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on both sides, as to the law or the fact of the navigability of the River Moisie, the respondent may find a remedy in art. 1299, or, at least, 1303, of the Revised Statutes of Quebec, and C.P.Q., art. 1007. All we are called upon to establish is that the clear terms of the letters patent he produces do not establish any grant of the fisheries he claims, and that these fisheries are located in a navigable or floatable river.

As to the navigability, we intimated to the appellant's counsel that it was not necessary to hear him in reply. We considered that we were relieved from the duty of reading the whole evidence upon this branch of the case. The counsel for the respondent had read enough of it to this court during his lengthy argument to satisfy us that the River Moisie is not only floatable—that is, for rafts, but navigable for canoes, boats, scows, barges, schooners, and even steamers. If we understood him correctly, he admitted that it is capable of navigation, although always difficult at a low tide, which in this instance rises to 7 or 8 feet, and this twice a day. In his factum, the respondent further says:

> The River Moisie has some 400 miles in length, and in all the plans produced by the Crown, and by the defence, and by the description given by witnesses, it is a series of rapids, falls, cascades, rocks, sand-banks, and reefs (battures), with a velocity of current equal to 4, 5, and 6 miles an hour. There never has been any regular navigation, traffic or commerce on this river.
>
> The only exception to this, if it can be so considered, is the salmon net fishing in the estuary of the river by Messrs. Holliday and Fraser, and now Messrs. Holliday Bros., and the fly fishing in the fluvial part of the river.
>
> There is no cultivation on either side of the river, all the timber has disappeared, at least, up to that part of the river where the lots in question are situate. * * As to the species of boats which have been in use on this river, those mentioned by the witnesses are the following: Bark and wooden canoes, drawing a few inches of water; small "flats," as the word indicates, flat bottomed, and drawing less

than 1 foot of water; and boats (barges). Amongst the latter, is what the witnesses call "the long-boat," used by the Messrs. Holliday to carry down their salmon nets in the estuary of the river. * *

This long-boat goes up the river during the fishing season daily, as far as the one before the last fishing camp, and once every week, to the uppermost camp. This boat, as Captain Mercier says himself, has the shape of a "chaloupe." The stern is square and not sharp, as the witnesses say. Its draught of water is two feet, perhaps a little more when completely laden. * *

Vessels are frequently stranded at the mouth of the river, the channel there is extremely narrow, and at low water contains scarcely four or five feet in depth. Vessels drawing 7 or 8 feet have to await the rising tide to enter the bay of the river and reach the wharves there. * * *

The "Pointe à Mercier" is of extremely difficult access; there is only at the most one foot and a half of water in the channel at low tide, and it becomes necessary to await the rising tide, as we have seen, in order to pass by. A glance at some of the maps, produced by the Crown and by the defence, gives an idea of the general physiognomy of that part of the river. Mr. Neilson, who is an old explorer, having a thorough knowledge of our rivers and forests, and who has gone up this river for a considerable distance (250 to 260 miles on eastern branch), says that the only means of navigating it is by the bark canoe and by taking advantage of the many portages. In truth, evidence of record shews that such is the general rule, and that it is exceptionally, or in favourable conditions of the river, that other boats have made use of, as we have seen. Advantage has to be taken of the high waters of the river, in the spring or after heavy rains or of the rising tide. * * *

Now, if we take the river below the American Camp, which is the part more particularly in question, we can divide it as follows: 1. The bay, that is, from the mouth of the river to "Pointe à Mercier." The bay is very large and the sand being continually driven down by the waters of the river, it is very shallow. 2. From "Pointe à Mercier up to the "Coude"; there are very serious obstacles in the way as regards the channel, even for the Messrs. Holliday Brothers' "long-boat." 3. Beyond the "Coude" the ordinary means of navigation used by the gentlemen, who go fly-fishing, is the canoe. Nevertheless, during the fishing season, to bring up their provisions and luggage, and to take their luggage down, they make use of a boat, which draws about two feet of water, some witnesses say two and one-half feet; but even in doing so, they must take certain precautions to avail themselves of the elevation of the water in the river, of the rising tide, etc.

And if we add to the above admissions, the facts as stated by Mr. Justice Larue, that steamers like the

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"King Edward," the "Lord Stanley," the "Beaver," the "Gypsy," drawing from nine to eleven feet of water, have been able to make regular commerce with Moisie, and on the River Moisie to very near the first rapids and in front of the lots granted to the respondent. I cannot see how it can be contended that the Moisie is not navigable up to and including the *locus* in question. Mr. Justice Larue has quoted the testimony of quite a number of witnesses, and we must not forget that he saw these witnesses and was in a better position than we are to judge of their intelligence, competency and truthfulness.

If we were to hold that rivers navigable only by the assistance of the tide, are not navigable within the meaning of the law, we would simply put out of the public domain a considerable number of large rivers, which in every country have been considered navigable and are used for transportation of commercial commodities. What is navigability of a river is a question of fact. I do not think the size of the boat has much to do with it. Until a little over one hundred years ago all the great rivers of Canada, including the Saguenay, the Ottawa and the St. Lawrence, above Montreal, were navigated by canoes and flat-bottomed boats. These were the kind of craft that the Hudson Bay Company, the North-West Company, the Government, and the traders of the West used to carry their furs, goods and merchandise to and from Montreal for hundreds of miles along the above rivers, and others connecting with them. Before the construction of the canals, for at least fifty years, steamers were navigating different parts of the St. Lawrence, but were prevented from ascending above Montreal by huge rapids and falls, and yet can it be said seriously that these rivers were not at all times navig-

able? Therefore, it is not necessary that navigation should be continuous, as contended for by the respondent. A river may not be capable of navigation in parts, like the St. Lawrence at the Lachine Rapids, at the Cascades, Coteau and Long Sault rapids, the Ottawa at Carillon, the Chaudière and the Chats rapids, and yet be a navigable river, if, in fact, it is navigated for purposes of trade and commerce. The test of navigability is its utility for commercial purposes. Every river is not equally useful. The Moisie, which is in the wilderness, with few fishing and mineral establishments for 15 or 17 miles from its mouth, cannot be compared with the River St. Lawrence, where the state has spent millions to improve its navigation possibilities. No public money has been spent on the River Moisie; it may never be spent if the volume of trade does not justify expenditure of public money; the Government is not bound to improve rivers, and it cannot be expected that it will do so without regard to the requirements of the shipping trade. For the moment, the Moisie is sufficient for the wants of its inhabitants and the public dealing with them.

In the case of *Bell* v. *Corporation of Quebec*, decided by the Privy Council(1), their Lordships, after citing Dalloz and Daviel, said:

> These general definitions of Daviel and Dalloz shew that the question to be decided is, as from its nature it must be, one of the fact in the particular case, namely, whether and how far the river can be practically employed for purposes of traffic. The French authorities evidently point to the possibility, at least, of the use of the river for transport in some practical and profitable way as being the test of navigability.

(1) 7 Q.L.R. 103, at p. 114; 5 App. Cas. 84, at p. 93.

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And, in the same case, Chief Justice Dorion said, in the court of appeal:

D'après cela, toute rivière qui, sans travaux artificiels, peut porter bateaux serait une rivière navigable. Cette définition laisse cependant beaucoup à désirer. En effet, une rivière comme la rivière Saint-Charles, qui une fois ou deux pendant l'année ,dans les plus hautes marées lorsque le volume de ses eaux sera considérablement augmenté par la fonte des neiges du printemps ou les pluies abondantes de l'automne, permettra à un bateau de se rendre jusqu'au pont de Scott, devra-t-elle être considerée comme navigable, lorsque pendant tout le reste de l'année il sera impossible d'y aller, même avec une chaloupe ne tirant qu'un ou deux pieds d'eau? Il semple qu'il faut admettre avec Championnière (Traité des eaux courantes, *n* 428), que la division des cours d'eaux est tout à fait arbitraire, et que ce n'est pas tant le volume de l'eau que la circonstance que son cours est ou n'est pas consacré au service public, qui lui donne son caractère légal.

The trial judge has found the River Moisie from the foot of the rapid near the Grand Portage to its mouth on the River St. Lawrence is navigable an floatable, not only when the tide is rising, but even at low water. I must confess that the evidence is conflicting as to this; but his findings as to navigability have not been reversed in appeal. Mr. Justice Hall did not agree with him that the river was navigable under any circumstances, while Mr. Justice Trenholme took a different view of the case. The majority of the court declined to express any opinion on this point, and so we have only the finding of one court as to the navigability of the Moisie at low water. Are we justified in overlooking such a finding? I would hesitate to do so, especially in face of our ruling in *Massawippi Valley Railway Co.* v. *Reed*(1).

However, we do not base our judgment upon this finding, but upon the fact, not controverted, and ad-

(1) 33 Can. S.C.R. 471.

mitted by the respondent, and upon the evidence, that the river is navigable, and is navigated by the assistance of the tide, in a practical and profitable way, and for the purposes of traffic, at least from its mouth up to and including the part in dispute. Beyond that we are not called upon to say anything, and we decide nothing.

Summarized, therefore, our holdings are:

1st. That the patent issued by the Crown is plain and unambiguous in its language, that the rights of the parties must be determined by it, and cannot be added to, altered or diminished by any previous negotiations, written or oral, leading up to its issue. That, therefore, the application of the patentee and subsequent correspondence between him and the Crown officials should not have been received in evidence for the purpose of explaining the patent, and, if looked at, for the purpose of establishing an independent or collateral contract conferring additional rights upon the patentee, entirely fail to do so. That the legal effect of the language of the patent with respect to the bed of the river, and the fishing rights therein, depends upon the determination of the question whether the Moisie at and in the four or five of its miles covered by the patent is navigable or floatable within the meaning of the law of Quebec, and that, adopting the test of navigability laid down by the Privy Council and hereinbefore quoted, we concur with the findings of the trial judge, and which findings are not questioned in the judgment of the court of appeal, that such river at such locality and from thence to its mouth, is so navigable and floatable.

For these reasons, the appeal is allowed with costs, and the judgment of the Superior Court restored.

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As admitted by the parties, these reasons of judgment apply to the appeal of the *King* v. *Adams*.

Appeals allowed with costs.

Solicitors for the appellant: *Caron, Pentland, Stuart & Brodie.*

Solicitor for the respondents: *E. J. Flynn.*

CONTROVERTED ELECTION FOR THE ELECTORAL DITRICT OF HALIFAX.

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*Oct. 4.

FREDERICK W. HETHERINGTON (PETITIONER) .... APPELLANT;

AND

WILLIAM ROCHE (RESPONDENT) .... RESPONDENT.

FREDERICK W. HETHERINGTON (PETITIONER) .... APPELLANT;

AND

MICHAEL CARNEY (RESPONDENT) ... RESPONDENT.

WILLIAM ROCHE (PETITIONER) ...... APPELLANT;

AND

ROBERT L. BORDEN (RESPONDENT) .... RESPONDENT.

MICHAEL CARNEY (PETITIONER) .... APPELLANT;

AND

J. C. O'MULLIN (RESPONDENT) .... RESPONDENT.

Controverted election—Commencement of trial—Extension of time.

An order fixing the time for the trial of an election petition at a date beyond the time prescribed under the Act operates as an enlargement of the time. *St. James Election Case* (33 Can. S.C.R. 137); *Beauharnois Election Case* (32 Can. S.C.R. 111), followed.

APPEALS from the judgments of Mr. Justice Townshend and Mr. Justice Russell, sitting for the trial of

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

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petitions against the return of members for the County of Halifax, and counter-petitions against the defeated candidates dismissing said petitions for want of jurisdiction to try them.

Various enlargements of the time for commencing the trials of the petitions in these cases were made, the last extending it to July 14th, 1906. In May, 1906, the Supreme Court of Nova Scotia, by order fixed July 17th as the date of trials and on July 6th, Mr. Justice Russell made an order enlarging the time for 30 days.

On July 17th the Election Court met and heard argument on the question of their jurisdiction to proceed, the statutory time having expired on the 14th, and then held that they had no jurisdiction, as the court could not fix a date beyond the 14th for the trial, and the order fixing the date was therefore invalid. Also that the enlargement by Mr. Justice Russell could not be invoked, as it was only asked for on the ground that the order of the court was void, and not as an appeal to the judge's discretion and the requirements of justice did not render an enlargement necessary. The petitions were therefore dismissed and the petitioners appealed to the Supreme Court of Canada.

Lovett for the appellants.

Lafleur K.C. and *Drysdale K.C.* for the respondents.

The judgment of the court was delivered by

GIROUARD J.—We need not hear counsel in reply. We believe that it is not necessary to give lengthy reasons why we arrive at this conclusion. We all agree that this case is governed by the *St. James Elec-*

tion Case(1) and the *Beauharnois Election Case*(2), and previous decisions, more especially in view of the order made by Mr. Justice Russell extending the time for thirty days, which embraces the day on which the election trial was begun.

We hold that there was a valid extension of time and that the trial was commenced within such extension. The appeal is, therefore, allowed with costs and in the other two cases without costs, and the trial is directed to be proceeded with.

NOTE BY REPORTERS.—In the case of *Hetherington* v. *Carney,* it was admitted that the facts and questions of law were the same as in *Hetherington* v. *Roche,* and the same judgment was pronounced.

In the two other cases the appeals were allowed without costs.

Appeals by Hetherington allowed with costs; appeals by Roche and Carney allowed without costs.

Solicitor for the appellant: *John A. MacKinnon.*

Solicitor for the respondent: *G. Fred. Pearson.*

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(1) 33 Can. S.C.R. 137. (2) 32 Can. S.C.R. 111.

1906
*Oct. 4, 5.
*Oct. 8.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF SHELBURNE AND QUEEN'S.

EDWARD A. COWIE (PETITIONER)....APPELLANT;

AND

WILLIAM S. FIELDING (RESPONDENT)........................... RESPONDENT.

ON APPEAL FROM THE DECISION OF WEATHERBE C.J. AND RUSSELL J.

Controverted election—Trial of petition—Evidence—Corrupt acts at former election—Agency—System of corruption.

A petition against the return of a member for the House of Commons at a general election in 1904 contained allegations of corrupt acts by respondent at the election in 1900 which were struck out on preliminary objections. On the trial of the petition evidence of payments by respondents of accounts in connection with the former election was offered to prove agency and a system and was admitted on the first ground. A question as to the amount of one account so paid was objected to and rejected.

Held, that such rejection was proper; that the question was not admissible to prove agency for agency was admitted or proved otherwise; nor as proof of a system which could not be established by evidence of an isolated corrupt act.

Held, also, that where evidence is tendered on one ground other grounds cannot be set up in a Court of Appeal.

APPEAL from the decision of Weatherbe C.J. and Russell J., sitting to try an election petition in the electoral district of Halifax, in favour of the respondent.

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

The facts are sufficiently stated in the above head-note and more fully in the judgment of the court.

Lovett for the appellant.

Lafleur K.C. and *Drysdale K.C.* for the respondent.

The judgment of the court was delivered by

DAVIES J.—This is an appeal from a ruling or decision of the judges who tried this election petition refusing to allow a question to be put to the respondent Fielding as to the amount of a payment admitted by him to have been made by him to one Farrell, an agent of his, shortly after a previous election which he, Fielding, had run in the same constituency some years before for expenses incurred at such previous election.

This petition was filed to have the election of 1904 declared void for corrupt practices on the part of Fielding's agents, and the successful candidate, Fielding, personally disqualified for corrupt practices. As originally filed, the petition contained many paragraphs charging corrupt practices against Mr. Fielding and his agent at a previous election run by him in the same constituency in 1900.

These paragraphs, however, were subsequently ordered to be struck out of the petition by one of the justices of the Supreme Court of Nova Scotia on preliminary objections taken to them, and on an appeal to this court against such order, and also against an order allowing another preliminary objection as to the service of the petition upon the respondent Fielding, the order setting aside the service of the petition was reversed, but no judgment was rendered with respect to the order striking out the paragraphs from

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the petition, because, as held by this court, it had no jurisdiction under the Controverted Elections Act to hear any appeal on the point, the order appealed from not being one which if confirmed "would put an end to the petition."

The petition therefor, with the paragraphs relating to the previous election of 1900 eliminated, no appeal having been taken from the order eliminating them to the Supreme Court of Nova Scotia, was subsequently tried before the Chief Justice of Nova Scotia and Mr. Justice Russell.

The election petitioned against was voided by them on the ground of corrupt practices having been committed by respondent's agents, and the personal charges were dismissed for want of any evidence to support them.

The question for our decision is whether the learned judges who tried the petition rejected any material evidence tendered on these latter charges which should have been admitted.

Mr. Fielding was twice examined on oath. First, on an order for discovery before Mr. Justice Meagher, and secondly, on the trial of the petition.

On his examination for discovery he was asked questions with respect to the payment by him of election bills relating to the election of 1900. Objection was raised to the questions being put, on the ground that all the charges in connection with the 1900 election had been struck out of the petition, when the counsel for the petitioner stated that the ground on which he tendered the evidence was "to shew a system." The question tendered was then allowed, but, on the advice of his counsel, Mr. Fielding declined to answer it. Several times the question was repeated and the objection was renewed and the ground on

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which it was tendered repeated with the same ruling by the commissioner.

Before the trial of the petition and after this examination for discovery, the petitioner delivered particulars of these personal charges, alleging substantially that at the election of 1900 certain persons named and others unknown, acting for and as agents of Mr. Fielding, had been guilty of corrupt practices; that after Fielding's return he had personally paid to them the moneys they had so expended in corrupt practices, and that such moneys had been so repaid corruptly and with full knowledge of how the money had been expended; that, at the subsequent election of 1904, the same persons acted as Fielding's agents

upon the agreement and understanding with the respondent (Fielding) that they should again engage on his behalf in corrupt practices, etc., in pursuance *of the system established* at the former election and be again reimbursed by the respondent after the election,

and that they did again act and were guilty of corrupt practices at the 1904 election.

At the trial, Mr. Fielding being under examination, Mr. Ritchie, petitioner's counsel, said that the witness on examination for discovery

gave evidence that he paid certain bills after the election of 1900 and he now proposed to ask the names of the persons who rendered the bills and the amounts and all about them, first, *as evidence of system*, secondly, *as clear evidence of agency.*

The Chief Justice stated after consultation with his colleague

that evidence would be allowed of transactions at the previous election tending to shew agency between the respondent and the persons against whom evidence has been given at this trial to shew corrupt acts or to have employed persons who did such acts.

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Thereupon the examination was proceeded with as follows:

Q.—Did you receive any bills from Mr. Farrell after the election of 1900?

A.—No.

Q.—Did you pay him anything in connection with the election of 1900 after the election in connection with the election?

A.—I did. It was for expenses incurred during the election. Some considerable time, I don't know how long after the election Mr. Farrell informed me there were unpaid expenses of the election campaign and he wanted to know if I would pay them. I objected and told him no. On further consideration I determined I would pay them. I thought it would be shabby if I allowed my friends in the county to pay these. Very reluctantly I agreed to pay the amount he mentioned. He told me the amount. I said to him at the time I agreed to the doing of this thing that *I wanted to have a distinct understanding that if I was to be a candidate again for Queen's County I would pay no such bills although they might be strictly legitimate;* bills should come to me in time to be paid through my agent, and I *told him distinctly that under no circumstances hereafter would I pay such bills.*

Q.—Tell me what these expenses were for?

A.—I can't tell you.

Q.—You were not told?

A.—I was not told. I assumed they *were legitimate expenses,* I did not inquire into them.

Q.—You did not have any *bills actually sent you?*

A.—No. Mr. Farrell stated this amount was due and I paid it. I did not ask any questions as to what it was expended for nor whose bills were unpaid.

Q.—*Give us the amount of the bills?*

Objected to.

Their Lordships decided the amount does not go to the proof of agency.

The examination is then continued with respect to each and all of the names mentioned in the particulars, and Mr. Fielding answers that from none of them had he any claim made upon him after the election of 1900 for outstanding bills and that he had not paid any one of them anything after such election, nor had he paid any one else than Farrell any such bills.

The result of the evidence, therefore, was that Mr.

Fielding had not had any bills sent to him after the election of 1900 by or from any person; that Mr. Farrell alone had informed him some months after the election of 1900 there were some unpaid expenses of that election outstanding, had told him the amount, and had asked if he would pay them, and that Mr. Fielding paid him the amount assuming they were legitimate expenses, but not inquiring into them or asking any questions about them, stating at the time

> that I wanted to have a distinct understanding that if I was to be a candidate again for Queen's County I would pay no such bills although they might be strictly legitimate; bills should come to me in time to be paid through my agent and I told him distinctly that under no circumstances hereafter would I pay such bills.

No other evidence on the point was put in or tendered, and the question for our determination is whether the single question as to the amount paid by Fielding to Farrell, in 1901 or 1902, for expenses connected with the election of 1900 was properly refused at the trial of the petition to set aside the election of 1904.

So far as the question of agency is concerned, its admission or rejection to establish that fact did not matter, because the agency of Farrell was either admitted or established by proof satisfactory to the court, and the election avoided for a corrupt act or acts of his, as such agent.

Then was the question admissible on the other ground on which it was tendered, as evidence of a system. We are of opinion that it clearly was not. It was a question relating to a single isolated act which happened several years before the election in contest took place, and, even admitting, for the purpose of argument, as Mr. Lovett contended he was entitled to assume, that the amount paid was a large one, such

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isolated payment, under the circumstances, paid not through the candidate's agent as provided for by the statute, but illegally and improperly by the candidate personally, could not in any way be held to establish the existence of such a system as that outlined in the particulars delivered and submitted by Mr. Ritchie as the ground on which he claimed its admission.

The whole subject of the admission of evidence of a previous crime or offence against a prisoner or person charged with a subsequent similar crime or offence on the ground that the first one had been committed under circumstances from which a reasonable inference might be derived of the same criminal object, has been lately exhaustively discussed in the case of *Rex* v. *Bond*(1), before the Court of Crown Cases Reserved, consisting of Alverstone C.J. and Ridley, Kennedy, Darling, Jelf, Bray and A. T. Lawrence JJ.

The head note to the report reads as follows:

> The prisoner, a medical man, was indicted for feloniously using certain instruments on a certain woman with intent to procure a miscarriage. At the trial evidence was tendered on behalf of the prosecution to shew that some nine months previous the prisoner had used similar instruments upon another woman with the avowed intention of bringing about her miscarriage, and that he had then used expressions tending to shew that he was in the habit of performing similar operations for the same illegal purpose. The evidence was admitted, and the prisoner was convicted.
>
> *Held*, by Kennedy, Darling, Jelf, Bray and A. T. Lawrence JJ. (Lord Alverstone C.J. and Ridley J. dissenting), that the evidence was rightly admitted, and that the conviction must be upheld.

Even there, with the evidence shewn that at the time of the commission of the first crime

> the prisoner had used expressions tending to shew that he was in the habit of performing similar operations for the same illegal purpose

(1) (1906) 2 K.B. 389.

the Lord Chief Justice and Ridley thought the evidence inadmissible.

All the previous cases are reviewed in the able and elaborate judgments of the different judges, and the conclusion from them seems to us to be irresistible that in the present case the bald proof of a single irregular and improper payment by the respondent, made years before the alleged statutory offence being tried, and having reference to another and a different election from the one in controversy at the trial, does not entitle a prosecutor to go into the full facts and details connected with the payment in order to shew the existence of a system, at least unless and until some evidence had been given from which the existence of some such system might be inferred.

Mr. Lovett further contended that, even if the evidence was not receivable on the ground on which it was tendered, still it was admissible as being material to the issues being tried.

During the argument the court, after carefully examining the clauses of the petition to which its attention was especially directed, were unanimously of opinion that the evidence was not admissible on the ground of its pertinency to the issues joined.

We are of the opinion that if a counsel at the trial of an issue of fact tenders evidence on a specific ground and the evidence is properly rejected on that ground, it is not open to him afterwards before a court of appeal to claim that the evidence should have been admitted on another and different ground never referred to at the trial.

In the result we hold that the sole question disallowed by the trial judges was properly so rejected, and that the appeal should be dismissed with costs,

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and the necessary certificates forwarded to the speaker.

Appeal dismissed with costs.

Solicitors for the appellant: *Ritchie & Robertson.*

Solicitor for the respondent: *G. Fred Pearson.*

GASPARD DESERRES (PLAINTIFF) . APPELLANT;

AND

HENRI A. A. BRAULT (DEFENDANT) . RESPONDENT.

1906

*June 7.
*Oct. 11.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Construction of deed—Ambiguity—Discharge of debtor—Contract—Illegal consideration—Right of action.

Where the language of an instrument is ambiguous or obscure, the intention of the parties should be ascertained by consideration of the circumstances attending the execution of the agreement.

A deed of settlement between B and a bank declared that he owed the bank $4,731.61 for interest on an advance in respect to a lottery scheme and a further sum of $18,762.02 for advances on an account for the purchase of stock, two notes being given for these amounts, respectively, and the shares of stock being pledged as security for the large note only. Subsequently, the directors of the bank passed a resolution authorizing the discharge of B., on payment of $15,000 by one V., *"jusqu'a concurrence de la dite somme de* $15,000" and the transfer of the shares to V. This resolution was followed by a deed of compromise, V. paying the $15,000, and obtaining a transfer of the shares, and it was thereby declared that, by the transaction, B. was discharged in so far as concerned the bank's advances on the stock account *"vis-à-vis la banque des avances qu'elle lui a faites du chef susdit mentionnées en un acte de règlement," etc.*, the resolution being annexed and the deed of settlement referred to for imputation of the payment, and V. was to become creditor of B. under conditions mentioned, *"jusqu'à concurrence de* $15,000," the note which had not become due and the securities being allowed to remain in possession of the bank. In an action by D. to whom the notes held by the bank were assigned:

Held, reversing the judgment appealed from, that the effect of the deed of compromise was to discharge B. merely to the extent of the $15,000 on account of the larger note; and further, affirming the judgment appealed from, that no action could lie upon the smaller note as it represented interest on a claim in relation to a contract of an illegal nature. *L'Association St. Jean Baptiste* v. *Brault* (30 Can. S.C.R. 598) followed.

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

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APPEAL from a decision of the Superior Court, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, at the trial, by which the plaintiff's action was dismissed with costs.

The plaintiff sued to recover $9,600.54 for the balance of two promissory notes made by the defendant in favour of La Banque du Peuple in settlement of debts owing by him to the bank, one for $18,762.02 for advances and interest on a loan for the purchase of Dominion Cotton Co. shares, and the other for $4,731.61 advanced to meet the interest on a loan made in connection with a lottery scheme. Credit was given for a payment of $15,000 on account of the larger note, thus leaving the balance claimed. The defendant contended that the whole amount of the larger note had been discharged by the deed of compromise mentioned in the head-note and that the smaller note had been compensated by a larger sum due him by the bank for interest on an obligation assigned by him to the bank. At the trial Mr. Justice Archibald held that the deed of compromise had discharged the whole of the larger note as a draft thereof had been approved by the bank before execution and the resolution of the directors in respect to its execution could be so construed as to authorize a full discharge; the learned judge also held that the consideration for the other note was illegal, being based upon an immoral contract relating to a lottery and, therefore, that no recovery could be had thereon. This judgment was affirmed by the judgment now appealed from.

The questions raised upon the appeal are stated in the judgments now reported.

Béique K.C. and *Delfausse* for the appellant.

Belcourt K.C. and *Lamothe* K.C. for the respondent.

THE CHIEF JUSTICE concurred in the judgment delivered by His Lordship Mr. Justice Maclennan.

GIROUARD J. concurred for the reasons stated by Idington J.

DAVIES J. concurred for the reasons stated by their Lordships Justices Idington and Maclennan.

IDINGTON J.—The respondent owed the Banque du Peuple $18,772.17 on the 20th July, 1897, for which he gave his promissory note at eighteen months with interest at six per cent. per annum pursuant to a deed of settlement relative to this and another debt he owed the bank. By that deed of settlement there was declared to be held by the bank "Dominion Cotton" and "Duluth" stocks of the respondents, as collateral security only for this debt, and that the bank could sell if default made in paying this note. The original advance on this amount had been $18,000 and the balance odd since is made up of interest thereon.

On the 15th September, 1898, the parties agreed that one Vinet should advance the bank $15,000 and get the "Dominion Cotton" stock, and that the respondent would have three years to pay the said sum, and the bank release the respondent.

The question is raised whether or not this release should be of the whole indebtedness or only the sum of $15,000, part of the whole principal debt.

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Several causes no doubt moved each party to this arrangement, but none of such a character as to suggest that the bank was likely to be willing, with such securities as it had, to sacrifice $3,772 and 14 months' interest on $18,772 for the sake of getting what they got.

Yet we are asked to construe the instrument which concluded the arrangement in this sense.

This instrument certainly contains some expressions which lend a colour to the contention which has received the support of the courts below.

It purports, however, to have been made by virtue of a resolution of the bank directors which is annexed to it.

This resolution must be held to govern all that is doubtful in the document in question. It is not clear that without such authority the bank agents had any power to make such a surrender of its claims, under such circumstances as existed here.

It is idle, however, to suggest that this agreement for release in whole or in part might have fallen within the scope of such general authority as the officers of the bank might have had, for it obviously never was intended by either party that in this case such authority was to be or was relied on.

The resolution clearly contemplates an acquittance to the respondent of his debt to the extent of the sum of $15,000—and no more.

If the parties have not been in accord as to that then there was no release.

It seems to me, however, that he well understood this was the extent to which he was released and all he expected or desired.

One crucial circumstance, in this connection, is

the retention by the bank of the respondent's promissory note and of the further collateral securities known as the "Duluth" stock, which so remained without objection in their hands until respondent heard of the proposed sale of same to the appellant, who acquired them from the bank and now sues upon said promissory note.

The intention of the parties must be sought in interpreting any document, and as an aid thereto the surrounding facts and circumstances can and, in doubtful cases when ambiguous words are used, must always be looked at.

I must not be understood as including in that, evidence of actual intention or agreement. Evidence of that kind given here I exclude, as it is not necessary to consider questions here raised thereby.

On this branch of the case I think appellants are entitled to succeed.

On the other branch where the question of illegality is raised I am unable to see how the appellants can succeed.

The promissory note sued upon was given for the balance of a debt of $34,731.61 of which $30,000 was extinguished by dealings, needless to refer to, save for the purpose of such indications as they furnish, as to the contested point of whether or not the $30,000 was paid on account of principal or interest.

It seems, by the case of *L'Association St. Jean Baptiste* v. *Brault* (1), that a claim for interest upon such advances can not be maintained.

Hence, in this case, if the promissory note now in question were given for interest, it must be held void in law.

(1) 30 Can. S.C.R. 598.

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It seems to me that the intention of the parties, as shewn by expressions in the documents dealing with this adjustment of thirty thousand dollars, on account of the appellant's claim when it stood at $34,731, as stated above, as well as date of note in question being a few days prior to those dealings, shew a clear intention to apply that sum of $30,000 on account of principal. The appellant's factum clearly refers to this payment as if on account of capital.

But, in case there be not a clear appropriation to pay principal, it might be urged, in the absence of such express appropriation, that the payment of $30,000 would, in due course of law, wipe out the interest first, and that as a result the balance going to make up the note in question must be treated as part of principal.

I am, however, of the opinion that if the illegality so tainted the interest that it be irrecoverable, then the law will not impute, in the absence of express application, the payment of any sum to the liquidation of such a debt when there is another to which it can be properly and lawfully imputed.

I have not been able to find express authority on the point or any allusion to it in the text books, but such a result seems to me clear on principle.

Hence I find that appellants must fail—on this ground—which leaves the interest all that the note in question can represent.

The reservation in the Criminal Code relied upon by Mr. Béique will not cover a lottery, of the character of this, as it was carried on. The case above referred to seems decisive unless that reservation could possibly have distinguished, as I think it cannot, this from that case.

All other debts of the respondent he swears were paid, and in this he is not contradicted.

As to this part of appellant's claim I think their appeal must fail.

As each had succeeded in a material part of the case I think there should be no costs of this appeal, but plaintiff (appellant) should get costs in courts below.

MACLENNAN J.—I am of opinion that the judgment should be affirmed so far as relates to the smaller of the two notes of the 20th July, 1897, but that we ought to reverse it with respect to the claim upon the other note.

The question is one of some nicety, depending on the construction of a deed dated the 15th September, 1898, between the Banque du Peuple and the respondent.

At the date of this deed the Banque du Peuple held two notes made by defendant, one for $18,772.17 and the other for a smaller sum, both made the 20th July, 1897, and both payable with interest at 6%, eighteen months after date; and for the largest note they held as security 150 shares of Dominion Cotton Co. stock, and 200 shares of Duluth Railway Co. stock, with power of sale on default. The larger note was for an advance made by the bank to the respondent of money wherewith to purchase the cotton shares.

While these notes had still about four months to run the dealing now in question took place.

It is in the form of a deed acknowledged before a notary. The parties to the deed are the bank and the respondent, and also a Mr. Vinet. The descrip-

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tion of the bank as party appearing is expressed as follows:—The Banque du Peuple represented in these presents by Mr. Dufresne, its cashier, in virtue of a resolution of its Board of Directors at a meeting of the ninth instant, *hereto annexed.*

The deed goes on to say:—As the result of a compromise between the parties, Vinet has this day paid in discharge of Brault to the bank a sum of $15,000 which it had advanced to him to acquire 150 shares of the Dominion Cotton Co., and the bank, which was guaranteed the repayment of its advance by the transfer which had been made to it of the said 150 shares, has this day transferred to Vinet the same shares. And by this act Brault is discharged towards the bank from the advances which it had made to him of the character aforesaid mentioned in a deed of settlement passed * * * the 24th July, 1897, to which the parties refer for the *application or reduction* of the sum, and Vinet becomes the new creditor of Brault on the following conditions, to the extent of $15,000 secured by the transfer of the said shares which takes effect from the first instant.

The remainder of the deed concerns Brault and Vinet alone and has no bearing on the question in the appeal except in declaring that the shares were to be regarded as worth par.

The judgment declares that upon the true construction of this deed the bank has discharged Brault from the full amount of the note, whereas the appellant contends that the discharge is limited to the sum of $15,000, and that he, as assignee of the bank, is entitled to recover the difference.

Now unless it is made perfectly clear that the

bank has released the respondent by this deed the appellant must succeed, for there is absolutely nothing else in evidence favouring that conclusion, and everything outside of the deed favours the contrary view. Some of these last circumstances may be noticed. The debt was represented by a note not yet due, which remained in the possession of the bank for more than a year afterwards, without objection or demand by Brault. The bank held as security, besides the 150 shares of the Cotton Co., 200 "Duluth" shares and these were left and continued in the name of the bank for more than a year afterwards, without any complaint or demand of transfer by Brault. The deed makes no provision whatever for delivering up of the note or the transfer of the shares to him.

Then let us see whether the deed, while it does not in terms discharge the note or provide for the retransfer of the shares, clearly releases the defendant beyond $15,000.

The first thing to be noted is that the resolution of the directors of the bank is referred to in the deed as being annexed (*ci-jointe*), and is therefore to be regarded as part of the deed. That resolution authorizes the cashier on the receipt of $15,000 from Vinet to transfer to him the 150 shares of "Cotton" stock, held by the bank as security from Brault, in such a manner that Vinet shall become the creditor of Brault, and that Brault shall be discharged to the bank *to the amount of the said sum of* $15,000, *"telle qu'enoncée"* in a deed of 24th July, 1897, and this present transfer being more particularly expressed in a draft deed approved by the counsel of the bank and which is to be signed by the bank and Vinet and Brault. The resolution further authorizes the cashier in order to complete the business, so far as con-

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cerned Mr. Brault, to transfer to Vinet in the name of the bank the 150 shares of "Cotton" stock.

This resolution is signed by the president, and professes to have been passed at a meeting at which five other directors were present. The draft deed referred to is the deed in question, which was in fact prepared by Brault some time before, and was approved of by the bank's counsel.

It is quite plain that what the board intended to do, and to authorize their cashier to do, was to discharge Brault only to the extent of $15,000. There is no sum of $15,000 mentioned in the deed of 24th July, 1897, and I therefore read *"telle qu'enoncée"* as intending to say that the $15,000 to be released was part of the money mentioned in that deed.

But then there is the reference to the draft deed, which is the very deed in question, and which now requires consideration. The deed says that, as the result of what had been agreed, Brault is discharged to the bank of the advances, which it has made to him, of the character or for the purpose aforesaid, (that is, as I understand the words "du chef susdit," for the purpose of buying the "Cotton" shares), mentioned in the deed of 24th July, 1897,

auquel les parties réfèrent pour l'imputation de la somme, et M. Vinet devient le nouveau créancier de M. Brault aux conditions ci-après jusqu'à concurrence de quinze mille dollars garanties par le transporte des dites actions.

Reading these words, and omitting all but the substantial governing words, they read thus:—By this transaction Brault is discharged from the advances mentioned in the deed of 24th July, to which the parties refer for the deduction of the sum, and Vinet becomes the creditor of Brault to the extent of $15,000.

That is, the words *to the extent of* $15,000 qualify not merely the words immediately preceding them, but also the words, *Brault is discharged from the advances mentioned.* The deed of 24th July is to be referred to for the deduction of *the sum.* What sum? Evidently the sum which was to be discharged, as well as the sum for which Vinet was to become the new creditor of Brault.

The language of the deed is obscure, but when studied and applied to the circumstances, may and ought to be read as above. Reading it in that manner makes it consistent with the clearly expressed intention and purpose of the directors of the bank, as expressed in the resolution, and also with the conduct of the parties at the time and for more than a year afterwards.

Appeal allowed in part without costs.

Solicitors for the appellant: *Martineau & Delfausse.*

Solicitors for the respondent: *Lamothe & Trudel.*

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*Oct. 24.

THE NORTH SHORE POWER COMPANY (DEFENDANTS) .... } APPELLANTS;

AND

ALBERT DUGUAY, ET UXOR (PLAINTIFFS) .... } RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT QUEBEC.

Practice — Pleading — Amendment ordered by the court — Married women—Legal community—Right of action—Reprise d'instance Arts 78, 174, 176 *C.P.Q.—R.S.C. c.* 135, *ss.* 63, 64.

APPEAL from the judgment of the Superior Court, sitting in review, at Quebec, affirming the judgment of the Superior Court, which maintained the plaintiff's action with costs.

The action was instituted by Léocadie Vézina, widow of Napoléon Raymond, deceased, who died from injuries sustained, as alleged, from the neglect of the company to exercise proper care in respect to the development of electrical currents of high voltage in their power-house at Three Rivers, Que., and to provide adequate protection for their servants employed in connection with their works.

By the action, the widow claimed damages, as well on her own behalf as in her capacity of tutrix to her minor children, issue of her marriage with deceased. While the action was pending and before judgment on the merits, she was married a second time to Albert

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

Duguay, one of the respondents, became common as to property with him under the law respecting legal community, and she and her second husband were subsequently appointed joint-tutors to the minor children. An admission was filed after this appeal had been inscribed for hearing in this court setting out these facts as follows:

Le dit Albert Duguay et la dite Dame Léocadie Vézina, la demanderesse personellement pour la part reclamée par la demanderesse et en leur qualité de tuteurs conjoints aux dits enfants mineurs, ont duement repris l'instance en cette affaire, et, par jugement de la cour supérieure en date du 20 novembre, 1905, ils ont été duement autorisés à reprendre la dite instance et à la poursuivre d'après les derniers errements.

By the judgment of the Superior Court, the action was maintained and the defendants were adjudged and condemned to pay to the plaintiffs, personally, damages in the sum of $300 for the female plaintiff personally, and in the sum of $2,700 to the plaintiffs in their capacity of joint-tutors to the children. This judgment was affirmed by the court of review.

At the hearing of the appeal in the Supreme Court of Canada, an objection, not taken in the factum nor raised in the courts below, was for the first time urged by the appellants, that, upon her second marriage, the female plaintiff was deprived of her right of action for the recovery of the damages claimed by her personally, that in respect to this part of the action there had been no *reprise d'instance* in the name of her second husband and that, consequently, the judgment appealed from was invalid in so far as it awarded personal damages to her: *McFarran* v. *The Montreal Park & Island Railway Co.*(1), and arts. 78, 174 and 176 C.P.Q. were cited.

(1) 30 Can. S.C.R. 410.

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L. A. Taschereau K.C. for the appellants.
Lafleur K.C. for the respondents.

The judgment of the court was delivered by

GIROUARD J.—The papers filed upon the motion for *reprise d'instance* are not before us, but the judgments, both in the Superior Court and in the court of review, shew that the suit was pending there between the appellants and both Duguay and his wife.

The appeal is dismissed with costs for the reasons given in the courts below, the case involving only questions of fact, and the court, of its own motion, under the provisions of sections 63 and 64 of the Supreme and Exchequer Courts Act, orders that the record should be amended so as to shew that the amount of $300 for which the judgment was rendered in the Superior Court is payable to both Duguay and his wife as *communs en biens,* from whom the appellants will get a full discharge when they satisfy the judgment.

Appeal dismissed with costs.

Solicitors for the appellants: *Tourigny & Bureau.*
Solicitors for the respondents: *Martel & Duplessis.*

ANTOINE ABAIS CANTIN (PLAINTIFF) .... APPELLANT;

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*Oct. 19.
*Oct. 29.

AND

LOUIS BÉRUBÉ (DEFENDANT) .... RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT THE CITY OF QUEBEC.

Tenant by sufferance—Use and occupation of lands—Art. 1608 *C.C.—Promise of sale—Vendor and purchaser—Reddition de compte—Actio ex vendito—Practice.*

The action for the value of the use and occupation of lands does not lie in a case where the occupation by sufferance was begun and continued under a promise of sale; in such a case the appropriate remedy would be by an action *ex vendito* or for *reddition de compte.*

APPEAL from the judgment of the Superior Court, sitting in review, at Quebec, affirming the judgment of the Superior Court, District of Quebec, which dismissed the plaintiff's action with costs.

In 1887, the defendant's wife, then a spinster, was in treaty with the plaintiff for the purchase of a house and lot, the price and terms of sale were agreed upon and partial payment made, but the deed was not executed, on the advice of her notary, because there was an undischarged hypothec registered against the property. The plaintiff undertook that the hypothec would be discharged, and, in the meantime, permitted the intending purchaser to take possession of the premises, which she did, in 1889, occupying

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them in the same manner as if she had become proprietor up to the time of her marriage with the defendant, and, subsequently, they had continued to occupy and enjoy the property together, in the same manner as before the marriage, paying taxes and ground rents and making repairs and improvements thereon. The plaintiff brought his action, in 1905, against the husband, as *chef de communauté*, for the value of the use and occupation of the premises during the 18 years which had elapsed, and, after deducting the disbursements for taxes, ground rents, repairs and maintenence, claimed a balance of $1,688.91, and a declaration that he was entitled to the possession of the property and asked that the defendant should be evicted.

The plea set up the facts as above stated, that the plaintiff was still in default, not having caused the hypothec to be discharged, and contended that, under the circumstances, the action for the value of use and occupation did not lie.

At the trial His Lordship Chief Justice Routhier dismissed the action, saving to the plaintiff such other recourse as he might be entitled to, and his judgment was affirmed by the judgment now appealed from, His Lordship Mr. Justice Andrews, dissenting.

The questions at issue upon the present appeal are stated in the judgment of the court, delivered by His Lordship Mr. Justice Girouard, which is now reported.

A. Corriveau K.C. for the appellant.
L. A. Taschereau K.C. for the respondent.

The judgment of the court was delivered by

GIROUARD J.—De tous les moyens invoqués par l'intimé à l'appui du jugement dont est appel, je crois

qu'il n'y en a qu'un seul qui puisse soutenir un examen sérieux. Les faits de la cause ont été resumé par Sir Alphonse Pelletier et je crois qu'ils sont amplement prouvés; je cite de son opinion en cour de révision:

En 1887, Adéline Boivin, alors fille majeure et commercante, entra en pourparlers avec le demandeur pour acheter un terrain avec maison dessus construite, située coin des rues Arago et Sauvageau et faisant partie du lot No. 376 du cadastre officiel pour la paroisse St. Sauveur de Québec. Un acte à cet effet fut préparé par le notaire Leclerc et par lequel acte le demandeur vendait le dit terrain et bâtisse pour la somme de $800, dont $400 comptant et les autres $400 payables $100 par année.

Néanmoins l'acte ne fut pas signé ce jour-là, le notaire ayant découvert qu'il y avait une hypothèque affectant la propriété. comme le demandeur vendait la propriété claire d'hypothèque, le notaire avisa sa cliente de ne pas signer l'acte tant que l'hypothèque ne serait pas radiée. Il fut convenu que le demandeur verrait à faire disparaître l'hypothèque. Mais du consentement du demandeur, Adéline Boivin prit possession de la maison, en mai 1889, et l'a toujours occupée comme propriétaire seule jusqu'à son mariage, et en 1895 avec le présent défendeur, et tous deux depuis le dit mariage ont occupé et occupent encore la dite maison.

La dite Adéline Boivin dit dans son témoignage que plusieurs fois avant son mariage, qu'elle est allée chez le demandeur pour finir le contrat, mais qu'il n'a jamais voulu rien faire et même la recevait mal et que depuis ce temps à venir jusqu'à la poursuite en cette cause, environ 17 ans, le demandeur ne lui a jamais rien demandé au sujet de la dite maison, et qu'elle a continué à l'occuper avec son mari comme propriétaires, qu'elle a payé les taxes et les rentes sur la propriété, qu'elle a fait des réparations à la maison pour environ $600, sans que le demandeur ait jamais rien fait ni réclaimé.

Ces faits n'établissent pas les relations de locateur et locataire; ils détruissent entièrement la présomption d'usage et d'occupation "par simple tolérance du propriétaire," consacrée par l'article 1608 du Code Civil. Cette présomption est répoussée par le fait avancé par l'intimé et admis par l'appelant que l'occupation, ou pour mieux dire, la possession, résultait des relations de vendeur et acheteur. L'ap-

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pelant allègue même dans sa déclaration que le défendeur et son épouse

ont occupé, géré et administré la dite propriété pour et au nom du demandeur.

C'est donc une action en reddition de compte qu'il aurait dû intenter ou peut-être encore une action *ex vendito* pour le recouvrement du prix de vente et des intérêts, en lui faisant, l'offre d'un titre clair de toute hypothèque. La jurisprudence est constante dans ce sens.

D'abord la jurisprudence de la province de Québec: *Parent* v. *Oisel*(1), 1883, McCord J.; *Letang* v. *Donohue*(2). Dans la présente cause la cour supérieure, Routhier J., et la cour de révision, Langelier et Pelletier JJ., Andrews J. différant, sont d'accord avec cette jurisprudence.

L'article 1608 du Code Civil a été emprunté de la loi anglaise, en 1853, par la 16e Vict. ch. 200, secs. 1 et 15; ré-édité, en 1855, par 18 Vict. ch. 108, sec. 16; en 1860, par les S.R.B.C. ch. 40, sec. 16. Or la jurisprudence anglaise est aussi formelle dans le même sens. *Right* v. *Beard*(3), 1811; *Winterbottom* v. *Ingham*(4), 1845. Qu'il nous suffise de répéter ce que Lord Denman C.J. disait dans cette dernière espèce:

A question of considerable importance, and likely to be of frequent occurrence, is involved in this case; whether one who contracts for the purchase of landed property, but is prevented from completing the purchase by the vendor's failing to make a good title, is liable to the latter in an action for use and occupation, in respect of the time of his holding in the expectation that such good title would be made and the purchase completed. * * The defendant certainly

(1) 9 Q.L.R. 135.
(2) 2 Rev. de Jur. 276. Q.R. 6 Q.B. 160.
(3) 13 East 210.
(4) 7 Q.B. 611.

was considered both by himself and the plaintiff as purchaser, not as tenant; and the plaintiff cannot convert him into an occupier, liable to pay for his occupation, by his own wrongful act in not completing the contract of sale. * * Admitting the defendant's occupation and the plaintiff's permission to occupy, we think a negative must be put on his third proposition, that the defendant promised to pay, because both parties understood that he made no such promise. Parties may easily secure themselves by stipulating for the event of a non-completion of the purchase in their contract of sale and purchase.

Si l'appelant se trouve aujourd'hui dans une position embarassante, il n'a de reproche à faire à personne, excepté lui-même. Après 1887, il ne s'est aucunement occupé de cette propriété qu'il laissa entièrement entre les mains des défendeurs pendant au delà de 17 ans; il fuyait même son acheteuse lorsqu'elle le recherchait pour en finir. Ce n'est qu'après l'institution de la présente action qu'il s'avisa de demander la quittance et la radiation de l'hypothèque qui la grevait, bien que l'acte déclare que l'argent avait été payé avant sa passation, sans cependant dire quand. Il a produit cette quittance au dossier. Pourquoi? C'est ce que je ne puis m'expliquer, si les défendeurs étaient simplement des locataires ou occupants.

Avec ces observations, qui définissent les motifs qui nous engagent à confirmer le jugement de la cour de révision, confirmant celui de la cour supérieure, nous renvoyons l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Apollinaire Corriveau.*

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

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*Oct. 19, 22.
*Oct. 29.

THE QUEBEC AND LAKE ST. JOHN RAILWAY COMPANY (DEFENDANTS) .... APPELLANTS;

AND

MARIE JULIEN, ÈS NOM ET ÈS QUALITÉ (PLAINTIFF) .... RESPONDENT.

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

Railways—Negligence—Defective construction of road-bed—Dangerous way—Vis major—Evidence—Onus of proof—Latent defect.

The road-bed of appellants' railway was constructed, in 1893, at a place where it followed a curve round the side of a hill, a cutting being made into the slope and an embankment formed to carry the rails, the grade being one and one-half per cent. or 78.2 feet to the mile. The whole of the embankment was built on the natural surface, which consisted, as afterwards discovered, of a lair of sandy loam of three or four feet in depth resting upon clay subsoil. No borings or other examinations were made in order to ascertain the nature of the subsoil and the road-bed remained for a number of years without shewing any subsidence except such as was considered to be due to natural causes and required only occasional repairs; the necessity for such repairs had become more frequent, however, for a couple of months immediately prior to the accident which occasioned the injury complained of. Water, coming either from the berm-ditch, or from a natural spring formed beneath the sandy loam, had gradually run down the slope, lubricated the surface of the clay and, finally, caused the entire embankment and sandy lair to slide away about the time a train was approaching, on the evening of 20th September, 1904. The train was derailed and wrecked and the engine-driver was killed. In an action by his widow for the recovery of damages,

Held, that in constructing the road-bed, without sufficient examination, upon treacherous soil and failing to maintain it in a safe and proper condition, the railway company was, *primâ facie*, guilty of negligence which cast upon them the onus of shewing that the accident was due to some undiscoverable cause; that

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this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and guarded against, and that, consequently, the company was liable in damages.

Judgment appealed from affirmed, following *The Great Western Railway Co. of Canada* v. *Braid* (1 Moo. P.C. (N.S.) 101).

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, which had maintained the plaintiff's action with costs.

The action was brought by the widow of the engine-driver of one of the company's freight trains, who was killed in the accident described in the head-note, to recover damages in consequence of his death, caused, as alleged, by the negligence of the railway company in failing to construct and maintain their permanent way, at the place where the accident occurred, in a safe and proper manner. The action was brought in her own name, personally, and as tutrix of her minor children, issue of her marriage with the deceased. At the trial, by Mr. Justice Pelletier without a jury, judgment was entered for the plaintiff for $4,000, of which $2,000 was awarded as personal damages to the widow and the balance, $2,000, as damages found in favour of the children. This judgment was affirmed on appeal by the judgment now appealed from, Bossé and Hall JJ. dissenting.

The questions at issue upon this appeal are stated in the judgments now reported.

Stuart K.C. for the appellants.

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

GIROUARD J.—The appeal is dismissed with costs. I concur in the opinion of my brother Davies.

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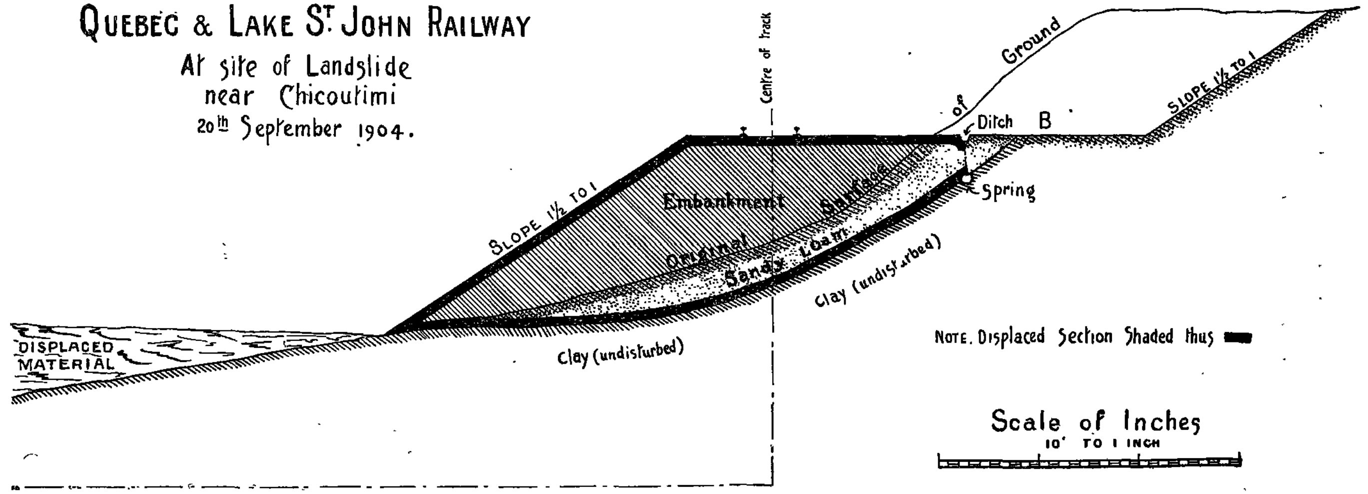
DAVIES J.—This action was brought by the representatives of the locomotive engineer of one of the appellants' trains who was killed in an accident which took place on the appellants' railway line near Chicoutimi, in the Province of Quebec, on the 20th September, 1904.

The railway runs along the western slope of the lands descending to the Saguenay River, and at and in the neighbourhood of the place where the accident occurred the country is very hilly.

At the place in question the rails followed a curve on an embankment built on the side of a hill, the hill having been partially cut down or into and the material used to form the embankment. The railway runs practically north and south, and at the place where the accident occurred the grade is represented as being very steep, one and a half per cent. or 78.2 feet to the mile. The road was constructed in 1893, and, according to the evidence of the engineers, was well constructed and generally of a high grade.

Shortly after the accident Mr. Vallée, the inspecting railway engineer for the Province of Quebec; Mr. Hoare, C.E., who was the chief engineer of the railway at the time of its construction in this locality, and Mr. Evans, C.E., who was the contractors' engineer at the time of the construction of the road, visited the scene of the accident at the defendant company's request. As stated in the factum of the defendant (appellant), these gentlemen examined the locality carefully, took measurements and made a plan which was produced as Exhibit D 3. As this plan gives a better idea of the situation than any language I could use can do, I have had it reduced so as to accompany and explain these my reasons for judgment.



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It is common ground between both parties that the entire embankment had been built upon the original surface of the soil on the slope of the hill and that for a depth varying from three to four feet this natural hill surface was composed of sand or sandy loam lying upon a clay bed or bottom, that water had entered into this sandy loam and percolating or running down the slope had lubricated the clay on which the embankment and the layer of sandy loam rested, causing the entire embankment and ledge of sand to slide down into the valley, of course carrying the rails with it.

There was some discussion as to whether the landslide had taken place before or when the train was actually on the embankment, but that point did not seem to make any difference in the determination of the issues to be decided.

The real question was as to where the water which caused the slide came from, and whether the company should be held liable for its presence underneath the embankment at the locality in question.

The plaintiff contended that the evidence all shewed that this water, which undoubtedly caused the accident, came from the upper or higher lands and percolated either through or alongside of the ditch constructed along the line to carry off the water, down through the three or four feet of sandy loam to the clay beneath, which ditch they contended was not kept clean and clear for months preceding the accident.

The defendant company, on the other hand, contended that this ditch was along a steep slope; that it was always kept clear and open and carried away the surface water, and that the water which caused

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all the damage came from a hidden spring on the edge of the clay bed underlying the sand ledge and directly underneath the bottom of the ditch at a distance vertically of about three or four feet. The land slide which carried away the embankment with the rails and also the ledge of sand forming the original and natural surface of the soil, left a little triangular corner of this sand ledge intact, of which a vertical line from the ditch to the spring formed one side of the triangle so left.

The first question to be determined in a case of this kind is whether a presumption of negligence or imperfect construction or maintenance arises from the admitted or proved facts. On this point I have no hesitancy in saying that it does, a conclusion reached alike by the majority judgment appealed from as by the minority judges who dissented.

In the *Great Western Railway Co. of Canada* v. *Braid*(1), the Judicial Committee, in delivering judgment, say, at p. 116:

> There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway the fact of its having given way will amount to *primâ facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it.

For us, this statement of the law must be held as conclusive, unless called in question by some subsequent decision of that judicial body or of the House of Lords. Other authorities on the subject are collected in a note to 601*a* of the 9th edition of Story on Bailments.

If this is the law we have then to determine

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

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whether the company has met the onus cast upon it. I do not think it has. The engineers called by them do certainly speak of the land-slide having disclosed the existence of what they call a spring lying about three or four feet below the ditch, and express their opinion that the water which caused the trouble came from this spring. But nowhere do they use any language from which any conclusion can be drawn as to the character of this spring or the quantum of water which flows from it. Whether that quantity made a respectable stream or was a tiny trickle only is not stated. The evidence on this point is extremely defective, and, moreover, their opinion is reached apparently by a process of exclusion and on the assumption that the drainage was excellent and carried off all the surface water.

Mr. Vallée, in his evidence, says, at that particular place:

I do not believe that five per cent. of the water could filter into the sand in a slope of a foot and a half per hundred *if there were good ditches, perfectly cleared, with a slope of a foot and a half per hundred.*

The other engineer's evidence was based upon similar assumptions,

good ditches, perfectly cleared, with the slope of a foot and a half per hundred.

But where was the evidence of these facts? The man who knew most about them, foreman of the section-men on this section of the railway, and who had been such for years, Harry Fox, left the company almost immediately after the accident, it is said because of insufficient wages, and crossed the international

boundary line into the State of Maine. He was not examined either by commission or at the trial, and we are without the benefit of his testimony. It certainly was not suggested in this court that the company or its officials had anything to do with his removal to the United States, but it is most unfortunate for the company, if he could support their contention on this crucial point, that his evidence was not forthcoming.

The other evidence on this point is given by one Tremblay, Harry Fox's predecessor as foreman of the section-men; two of the section-men, Truchon and Larouch, and Michael Carpenter, the road-master of 150 miles of the railway, including the place in question. The latter witness certainly did state that he passed over the place about a week before, inspecting the road, both in a hand-car and walking, and found the road at the place of the accident in

> good condition, ditches in good condition, * * water running very nicely but very little, * * (and that) there was nothing to attract or which did attract his attention.

As against this general evidence there was that of the ex-foreman, Tremblay, who swore that, when he was section-foreman, about two years after the completion of the line, he found the water oozing through the slope of the embankment under the railway at the place where the accident happened, and for its protection sunk down some pickets and piled up some railway ties inside them so as to protect the dump, and enlarged it some two or three feet, and then opened up, cleaned and straightened the ditch leading to the culvert, after which he says that for years, and while he kept the ditch open and clear, there was no further trouble. Truchon, the section-labourer, said that the ditch must be cleared every spring, but that

they did not clear it the spring of the accident year, but simply "broke the ice on the surface."

He was a witness called and examined by both sides, and was vigorously attacked by the company's counsel as being stupid, but his credibility seems to have been accepted by the trial judge, who makes no remark upon his alleged stupidity. Accepting the plan put in evidence by the defendant company and prepared and signed by Mr. Evans, C.E., and Mr. Vallée, chief engineer of the Department of Railways of Quebec, after a careful examination of the locality immediately after the accident, for the very purpose of making such plan, as being accurate and correct, it does seem to me that, as the ditch which was to carry off all the water descending from the higher lands upon the railway appears to have been made right over the ledge of sandy loam on which the embankment was constructed, the greatest possible vigilance would be required to keep that ditch in perfect working order. Any imperfection in it or any stoppage of it would probably result in the water it accumulated filtering down through the sandy loam to the clay below. The onus of shewing that such did not take place has not in my opinion been discharged. The placing of such an embankment over such a seam of sand overlying a bed of clay on a hill-side such as this would seem to call for extreme vigilance so as to prevent the surface water from the higher lands percolating through the sand to the clay and so causing a land-slide.

It was suggested by Mr. Stuart that the plan so prepared for and at the request of the company, and put in evidence by them, is inaccurate and misleading in that it does not correctly shew what he suggested was the fact, that the clay bed on which the

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sand loam strata rested stopped short at the place where the spring is marked, and did not go further up the hill, which he suggested, above that point, was composed of sand. He called special attention to the evidence of Doucette, the present chief engineer of the road, who stated that the cut in the hill immediately above was about twelve feet deep, and that no clay shewed in that cut. The inference he wished us to draw was that the clay bed stopped some four feet or more below the bottom of the hill-cutting, and that the contractors of the road had no reason to suspect its existence. Asssuming that to be the case, he strenuously contended that they were not obliged by boring or otherwise to ascertain the true nature of the foundations on which they built the embankment on this steep hill-side, but were justified in assuming them to be as shewn upon the surface. Without entering further into a discussion of this very interesting legal question, it is sufficient for us to point out that the plan in question was prepared just after the accident, under conditions which enabled the draftsmen to ascertain with absolute accuracy just where the clay bed did lie, and its extent with reference to the cutting above and the embankment; that Mr. Evans stated explicitly that

it correctly represented the condition of things which he found,

and that it was put in evidence by the defendant company as correctly representing those conditions, and their expert engineers, in giving their opinions as to whether the company could have foreseen that such an accident was liable to happen as did happen, were asked to do so on the assumption that the plan correctly represented the true condition of things. Not a suggestion was made at the trial as to any inaccu-

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racy in the plans with respect to this clay bed or otherwise, and to ask the court of appeal to assume that the plan is misleading in this important particular and to draw the inference that the clay bed did not underlie the sandy loam on the hill-side except at a distance down undiscoverable by the construction of the road unless by borings, is, in my opinion, asking what this court would not be justified in doing, more especially in the face of ex-foreman Tremblay's evidence as to the soakage of the surface water through the embankment some two years after construction and the means which he then successfully resorted to in order to overcome the difficulty and danger.

The suggestion that the water which caused the damage may have come from the alleged hidden spring loses a great deal of its force from the absence of any evidence as to the size, capacity of or flow from the spring.

It does not satisfy the onus which lay upon the plaintiff, it disproves neither negligence in the original construction or in the proper maintenance of the road-bed under its peculiar and hazardous construction, and it leaves the question of the actual condition of the drains at least open and in grave doubt, and even if accepted as a partial explanation does not negative the fair inference to be drawn from the facts that at least a substantial portion of the water which caused the damage was surface water which filtered through in consequence of defective drainage.

I do not, after a careful consideration of all the evidence given as to the sinking from time to time of the *outer* rail on this embankment, while the inner rail, which naturally bore the greater weight of the passing trains, did not sink at all, draw the conclu-

sion that the company's employees should have suspected the undermining of the embankment. Rather I would conclude that this evidence pointed more to the wearing away of the outer steep sloping surface of the embankment from natural causes and called for its strengthening, which appears to have been attended to. Such evidence does not indicate to me necessarily or reasonably the existence of any defect which caused the land-slide.

Looking at the evidence as a whole I conclude for the foregoing reasons in agreeing with the Court of King's Bench that the presumption of negligent construction and maintenance has not been rebutted, and that the company has failed to discharge the onus which under the circumstances the law casts upon it.

The appeal should be dismissed with costs.

IDINGTON J.—I think this appeal ought to be dismissed with costs.

I cannot subscribe to the entirety of what is relied upon in support of either of the judgments in the courts below, or I would content myself with doing so.

The evidence given by witness Tremblay of what the appellants' foreman, Fox, when off duty, told him, seems to be quoted in each court below as supporting respondent's case. It seems to me that this evidence was not properly admitted, and I discard it entirely in coming to the conclusion I do.

As to the expression used by Fox when engaged on the work, I think it neither adds to nor detracts from the weight of evidence either way, and, therefore, am not concerned to determine whether it was properly admitted or not, though I am inclined to think it was

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not admissible in the connection, and for the purpose it was presented.

There is much in the case to support the view that there was negligence in the construction of the road in question, at the point now giving rise to many curious considerations. I am unable to see how a railroad can be held to have been constructed without negligence if its road-bed is rested on a hill-side covered by a bed of sand or sandy loam, or both, and requiring artificial embankments along the side of the hill to make that road-bed wide enough to lay a track upon; and yet no attention paid by the contractors or engineers in charge to the thickness of the sand or nature of the sub-stratum upon which this bed of sand, or sandy loam, rested, or to ascertain accurately the nature of the foundation whereon they were building.

As one result, this bed of sand, when saturated with water, slid off the bed of clay on which it rested, and which by nature was formed, as one would expect, with an inclination towards the river, and thus well adapted when lubricated by the moisture in the sand, to produce such results as we see here.

It was clearly disclosed as a result of this accident that the bed of sand or sandy loam was only from three to four feet thick, measuring from the surface of the original soil. This bed, resting upon a sloping bed of clay, was, as I understand it, together with the added embankment, the foundation upon which the track in question rested. It would seem a treacherous sort of foundation to build upon, unless in the course of construction the added embankment was of such extent, weight and material, solidly packed, as to prevent the possibility of the sliding that has taken place.

Time and use would no doubt solidify and improve

such a foundation if care were taken to keep water from undermining it or retarding this process of solidification. No care seems to have been taken to discover such springs or other outlets furnishing drainage from the mountain area above, as one is apt to find in the face of all hills. The shallow ditch in the sand would not seem to have been a proper safeguard against what has been discovered, and what I venture to think ought to have been discovered long ago.

A road thus constructed may have appeared to be properly constructed. It was not in fact properly constructed, and with due regard to the necessities for drainage.

It might be, as in truth it was, used for years without disastrous results.

And if it may thus be said to have been in a sense properly constructed, it would nevertheless call for greater care in its maintenance than in the case of a road-bed known to rest upon a level rock or extended level bank of solid clay.

We are left in doubt as to the exact operation of each and all of the manifest causes that brought about this accident. Some may or may not have contributed quite as much as others or as much as we may feel inclined to say when trying to appreciate this evidence and allot to each branch thereof its proper weight.

Some factors producing or tending to produce such an accident as this in question, may be attributable to neglect in construction. Others may be attributable to neglect of maintenance and repair.

It is obvious that either sort of neglect, or the combined effect of both kinds of neglect, must, if found to be the cause or causes of the accident in question, result in finding the appellants liable.

Can there be any doubt, if we accept the evidence of Truchon, that the place where the track gave way had been for at least from six weeks to two months in a dangerous condition? Can any one read his story and doubt that this condition of things was neglected in a way that it should not have been? Can there be any doubt that the sinking of the road-bed and the wet weather were concurrent events? How could any capable man attending to this work have failed to realize that fact? Would a careful, prudent man, fit to be entrusted with such duties as devolved upon this foreman, have been satisfied with what he did, and failed to find, or even to search for, the cause of such repeated subsidences of track as shewn by the evidence if the substance of it is to be believed.

It has been urged that Truchon is stupid. It is not urged that he is dishonest. Reading his evidence does not so impress one as to find in the results of his stupidity an equivalent for dishonesty. The utmost extent to which I can find his stupidity yield unsatisfactory results, is that the exact length of time ove which this defective state of the road-bed in question continued, and the exact number of times when it demanded and got attention, beyond that paid to other parts, cannot be fixed. It is not absolutely essential here that they should be so fixed. There is enough to lead to the conclusion that, though the exact dates and numbers of times and length of time cannot be accurately fixed, yet there was for a considerable time (much too long a time) a continuous want of repair on one spot in this road. It was never properly mended there. No attempt was made to find out the cause. Hence all the efforts were quite unavailing.

Fox was the only man of any sort of railway ex-

perience, so far as we know, that saw the place, and we do not know what remarkable things passed through his mind. Truchon was certainly not the only stupid one of that party.

Ordinary sense would have taught men fit to be entrusted with such work, that wet weather tends to make things soft, and heavy weights placed thereon sink, yet Fox loaded the outside of this sinking bank, when obviously sinking from the effects of wet weather, without trying to find where the water in question came from, or went to. The result is before us.

We are asked to sweep aside the facts that are before us, explaining as only facts can, the causes of these results, and substitute, for the facts, the speculation of experts, some of whom never saw the place and the facts, lying open for investigation, and others of whom saw, yet refrained from that thorough investigation that alone can make expert evidence worth anything.

These speculations rest upon the existence of the spring discovered by this accident uncovering the clay bed and shewing the spring about two feet and a half directly underneath (if I understand the plan rightly) the ditch that I have referred to.

It hardly consists with reason to suppose that a spring of any very substantial size or force could have remained for ten or twelve years undiscovered on a sandy hill-side, beneath only so slight a depth as I have mentioned.

Why did it not seek a way out through so very natural a channel for a spring to burst through? And then why not find its way down hill into the ditch? Why did it not do this, as springs usually do under such favourable circumstances, instead of being perverse enough to try and seek a way of its own ten feet

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(or fifteen, or twenty feet, the plan is uncertain) away, for an outlet?

Driven to explain suggestions like these, the appellants suggest that the spring only came into existence at the time of the accident, or shortly before, and wrought the destruction of life and property in the way that great land-slides are brought about.

If this suggestion had any foundation in the minds of the engineer or engineers who saw it and attribute to it such great consequences, one would have expected them to be able to enlighten us by other appearances than that of a little vein of water, so small that one of them, the only one who speaks of its size, is unable to give us any intelligent idea with regard to that.

We would expect, if this suggestion had been taken seriously, to have found some examination for fissures in the clay, or disturbances in the surrounding earth, that would account for the sudden appearance of such a spring. We would expect such investigation, all the more, because we find such care bestowed upon fissures and disturbances of the earth in other relations that some of these witnesses speak of.

With every respect that one can have on reading such evidence, I cannot help saying that I do not find any evidence for such a theory as the coming into existence suddenly of this spring.

However, none of these experts giving evidence have ventured to meet with their theories the case which Truchon's evidence presents. Any of them con-confronted with the substance of his evidence failed to say that their theory would hold good as shewing the cause of the accident, in face of such assumed facts.

It seems clear that this spring, called by road-

master Carpenter "a very small stream, a vein," was most insignificant, and probably nothing but what, in very wet weather, may be found at any time on the hill-sides. In dry weather probably it had no existence.

The state of repair of the ditch seems much in doubt. The evidence is conflicting. It is contradictory. It is clear, moreover, that the foreman thought proper to dump stones and other refuse into this ditch. I must be permitted to doubt how long they stayed there. Something of that kind, happening then, or at some other time, probably accounts for the change in the course of the weepings of this spring.

Insignificant as I think it was, possibly it had something to do with the supply of the water which softened the bank. It was not, however, the only supply.

When this case is stripped of all these mysterious suggestions and theories, as I think it must be stripped of them to comprehend it properly, we have the broad fact presented to us that for want of proper drainage this embankment was undermined and the surface of the clay lubricated; hence the accident. We have this outstanding feature of the case, which may be called negligent construction, or negligent maintenace and repair, as one may be disposed to look at the facts.

We have, moreover, along with that no mystery, no unforeseen cause, no *vis major*; for we have had the results of this development holding up a signal as it were for at least six weeks before this occurrence, without attracting the eyes of those whose duty it was to see and observe such signals. I prefer to call this a neglect of repair and maintenance.

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MACLENNAN J. concurred in the reasons stated by Davies J.

DUFF J.—I agree to the dismissal of the appeal with costs.

Appeal dismissed with costs.

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

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

DANIEL HATTON, VICTOR GUERTIN AND HENRI GUERTIN (DEFENDANTS) .... APPELLANTS;

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*Oct. 9, 10.
*Nov. 15.

AND

THE COPELAND-CHATTERSON COMPANY (PLAINTIFFS) .... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent of invention—Infringement of patent—Sale for a reasonable price—Use of patented device—Contract—"Patent Act," R.S.C. c. 61, s. 37—Evidence.

The patentee of a device for binding loose sheets sold the defendant H. binders subject to the condition that they should be used only in connection with sheets supplied by or under the authority of the patentee. H. used the binders with sheets obtained from the other defendants, contrary to the condition. In an action for infringement of the patent,

Held, that the condition in the contract with H. imposing the restriction upon the manner in which he should use the binders was not a contravention of the provisions of section 37 of the "Patent Act," R.S.C. ch. 61, in respect to supplying the patented invention at a reasonable price to persons desiring to use it, and that the use so made of the binders by H. was in breach of the condition of the contract licensing him to make use of the patented device and an infringement of the patent.

Judgment appealed from (10 Ex. C.R. 224) affirmed.

APPEAL from the judgment of the Exchequer Court of Canada(1), maintaining the plaintiffs' action with costs.

The action was brought, under the circumstances

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

(1) 10 Ex. C.R. 224.

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stated in the head-note, against the defendant Hatton, with whom the contract had been made, and the defendants Victor Guertin and Henri Guertin as having knowingly and for their own gain contributed to the infringement of the patent.

The judgment appealed from, in maintaining the action, directed the usual reference for the taking of accounts, restrained the defendant Hatton from using in any of the binders purchased by him from the plaintiffs, on the condition mentioned in the contract, any sheets other than those sold by or under the plaintiffs' authority, and, further, restrained the other defendants from making, using or vending similar binders; and, with respect to sheets adapted for use in such binders, restrained them from procuring or inducing persons known to be purchasers of the plaintiffs' binders subject to such restrictive conditions, to use such sheets in plaintiffs' binders.

Mignault K.C. and *Perron K.C.* for the appellants.
Raney for the respondents.

The judgment of the court was delivered by

IDINGTON J.—The respondents never authorized, nor intended to authorize, the use by the appellant of the binder sold to him, save in connection with sheets sold by the respondents. That is clearly expressed by the words

this binder is sold and bought for use only with sheets sold by or under authority of the Copeland-Chatterson Co., Limited,

forming part of the appellant's order, and inscribed in large letters prominently set forth in the inside cover of the binder delivered.

The appellant never paid nor agreed to pay such a reasonable price for the patented binder as if bought freed, by the terms of purchase, from this obvious restriction upon its use.

An absolute, unconditional sale of a patented article may carry with it unlimited license to use it.

If the appellant desired that unlimited right he ought to have bargained for it, and not left it in such doubtful condition.

The rights to make, use or sell a patented article are daily subject matter of limitation in regard to time and place and *mode of user thereof.* So infinitely varied are these that no fixed price or terms can be attached uniformly to all of these modes of licensing the use of a patent right.

The patentee and those claiming under him arrange these various rights of user between themselves, and it is not our province to do more than determine whether or not the use has been within or beyond the intention of the parties.

If a use goes beyond that which is clearly expressed and permits such user the court enjoins, and if the use is within a clearly expressed intention the court refrains.

In each case the duty of the court is to find, as in other cases, the intention from the agreement.

No question arises of want of jurisdiction so long as the point raised is one of extent of right to use. Collateral agreements of many kinds involving something beyond this bare issue, yet having relation to, or springing out of, patents in their relation to the uses of articles, may arise and be outside the jurisdiction of the Exchequer Court. I see nothing such in this case, and the astute counsel who had charge of the case does not seem to have pleaded it.

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As to the alleged forfeiture I see nothing to support the contention.

Clearly, section 37 of the "Patent Act" has been complied with in every respect, unless we are to find, what is not in evidence, that respondents, having manufactured in Canada and made obtainable for use therein, as they did, the article in question, refused deliberately to permit its use, or its being obtained therefor, for a reasonable price.

The Huysman incident occurred after this suit began, and is not pleaded even if available. The evidence relating to it is not definite. It obviously relates to a supposed request to sell one of the articles then being vended, covered by other patents, presumably valid, as well as the use it is said herein to relate to.

It is, even if capable of the meaning which I should not attach to it, fully met by abundant evidence. Neither is the long and very extensive dealing of respondents in the goods covered by this patent, restricted, as I am viewing it just now, to the binder part as subject to a separate patent, any evidence of refusal to sell the binder part alone and unconditionally.

If parties having a patent see fit to make ten thousand bargains for a limited use thereof with people ready and willing to accept such limitations, that is no evidence that it has become impossible to obtain the unlimited use of the article so patented at a reasonable price.

The patentees might have been giving the patented article away, as an inducement to bring about by its use compensation in the sale, at a large profit, of other articles stipulated to be used therewith so long as, and whenever, used. That compensation is no

measure of, or criterion of, what might be a fair price to ask for an unconditional sale or other use of the patented article by itself.

The price in this latter case would be something so difficult to fix, and needing so much consideration, that I do not think a patentee is to be tripped up and his ruin brought about by such an ingenious device as displayed in Huysman's visit to the shop of the respondent, the invitation to somebody there to meet him, and the interview that followed. It may be said the patentee might from the start have fixed that price. I decidedly think the reasonable price contemplated by the statute is not a thing that must be fixed once and for all during the currency of the patent.

A patentee might fix, in order to induce buyers to interest themselves at first, a price far below what could be insisted upon by the public as a reasonable price.

Surely he is not bound to abide by that.

And if by reason of such a situation, never until years after the issue of a patent, (from such causes as existed here) having arisen, he has overlooked this fixing of a price, he is entitled to time to consider.

In dealing with the patent as if restricted to the binder alone, or as if separate, I am not to be taken as saying or holding that such is the necessary meaning of this patent under the law.

I have formed no opinion either as to the validity of other claims set up in this patent and case, or as to the true extent of meaning (in every case) of the word "use" in section 37, or many other questions that this case suggests, and in respect of some of which I may, in thus arguing it out, have thrown out tentative suggestions.

Certainly I do not think that it is desirable to

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weaken in any way the provisions of section 37. The respondent's property in his invention is the creation of a statute intended for the benefit (by encouraging productions of inventive genius) of others as well as the patentee. Whilst he must be treated fairly, he must treat these others fairly. It is in that spirit I would desire to interpret that section, when, if ever, the necessity for a closer scrutiny of its meaning arises.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Archer, Perron & Taschereau.*

Solicitors for the respondents: *Mills, Raney, Anderson & Hales.*

PIERRE TANGUAY (DEFENDANT) .... APPELLANT;

AND

WILLIAM PRICE (PLAINTIFF) .... RESPONDENT.

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*Oct. 24, 25.
*Nov. 15.

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

Rivers and streams—Floating sawlogs—Use of booms—Vis major—Action—Salvage—Quantum meruit—Riparian rights.

P. placed booms across a floatable river to hold logs at a place where he had erected a sawmill on land owned by him on the bank of the river. T. had a boom further upstream for storing pulpwood. An unusual freshet broke T.'s boom and brought a quantity of his wood down with the current into P.'s boom, where it was caught and held for some time, until removed by T., without causing any damage or expense to P. In an action by P. to recover salvage or the value of the use of his boom for the time during which T.'s wood had remained therein,

Held, reversing the judgment appealed from (Q.R. 14 K.B. 513), that as P. had no right of property in the waters of the river where he had placed his boom those waters were *publici juris*, notwithstanding the construction of the boom; that T.'s wood came there lawfully, and that, as the service rendered in stopping the wood was involuntary and accidental, P. could recover nothing therefor.

Per Fitzpatrick C.J.—There is no difference between the laws of the Province of Quebec and those of England in respect to the rights of riparian owners to the waters of floatable streams flowing past their lands. *Miner* v. *Gilmour* (12 Moo. P.C. 131) referred to.

APPEAL and CROSS-APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of the Superior Court, District of

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

(1) Q.R. 14 K.B. 513.

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Montmagny, and maintaining the plaintiff's action, to the extent of $100, with costs.

The circumstances of the case are shortly stated by His Lordship, Mr. Justice Maclennan, now reported, and in the head-note. It may, however, be added, that the river in question, Rivière du Sud, is floatable *â bûches perdues,* and that the respondent is riparian owner of the land on the side of the river where his mill was erected and opposite which he had placed his boom across the entire breadth of the stream.

The plaintiff, by his action, claimed $4,000 for the value of salvage of the defendant's wood, and of the use and occupation by the defendant for a period of two months, during which the defendant's wood was allowed to remain in plaintiff's boom.

At the trial Mr. Justice Pelletier dismissed the plaintiff's action for reasons stated as follows:—

"Considérant qu'il est en preuve que le défendeur a, sur la Rivière du Sud, * * à 2 à 5 milles en amont des estacades du demandeur, un barrage pour arrêter et retenir son bois de pulpe;

"Considérant que ce barrage derrière lequel se trouvait une certaine quantité de bois de pulpe appartenant au défendeur et un grand nombre de billots appartenant au demandeur, s'est rompu et que tout ce bois est descendu dans les booms du demandeur et y été retenu;

"Considérant que le défendeur a été chercher son bois dans les booms du demandeur;

"Considérant que le demandeur n'a fait aucune dépense pour reçevoir et retenir son bois de pulpe et le livrer au défendeur;

"Considérant que le fait seul que ce bois appartenant au défendeur a été arrêté et retenu par les

booms du demandeur ne constitue pas une obligation de la part du défendeur d'indemniser le demandeur;

"Considérant que le demandeur n'a pas prouvé que l'arrivée et la rétention de ce bois dans ses booms lui aient causé aucun tort."

On appeal, this judgment was reversed by the Court of King's Bench, Lacoste C.J. and Ouimet J. dissenting, and judgment was entered in favour of the plaintiff for $100 with costs, for reasons stated, in the formal judgment, as follows:

"Vu que les parties en cette cause font sur la Rivière du Sud, chacune pour leur propre compte, l'exploitation et la descente de bois de différentes espèces;

"Vu que cette exploitation ne peut être conduite à bonne fin qu'au moyen d'écluses et estacades qui doivent être construites en prévision des crues des eaux, afin de retenir les bois malgré ces crues;

"Considérant que ces écluses et estacades doivent partant être faites, placées et construites de manière à éviter leur rupture et l'entraînment des bois sur les fonds inférieurs;

"Considérant que, dans l'espèce, les estacades établies par le défendeur n'ont pu retenir la grande quantité de bois de pulpe qui s'y trouvait, plusieurs mille cordes qui ont été entraînées dans les estacades du demandeur, solidement établies et renforcées davantage en prévision de la descente des bois du défendeur;

"Considérant que ce flot de bois de pulpe constituait un danger pour l'établissement du demandeur, qui s'en est garé par les travaux susdits;

Considérant que les estacades du demandeur ont empêché les bois du défendeur de descendre jusqu'au fleuve et d'y être complètement, ou à peu près perdus;

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Considérant que ces bois sont ainsi restés chez le demandeur pendant deux mois et ont été conservés dans ses estacades, d'où ils ont été retirés par le défendeur, à son bénefice, au fur et à mesure qu'il pouvait le faire;

"Considérant que le défendeur s'est partant enrichi aux dépens du demandeur et lui doit compensation pour l'usage d'écluses et estacades, dont il a tiré profit de même que pour les travaux faits en prévision de la descente des bois provenant de la région supérieure;

"Considérant que cette indemnité n'est pas couverte ni prévue par les statuts en vigeur et qu'elle ne peut être établie qu'en vertu des régles du droit commun et de l'équité."

The defendant appealed to the Supreme Court of Canada, and, by cross-appeal, the plaintiff asked that the amount of the judgment in his favour should be increased to $3,000.

Belcourt K.C. and *Turcotte K.C.* for the appellant and cross-respondent. The principle of salvage can have no application. Salvage is an act performed, at the moment of danger, to save a thing from destruction, and the word implies the intention of so preserving it. There must be very meritorious and exceptional services to entitle any one to salvage. There can be no question of lease, mandate or *negotiorum gestio*. Art. 1043 C.C.; 7 Larombière, Obligations (ed. 1885), No. 4, p. 406; 31 Demonlombe, Nos. 56, 57, tome 8, "Contrats." Mandate and *negotiorum gestio* are gratuitous. The *gestor* can recover only his *actual* and useful expenses which he has incurred *specially*. He who performs a work for his own advantage has no claim against a third party who may benefit by

it. Arts. 1702, 1046 C.C.; 20 Laurent, No. 331, p. 359; 8 Huc, No. 384, p. 510; 31 Demolombe, No. 173, p. 153, No. 103, p. 100; 7 Larombière, Obligations, No. 8, pp. 407, 408; 33 Dal. Rép., "Obligation," Nos. 5402, 5403; *Caldwell* v. *McLaren*(1).

There is no action *de in rem verso;* 3 Baudry-Lacantinerie, Obligations, 2e partie, No. 2826, p. 1060.

The respondent suffered no loss or expense by reason of Tanguay's wood being in his boom. *Nemo ex alterius detrimento fieri debet locupletari; Fletcher* v. *Alexander*(2).

This river is naturally floatable, and both its waters and bed are of the public domain; it is a public highway. No one can place any boom or barrier in a floatable stream and exact toll or remuneration on the ground of services rendered without having been thereto previously authorized by competent authority. Art. 400 C.C.; *McBean* v. *Carlisle*(3); *Pierce* v. *McConville*(4); *Atkinson* v. *Couture*(5); *Vézina* v. *Drummond Lumber Co.*(6); 1 Stephens, Commentaries (7 ed.), p. 664; 12 Encycl, Laws of England, "Tolls," p. 85; *Reg.* v. *Patton*(7); *Oliva* v. *Boissonnault*(8).

Stuart K.C. and *Bender K.C.* for the respondent. It is shewn that we have used and maintained the booms which saved the defendant's wood, with piers planted on our lands, for over thirty years. We refer to the reasons of the majority of the judges of the court below, as reported(9), but insist that, on our cross-appeal, we should have the amount of the

(1) 9 App. Cas. 392.
(2) L.R. 3 C.P. 375, at p. 381.
(3) 19 L.C. Jur. 276.
(4) 5 Rev. de Jur. 534.
(5) Q.R. 2 S.C. 46.
(6) Q.R. 26 S.C. 492.
(7) 13 L.C.R. 311.
(8) Stu. K.B. 524.
(9) Q.R. 14 K.B. 513.

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judgment in our favour increased to $3,000, on the evidence.

The conclusive answer to the reasoning of the minority of the court of appeal is the defendant's plea, wherein he not only does not say that his pulp-wood went down into the respondent's boom as a result of an accident, nor that the respondent is making use of his misfortune to enrich himself, but in which he does say that his pulp-wood went down in the ordinary course of the "driving" of the river and in the ordinary carrying on of his lumbering operations and in which he directly claims to be entitled to use the respondent's property without paying for it until such time as the Lieutenant Governor in Council shall have fixed a toll of payment for its use.

On the facts in the case the respondent is entitled to compensation, and the appellant has no right to the free use during two months of the respondent's property, nor to endanger the whole of the respondent's mills and logs, simply on the excuse that he is in the exercise of his rights in "driving" the river. No person may occupy the property of another for a period of two months without payment, and, under such circumstances, the question whether or not damage is caused to the proprietor is not relevant except to increase the sum. If the appellant had not made use of the respondent's booms he would have completely lost his pulp-wood, worth from $15,000 to $18,000; he very seriously endangered the respondent's logs in the boom, worth some $46,000, and some 36,000 logs were kept back by the appellant's boom, solely for his own convenience. Arts. 407, 7608 C.C.

In addition to the use and occupation, the respondent can recover upon a *quasi* contract of *negotiorum gestio.* Arts. 1041, 1043, *et seq.,* 1053 C.C.; 3 Beau-

dry-Lacantinerie, Obligations, Nos. 2789, 2795, 2796, 2798. The fact that respondent was acting also in his own interest does not prevent the act from being one of *negotiorum gestio*. Sirey, Code Civile ann. (4 ed), art. 1375, Nos. 26, 27, 28, 29, art. 1111, 1112, No. 13; 1 Domat (Rémy), lib. 2, tit. 4, sec. 2; 31 Demolombe, Nos. 174—104, 81, 82, 83; Larombière, arts, 1372 et 1373, notes 6 and 18; 20 Laurent, Nos. 322, 323, 324; 13 Duranton, No. 649; Marcadé on art. 1375, No. 35, No. 3; 5 Massé et Vergé on Zachariae, No. 622, note 5; 5 Pothier, Buguet's Ed., No. 189; C.C. 1043, 1722, C.N. 1999; Beaudry-Lacantinerie, Obligations, No. 2821; 4 Aubry & Rau, pp. 723-725; Larombière on Arts. 1372 and 1373, No. 20; Paquin & G.T.T.R., Quebec Reports 9 S.C., p. 336; Forest & Cadot, 1 Revue de Jurisprudence, p. 173; *King* v. *Ouellet*(1), and cases in foot-note; *Boswell* v. *Denis* (2); *Pierce* v. *McConville*(3); *McBain* v. *Carlisle* (4); *Ferrier* v. *Trepannier*(5); *Arpin* v. *The Merchants Bank*(6); *Toronto Railway Co.* v. *Balfour*(7); *Finnie* v. *City of Montreal*(8).

The statute, 55 Vict. ch. 25 (Que.), does not bear the meaning appellant places upon it; all the courts have been unanimous in holding that it did not apply; it, however, establishes the right to compensation for the use of the improvements on the river in favour of the proprietor of such improvements and it does not subordinate that right to the fixing of a tariff by the Lieutenant Governor in Council. It has been held, in interpreting C.S.L.C. ch. 51 (now art. 5535 R.S.Q.), that the common law right to indemnity continued to

(1) 14 R.L. 331.
(2) 10 L.C.R. 294.
(3) Q.R. 12 K.B. 163.
(4) 19 L.C. Jur. 276.
(5) 24 Can. S.C.R. 86.
(6) 24 Can. S.C.R. 142.
(7) 32 Can. S.C.R. 239.
(8) 32 Can. S.C.R. 335.

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exist. *McGillivray* v. *McLaren*(1); *Emond* v. *Gauthier*(2); *Proulx* v. *Tremblay*(3); *Bazinet* v. *Gadoury*(4); *Brissette* v. *Pillsbury*(5); *Larochelle* v. *Price*(6); *Hamelin* v. *Bannerman*(7).

THE CHIEF JUSTICE.—The appeal is allowed with costs and the judgment of the Superior Court is restored; the cross-appeal is dismissed with costs. I concur for the reasons stated by my brother Maclennan.

There is no difference between Quebec and English law on the points raised in this case with respect to the rights of riparian owners to waters of floatable streams flowing past their lands. *Miner* v. *Gilmour* (8).

DAVIES and IDINGTON JJ. also concurred for the reasons stated by His Lordship Mr. Justice Maclennan.

MACLENNAN J.—This is an appeal by the plaintiff from a judgment of the Court of King's Bench of Quebec which, two of the learned judges, the Chief Justice Lacoste and Mr. Justice Ouimet, dissenting, reversed the judgment of the Superior Court, District of Montmagny, which had dismissed the action.

The plaintiff is the owner of a sawmill on the bank of the Rivière du Sud, near its débouchure into the St. Lawrence, and, in connection with his mill, has constructed a boom upon and across the river for the

(1) 5 Legal News 199.
(2) 3 Q.L.R. 360.
(3) 7 Q.L.R. 353.
(4) 21 R.L. 299; M.L.R. 7 Q. B. 233.
(5) 4 Rev. de Jur. 243.
(6) Q.R. 19 S.C. 403.
(7) Q.R. 10 Q.B. 68; 31 Can. S.C.R. 534.
(8) 12 Moo. P.C. 131.

reception and safekeeping of his logs, which are cut in the woods up and along the river, and are floated down to his mill. It is said that this boom was constructed at a cost of about $25,000.

The defendant is a manufacturer and dealer in pulpwood, and has also constructed a boom on the river some miles above the plaintiff's mill and boom, for the safekeeping of his wood, which is also cut higher up the river and is brought down by flotation.

In the month of September, 1904, there was in the defendant's boom a large quantity of the defendant's pulpwood, it is said about 4,000 cords, and there was at the same time in the defendant's boom a large quantity of the plaintiff's logs on their way down to the plaintiff's boom and mill.

In that month an unusually heavy rainfall occurred which caused a flood in the river, the force of which, acting upon the pulpwood and logs, broke the defendant's boom, and the plaintiff's logs and the defendant's pulpwood were carried down the stream until they were stopped by the plaintiff's boom.

The defendant promptly used every exertion to separate his pulpwood from the plaintiff's logs and to convey it back to his own boom, and this operation was only completed in about two months.

On the 5th of December following the plaintiff brought this action to recover the sum of $4,000 from the defendant as the value of the salvage of the defendant's pulpwood by means of the plaintiff's boom, on the ground that but for his boom the defendant's pulpwood would have been carried out to sea and would have been lost, or would have cost more in the recovery than it was worth.

In the course of his pleadings the plaintiff admitted that in constructing his boom he had not im-

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proved the condition of the river as a floatable stream, *au point de vue du flottage,* which effectually excluded from the case the application of the statute, 54 Vict. ch. 25 (Que.), and the offer of the defendant to pay the toll which under that Act might be fixed by the Lieutenant Governor in Council. He also frankly admitted that the defendant's wood was collected in his boom without any labour of any of his men, and was brought there by the current. He urged at the trial, however, and before us, that, seeing the mass of wood which was coming down the river, he had expended some labour in strengthening his boom.

The trial judge, as I have said, dismissed the action, but the judges of the Court of King's Bench reversed that judgment, and by a majority of three to two awarded the plaintiff the sum of one hundred dollars. This they did, as they say, *"en vertu des règles du droit commun et de l'équité."*

Besides resisting the defendant's appeal the plaintiff has taken a cross-appeal, insisting on his right to the larger sum claimed by him for his alleged service to the defendant.

I am clearly of opinion that we ought to allow the defendant's appeal, and to disallow the cross-appeal, and that the plaintiff should pay all the costs both here and below.

The reasons of the learned Chief Justice of the Court of King's Bench are so full and satisfactory that little is left to be said in support of his conclusion.

I may point out, however, that the shelter which the plaintiff had provided for his logs was not his private property; his boom was stretched across the public floatable river, and we have not to consider what his rights might have been if the defendant's

wood had been carried down and received into an artificial haven or shelter constructed by the plaintiff upon his own land. The defendant's logs were lawfully in the river while on their way down, and until they were stopped by the plaintiff's barrier, and they continued to be lawfully there after they were stopped. They were there quite as lawfully as the plaintiff's own logs, and for the reason that the water in which they were lying was public water. Beyond all question, that water was and continued to be *publici juris,* notwithstanding the plaintiff's structure. It is true that the plaintiff might have opened his boom and have allowed the defendant's wood to pass out and be lost. But because he did not do such an unneighbourly act is no reason for claiming the large compensation to which he thinks himself entitled. The plaintiff's logs and the defendant's wood having been mixed together, to have opened his boom would probably have been as disastrous to the plaintiff himself as to the defendant. The truth is that the service rendered to the defendant by the plaintiff's boom, although of great value, was involuntary and accidental, and could afford no ground of action upon any principle of common law or equity which has been brought to our attention.

DUFF J. concurred.

Appeal allowed with costs; cross-appeal dismissed with costs.

Solicitors for the appellant: *Bedard, Roy & Chaloult.*

Solicitor for the respondent: *A. J. Bender.*

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*Oct. 29, 30.
*Nov. 15.

MICHEL SIMÉON DELISLE (PLAINTIFF) .... APPELLANT;

AND

CLOVIS ARCAND (DEFENDANT) ...... RESPONDENT.

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

Title to land—Ownership—Artificial watercourse—Canal banks—Trespass—Possessory action—Bornage—Practice.

The possessory action lies only in favour of persons in exclusive possession *à titre de propriétaire.*

The ownership of a canal serving as a tail-race for a water-mill naturally involves the ownership of the banks of the canal and the right to make use thereof for the purpose of maintaining the tail-race in efficient condition.

In the present case, the bank of the canal had fallen in at a place adjoining lands belonging to D., and the projection thus formed had been, for some years, occupied by him. A. made an entry for the purpose of removing this obstruction, and re-building a retaining wall to support the bank. In a possessory action by D.:

Held, that, as the original boundary had become obliterated, the decision of the question of possession should be postponed until the limits of the canal bank had been re-established. *Parent* v. *The Quebec North Shore Turnpike Road Trustees* (31 Can. S.C.R. 556) followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and dismissing the plaintiff's action with costs.

The defendant was proprietor of a mill, operated by water-power, with a canal appurtenant thereto which served as a tail-race for the escape of the water

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from the mill. The plaintiff was proprietor of lands adjoining and bounded by the canal and was in occupation of a point or mound projecting into the canal, formed there by the falling in of the bank. The defendant made an entry and commenced to clear away the obstruction thus formed in the tail-race and to re-build a retaining wall to support the bank of the canal. The plaintiff claimed ownership to the water's edge, contended that these acts were a trespass upon his property and sought relief by a possessory action, which was maintained by His Lordship, Mr. Justice F. Langelier, in the Superior Court. This decision was reversed by the judgment now appealed from, Trenholme, J., dissenting, which declared it to be impossible to decide whether or not there had been a trespass until the boundary between the properties of the parties had been established, that the plaintiff had failed in proving the necessary possession, for the year and a day preceding the action, of the strip of land in dispute, and dismissed the action with costs.

Stuart K.C. and *Chaloult,* for the appellant.

L. P. Pelletier K.C. for the respondent.

The judgment of the court was delivered by

GIROUARD J.—Le demandeur était probablement en possession de la bande du canal jusqu'à l'eau; mais l'était-il à titre de propriétaire? Son propre titre démontre que son immeuble était borné d'un côté par le canal du dit moulin. D'après l'ancien droit français, le propriétaire d'un moulin, mu par l'eau d'un canal, est présumé être le propriétaire du canal et de ses berges. Sous le code, la jurisprudence

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n'est pas uniforme; des distinctions ont été faites; mais, comme l'observe le juge-en-chef Lacoste, les décisions contraires à l'ancien droit sont rares. L'appellant invoque un arrêt de la cour de cassation du 7 avril, 1880, rapporté par Dalloz, Jur. Gén., 1880, part. 1ère, p. 215. Cet arrêt ne dit pas qu'un possesseur comme l'appelant a l'action possessoire, mais seulement que le propriétaire du moulin et du canal ne peut pas l'instituer sans prouver une possession réelle. D'ailleurs, l'annotateur observe, notes 3 et 4, qu'une autre chambre de la cour de cassation, la chambre des requêtes, a décidé tout le contraire par deux arrêts qu'il cite. Dans la présente espèce, la cour d'appel a cru devoir suivre la jurisprudence de ces deux arrêts, et nous croyons qu'elle avait raison. D'abord ils sont conformes à l'ancienne jurisprudence, et d'ailleurs me paraîssent fondés en raison. L'appelant admet que le canal fait partie du pouvoir d'eau du moulin qui est la propriété de l'intimé et alors je ne puis conçevoir qu'il n'est pas également propriétaire de ses bords, de manière à pouvoir maintenir la capacité du pouvoir d'eau.

Il existe, cependant, une difficulté dans l'application de ce principe. Où commence et finit le canal et ses berges? La preuve établit qu'il y a eu constamment des éboulis et que le canal est plus ou moins rempli. Pour cette raison, la cour d'appel a décidé qu'avant de prononcer sur le possessoire, il fallait délimiter l'étendue de ces éboulis, c'est-à-dire, une action en bornage, et je n'éprouve aucune hésitation à adopter ce sentiment, qui résulte des faits qui font la base d'un des considérants du jugement de la cour d'appel.

Considérant qu'il n'y a aucun doute qu'autrefois, lors de la construction du dit moulin et du dit canal, et pendant les premières an-

nées de l'exploitation du dit moulin, l'eau du dit canal coulait sur une partie maintenant découverte du dit canal, que des deux côtés du dit canal il y avait un quai pour en empêcher les bords de s'ébouler, mais que lors de l'acquisition comme susdit du dit immeuble par le demandeur, il y avait longtemps que le quai de son côté du canal était tombé de vétusté et avait disparu complètement, et que les terres s'étant éboulées elles avaient formé du côté du demandeur une saillie qui remplissait en partie le dit canal.

Pour ces raisons, l'appelant n'a pas prouvé une possession exclusive à titre de propriétaire et son action doit être déboutée; et ici notre jugement dans la cause de *Parent* v. *The Quebec North Shore Turnpike Road Trustees*(1), reçoit son application. L'appel est rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Bedard, Roy & Chaloult.*

Solicitors for the respondent: *Drouin, Pelletier, Baillargeon & St. Laurent.*

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(1) 31 Can. S.C.R. 556.

1906
*Nov. 21.
*Nov. 22.

THE CANADA CARRIAGE COMPANY AND OTHERS (PLAINTIFFS) .. } APPELLANTS;

AND

E. A. LEA, MAUD C. LEA AND A. C. LEA (DEFENDANTS) .... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—New trial—Discretion—Ontario Appeals—60 & 61 V. c. 34.

Per Fitzpatrick C.J. and Duff J.—Sec. 27 of R.S.C. ch. 135 prohibits an appeal from a judgment of the Court of Appeal for Ontario granting, in the exercise of judicial discretion, a new trial in the action.

Per Davies J.—Under the rule in *Town of Aurora* v. *Village of Markham* (32 Can. S.C.R. 457) no appeal lies from a judgment of the Court of Appeal for Ontario on motion for a new trial unless it comes within the cases mentioned in 60 & 61 Vict. ch. 34 or special leave to appeal has been obtained.

Appeal from judgment of the Court of Appeal (11 Ont. L.R. 171) quashed.

APPEAL from a decision of the Court of Appeal for Ontario(1) granting to the defendant Maud C. Lea a new trial if she chose on payment of costs of the former trial and of the appeal and reversing the judgment against A. C. Lea, and dismissing the action as to him.

The action was brought by the appellants on behalf of themselves and all other creditors of the defendant E. A. Lea to set aside a deed of land and a bill of sale of chattels made by him to the defendant Maud

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(1) 11 Ont. L.R. 171.

C. Lea as being fraudulent under the Statute of Elizabeth. The plaintiffs also claimed damages from the defendant A. C. Lea for having conspired with the other defendants to procure such conveyances to be made.

At the trial the conveyances were set aside, the defendant E. A. Lea ordered to pay the claims of creditors and the three defendants to pay the costs, The Court of Appeal reversed this judgment, dismissing the action as against A. C. Lea, granting Maud C. Lea the option of a new trial on payment of all the costs or else the judgment as against her to stand. The plaintiffs appealed.

Shepley K.C. for the respondents, takes exception to the jurisdiction so far as the appeal against the respondent Maud C. Lea is concerned.

Lynch-Staunton K.C. for the appellants, *contra.*

THE CHIEF JUSTICE.—The Supreme Court of Canada has appellate, civil and criminal jurisdiction throughout Canada.

And appeals lie:

1st. From any *final judgment* of the highest court of final resort in cases in which *the court of original jurisdiction is a superior court.*

The exceptions are as to proceedings by way of *habeas corpus, certiorari* or prohibition in criminal cases, and in criminal cases except as provided in Criminal Code.

2nd. From any *final judgment* of the highest court of final resort where the action, suit, cause, matter or other judicial proceeding *has not originated in a superior court* in certain enumerated cases.

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3rd. From the judgment *whether final or not* of the highest court of final resort where the court of original jurisdiction is a superior court.

(*a*) in motions to enter verdict or nonsuit;

(*b*) upon any motion for a new trial;

(*c*) in equity cases.

4th. There is no appeal as of right from any judgment of the Court of Appeal for Ontario unless

(*a*) the title to real estate is in question;

(*b*) the validity of a patent is affected;

(*c*) the matter in controversy *in the appeal* exceeds the sum or value of $1,000.

(*d*) the matter in question relates to taking of an annual or other rent, duty, fee, etc.

5th. No appeal shall lie from orders made in the exercise of judicial discretion.

This appeal is clearly covered by the decisions of this court of *Barrington* v. *The Scottish Union and National Ins. Co.*(1), and *The Accident Insurance Co. of North America* v. *McLachlan*(2). In the latter case it is pointed out that the order for a new trial made in the court below was

> in the exercise of its discretion for the purpose of eliciting further information as to the facts,

and that therefore no appeal would lie. In the present case it is expressly stated in the judgment of the Court of Appeal that, in its opinion, this was a case in which the court should exercise the discretion vested in it to direct a new trial as respects the defendant Maud C. Lea inasmuch as a most material point in the case had been left by the evidence in a state of uncertainty.

(1) 18 Can. S.C.R. 615. (2) 18 Can. S.C.R. 627.

GIROUARD J. — Without committing myself to everything advanced by the learned Chief Justice, I agree with him in the conclusion.

DAVIES J.—I agree in the result, and cannot but think that the case of *The Town of Aurora* v. *The Village of Markham*(1) is applicable and conclusive.

IDINGTON and DUFF JJ. also concurred in the judgment quashing the appeal.

Appeal quashed with costs.

The argument then proceeded on the appeal against A. C. Lea and after hearing counsel for the appellants, the court dismissed the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Staunton & O'Heir.*
Solicitors for the respondent A. C. Lea: *Lees, Hobson & Stephens.*
Solicitor for the respondent Maud C. Lea: *J. Y. Murdoch.*

(1) 32 Can. S.C.R. 457.

1906
*Oct. 23, 24.
*Oct. 29.

THE GUARDIAN FIRE AND LIFE ASSURANCE COMPANY (PLAINTIFFS) .... APPELLANTS;

AND

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

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

Negligence—Electrical installations — Cause of fire—Defective transformer—Improper installations—Evidence—Onus of proof.

In an action to recover the amount of a policy of fire insurance paid by the plaintiffs upon the destruction of the premises insured by fire caused, as alleged, through the defective condition of a transformer of the defendant company, whereby a dangerous current of electricity was allowed to enter the insured building, the evidence failed to shew conclusively that the transformer was out of order previous to the occurrence of the fire, and at the same time it appeared that the wiring of the building may have been defective.

Held, affirming the judgment appealed from, that the onus of proof upon the plaintiffs had not been satisfied and that they could not recover. *Abrath* v. *The North Eastern Railway Co.* (11 Q.B.D. 440) referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, sitting in review at Quebec(1), and restoring the judgment of Andrews J., at the trial,

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

(1) Cf. *Union Assurance Co.* v. *The Quebec Railway, Light and Power Company*, Q.R. 28 S.C. 289.

by which the plaintiffs' action was dismissed with costs.

The respondents are a company incorporated for the purpose of generating and supplying electric power and light in the City of Quebec, and furnished electric light to the owner of the building, insured by the plaintiffs, which was destroyed by fire said to have been caused through a defect in the defendants' transformer which they had negligently allowed to remain in an unsafe condition so that it broke down and sent a current of 2,000 volts of electricity over the secondary wires by which the building was lighted and which were calculated to stand a current of 110 volts only. The insurance company paid the amount of the insurance, obtained a subrogation from the proprietor of the building and claimed re-imbursement from the defendants on the ground that they had been guilty of the negligence by which the fire occurred in failing to maintain their transformer in a proper condition to ensure their consumers against the consequences of dangerous high tension currents entering on the secondary wires. The defence was that the defendants' appliances were of the best known quality and skilfully set up, and that, if the fire had actually been caused by an electric current, it resulted from the unskilful and improper installations in the building itself.

At the trial Mr. Justice Andrews found that the fire was caused by electricity, but that no fault or negligence had been proved against the defendants. This judgment was set aside by the Court of Review(1), but, on appeal, the judgment of the Superior Court, at the trial, was restored by the judgment now appealed from.

(1) See 1 Q.R. 28 S.C. 289.

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The facts of the case are shortly stated in the head-note and more fully referred to in the judgments now reported.

J. E. Martin K.C. and *L. A. Taschereau K.C.* for the appellants.

Stuart K.C. and *Lafleur K.C.* for the respondents.

GIROUARD and DAVIES JJ. concurred in the judgment dismissing the appeal with costs.

IDINGTON J.—In my view of this case there is no necessity of passing upon any of the many questions of law (some of them of a most interesting nature) presented to us here for consideration, save the very common-place one that a plaintiff, when his cause of action is denied, must prove his case by evidence that can be relied upon, before he can be held entitled to succeed.

The appellant complains that a house was destroyed by fire, started by electric wires, conducting an electric current, supplied by the respondents, to light the house in question.

The wiring inside the house was, where at least one fire, or part of the whole fire, first broke out, very defective.

The respondents' transformer through which the current was supplied for use by means of this defective wiring was found after the fire to be then broken down.

One side blames the fire on the defective wiring, and the other on the defective or broken down transformer.

The transformer admittedly was of the best make known, and had been well tested before being placed,

and had only been in use three years. It is not known how long it might live, but, barring accidents, might reasonably have been expected to serve for seven years longer. Periodical inspection from day to day, or other short period, would seem from the evidence of appellants' expert witness, as well as the other evidence, to be quite impracticable, that is, an inspection of such character as might have discovered the derangement complained of inside this transformer in question.

In their normal condition, these appliances and their connections should have brought into the house a low tension current of only 100 to 110 voltage.

It is asserted by respondents that no fire can, in such a place as the wires in question ran, be produced by such a current. The evidence of respondents' witnesses, however, admits the possibility, and under certain unusual conditions the probability, of fire therefrom.

It seems to be admitted, or at least not seriously denied, that once a fire started in this house the result might possibly be to break down the transformer and leave it as found after this fire, though up to the time of the fire it had been in good working order.

Notwithstanding these respective possibilities arising from the circumstances referred to, in each of the respective conditions relating thereto, we are asked to find that as a fact, in some way or other unexplained, the transformer, working well up to 3 a.m., suddenly broke down and let into this house a higher tension of current than that necessary to serve the house.

Such is the problem of fact to be solved by the appellants before they can succeed. And this problem must be so solved as to satisfy us that the solution

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arrived at is in accord with the evidence, supported by the evidence, and appeals to our reason in such a way as to enable us to find this transformer had suddenly gone wrong.

The evidence of the fire in this house being caused by electricity might reasonably be found in this case. I am, however, quite unable, after a most careful consideration of the evidence and all else in the case, to find such evidence as would establish that the fire was caused by a current of higher tension than the owner of the house agreed might be transmitted therein.

The contract between the parties was in writing, but that is not produced, and the contents are not proven. We must deal with the case as if the relations between said parties had for their basis an agreed service such as I have adverted to.

Much ingenuity was displayed in the argument by suggesting certain presumptions. I think the evidence has not reached that stage at which, on any theory of this case possible on the evidence before us, there can be any presumption that would operate in appellants' favour. If the appellants had succeeded in establishing as a fact upon which we could act that, with the low tension current permissible, the fire in question could not possibly have arisen, perhaps we might have had to consider these suggestions.

As the case stands the appellants have not established a *primâ facie* case of any possible cause of action.

With such inaccurate data as given here to build upon it would be an impossible task to make even a reasonably fair appearance of a case.

The evidence has been so fully analyzed in the courts below, and so fully dealt with in the argument

before us, that I see no good purpose to be served by any lengthy exposition of it here.

Much seeming strength was given to the appellants' case by the apparent coincidence of a little flame scorching on this occasion a rosette through which the service wire from this same transformer entered another house. To support the appellants' case, such an apparent coincidence ought to have been clearly shewn to have been coincident and taken place immediately before, or simultaneously with, the fire in question.

We can only guess at the exact time when the fire broke out.

The owner was awakened by a child's cry and found smoke, that indicated fire between a ceiling and a floor, coming through the floor in the child's room. Common experience forbids us accepting the time of this awakening as that when the fire started. If the fire was the result of a low tension current it might have begun in such a place long before the awakening, and remained unnoticed for an indefinite time.

This is one of many obvious weaknesses of the case upon which a very ingenious theory has had its foundation laid.

Accuracy in something—absolute accuracy if possible—is the first essential for a scientific investigation of anything. And in approaching the solution of a question in which the working of electricity has to be reckoned with, if we cannot find some solid basis of accuracy in time or place or both, we had better leave the problem as unsolved.

The appellants' chief expert witness frankly admits he was only sent to find out if the fire had been caused by electricity, and that if he had thought he

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was sent to build up a case against the respondents he

would have taken many more precautions to secure additional evidence then.

The appellants' whole case exemplifies this as absolutely true. Doubtless this accounts for many missing links one would like to have seen supplied in order to understand what actually had happened. Thirty to forty other houses were served through this transformer, yet this scorching of the rosette referred to is the only indication of even seemingly concurrent accident. The setting of this rosette was unusually fitted to attract to it the current, and much dispute occurs as to whether its scorching was the result of a low tension current, or a result flowing from the fire in question.

To indicate some of the many proofs wanting in this connection, I may say that the doubt as to the order of events in relation to the fire in question, and that developed at this rosette, is such as to deprive the latter circumstance of any possible value.

Each side in argument seemed satisfied that they had established this rosette fire as before or after (as their interest required) the main fire in question. I find it utterly impossible on the evidence to determine which may be right. Either may be right. I am quite clear the evidence does not satisfactorily establish either view.

This scorched rosette no doubt influenced many parties having to deal with this matter from the beginning, including the courts through which the matter has been carried.

I repeat that owing to the impossibility of determining the time when the fire in the house began, the

1906
GUARDIAN FIRE AND LIFE ASSURANCE CO. v. QUEBEC RAILWAY, LIGHT AND POWER CO.
Idington J.

determination of this point is impossible. In the evidence upon which the appellants' expert proceeded, he says this rosette scorching was only a confirmation of his judgment.

I rather think it so impressed him that it vitiated his whole attitude to the issue raised.

I think the appeal should be dismissed with costs.

MACLENNAN J. concurred in the judgment dismissing the appeal with costs.

DUFF J.—Admittedly a condition of the plaintiffs' success is the proof by them that the fire giving rise to the litigation was caused by the introduction into Morissette's house, through the defendants' system, of a current of electricity having a tension higher than 110 volts. The burden of this proposition of fact remained throughout the trial upon the plaintiff, and accepting the contention of the plaintiffs' counsel that proof of the derangement of the transformer was alone sufficient to establish a *primâ facie* case, I am still unable to disagree with the opinion of the majority of the court of appeal that the evidence viewed as a whole is upon this issue inconclusive. In this I am much influenced by the fact, not, I think, open to dispute, that owing to the defective state of the wires and appliances which Morissette himself, to connect his lamps with the defendants' system, placed in his house (and over which the defendants exercised no supervision or control), the house was exposed to the hazard of fire from the ordinary current of 110 volts which the defendants were under their contract bound to supply. In *Abrath* v. *North Eastern Ry. Company*(1), Brett M.R., said:

(1) 11 Q.B.D. 440.

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GUARDIAN FIRE AND LIFE ASSURANCE Co. *v.* QUEBEC RAILWAY, LIGHT AND POWER CO.

Duff J.

It is contended (I think fallaciously) that if the plaintiff has given *primâ facie* evidence which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. * * It seems to me that the proposition ought to be stated thus: the plaintiff may give *primâ facie* evidence which, unless it be answered, either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour; the defendant may give evidence, either by contradicting the plaintiff's evidence or by proving other facts; the jury have to consider, upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer. * * Then comes this difficulty—suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff; in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able, by the additional facts which he has adduced, to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

The facts in evidence leading to this state of doubt I think the plaintiff must fail.

Appeal dismissed with costs.

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

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

MONTREAL STREET RAILWAY CO. (DEFENDANTS) .... APPELLANTS;

1906

*April 9, 10.

AND

JOSEPH DESLONGCHAMPS (PLAINTIFF) .... RESPONDENT.

Negligence—Operation of tramway—Carriage of passengers—Crossing cars—Undue speed—Sounding gong—Findings of jury.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Montreal, entered upon the verdict of a jury, in favour of the plaintiff.

The plaintiff was a passenger on a tramcar operated by the company and, on approaching a crossing, signalled the conductor to stop the car and, when it slowed down but before it reached the crossing, stepped off the car and attempted to cross to the other side of the street by passing in rear of the car on which he had been travelling. He was struck and injured by a car coming at considerable speed from the opposite direction without, it was alleged, giving notice according to running regulations, by sounding the gong as it was meeting and passing the other car. The jury found generally for the plaintiff, without specifying any particular act of negligence, but that the plaintiff was also negligent and assessed the damages at $3,500, for which judgment was entered at the trial. By the judgment appealed from it was held

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

(1) Q.R. 14 K.B. 355.

1906
MONTREAL STREET RY. CO.
v.
DESLONGCHAMPS.

that, upon the contradictory evidence, there was sufficient ground to support the verdict. On the appeal to the Supreme Court the company contended that there was misdirection, irregularity in the verdict and that the verdict was against the weight of evidence.

After hearing counsel on behalf of the appellants and without calling upon the respondent's counsel for any argument, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Duclos K.C. and *R. Taschereau* for the appellants.
A. Geoffrion K.C. and *Elliott* for the respondent.

THE ST. GEORGE PULP AND PAPER CO. (DEFENDANTS) .... APPELLANTS;

1906
*May 4, 7.
*May 14.

AND

FREDERIC E. ROSE (PLAINTIFF) .... RESPONDENT.

Contract—Sale of pulp wood—Measurement—Scaling of timber.

APPEAL from the judgment of the Supreme Court of New Brunswick(1) affirming the judgment at the trial maintaining the plaintiff's action with costs.

The action was for a balance claimed on two contracts for the cutting and delivery of pulp wood; the question at issue on the appeal being as to whether or not the plaintiff was entitled to have the measurement of the timber according to the full scaling of the logs or limited by the provisions of chapter 96, R.S. N.B. The judgment appealed from refused a rule for the reduction of the verdict or for a new trial.

After hearing counsel for the parties, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs for the reasons stated in the court below.

Appeal dismissed with costs.

Currey K.C. and *George J. Clarke* for the appellants.

Pugsley K.C. and *Ewing* for the respondent.

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*PRESENT:—Sedgewick, Girouard, Idington and Maclennan JJ.

(1) 37 N.B. Rep. 247.

1906
*June 6.

THE SHAWINIGAN CARBIDE CO. (DEFENDANTS) .... APPELLANTS;

AND

MARIE ST. ONGE ÈS NOM ET ÈS QUAL. (PLAINTIFF) .... RESPONDENTS.

Negligence—Electrical installations—Necessary protection of employees—Onus of proof—Voluntary exposure to danger.

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

The action was brought by the widow of an employee of the appellant company who was killed by an electric shock while performing his work in the company's power-house, near electric heaters and drying out transformers, to recover damages, sustained, in consequence, by herself personally and as testatrix of a minor child of the deceased. The plaintiff was awarded $2,500 damages by the judgment at the trial, Cook, J., and the decision of the trial court was affirmed by the judgment appealed from. On the appeal the defendants contended that the deceased came to his death solely on account of his own carelessness in approaching too near to the heaters which he knew to be highly charged with electricity and of which he had due warning.

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

(1) Q.R. 15 K.B 5.

1906
SHAWINIGAN CARBIDE CO.
v.
ST. ONGE.

After hearing counsel for the appellants and without calling upon the respondent's counsel for any argument, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Campbell K.C. and *Erroll Languedoc* for the appellants.

Lafleur K.C. for the respondent.

1906

* March 15.

PEOPLE'S LIFE INS. CO. . . . . APPELLANTS;

AND

TATTERSALL. . . . . RESPONDENT.

Insurance — Payment of premium—Thirty days' grace—Death of insured after premium due—Estoppel.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment at the trial(2), in favour of the respondent.

By a condition of a policy of life insurance thirty days grace were allowed for payment of a premium if insured was unable to pay it when due. The insured died about ten days after a premium was payable and a firm of solicitors acting for his family notified the insurance company of his death, stating in their letter that if the premium had not been paid they would pay it. On the same day the beneficiary under the policy called at the company's office and saw the secretary who, knowing, the premium was unpaid, told her the policy was all right so far as he knew. The solicitor of the company to whom had been given the letter with notice of the death of insured answered it by requesting that proofs of loss be sent in saying nothing about the premium.

The company afterwards set up the non-payment and refused to pay. The beneficiary named in the policy sued and obtained a verdict at the trial. This

*PRESENT: Sedgewick, Girouard, Davies, Idington and Maclennan JJ.

(1) 11 Ont. L.R. 326. (2) 9 Ont. L.R. 611.

was affirmed by the Divisional Court, which held that plaintiff was a beneficiary and the company were estopped by conduct from setting up non-payment. The Court of Appeal affirmed this decision.

The Supreme Court heard counsel on behalf of the appellants and without calling on respondent's counsel dismissed the appeal.

Appeal dismissed with costs.

Watson K.C. for the appellants.
Crerar K.C. for the respondent.

1906
* April 3-6.
* April 14.

THE CITY OF TORONTO (DEFENDANTS) .... APPELLANTS;

AND

THE METALLIC ROOFING COMPANY OF CANADA (PLAINTIFFS) RESPONDENTS.

Contract—Work and materials—Faulty work—Extras—Dismissal.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment at the trial(2) in favour of the plaintiffs.

Plaintiffs had contracted to cover the roof of a market building in Toronto with sheet metal work. After the work was partly completed a delay occurred of over a year caused by other trades working on the building. When plaintiffs were able to resume work it was found that what they had done was inadequate as the roof leaked badly and the architects instructed them to remedy it, which they were unable to do. They claimed that the fault was in the construction of the roof, the boards being too thin to hold the nails which were to secure the iron covering, while the city claimed that in such case rivets should have been used. Finally the city dismissed plaintiffs and had the work completed by others.

The plaintiffs sued for the value of the work done originally and for that done to prevent leakage as extra work, and for other relief. The Chancellor who

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*PRESENT: Sedgewick, Girouard, Davies, Idington and Maclennan JJ.

(1) 6 Ont. W.R. 656.

(2) 3 Ont. W.R. 646.

tried the case held them entitled to both, and his judgment was affirmed by the Court of Appeal.

The Supreme Court held that plaintiffs could not recover for extras as the terms of the contract in respect thereto had not been observed. They held, however, that plaintiffs were entitled to damages for wrongful dismissal and directed that the reference ordered by the Chancellor should include such damages. As each party had partially succeeded no costs were given.

Appeal allowed in part without costs.

Shepley K.C. and *McKelcan* for the appellants.

Tilley and *Johnston* for the respondents.

1906
* May 15.
* June 12.

SUTHERLAND....................APPELLANT:

AND

SECURITIES HOLDING CO.........RESPONDENTS.

Broker—Purchase on margin—Non-payment — Sale without notice——Liability of customer—Damages.

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

Ames & Co., brokers in Toronto, on instructions from the defendant Sutherland, of Winnipeg, procured for him a number of shares of Dominion Coal Co. stock, defendant paying 20% of the then market price and agreeing, by the custom in such transactions, to protect the purchase if the price should go down. It did go down and defendant not responding to the brokers' calls for further payments they sold the stock, and after crediting defendant with the proceeds sued for the balance due them for commissions and interest. Defendant was notified of the sale and of the state of his account and made no objection until the action was brought some six months later.

Plaintiff had judgment at the trial for the amount claimed which was affirmed by the Divisional Court and the Court of Appeal. After the trial the brokers failed and the action was continued by the present respondents, their assignees.

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*PRESENT: Sedgewick, Girouard, Davies, Idington and Maclennan JJ.

(1) 11 Ont. L.R. 417, *sub nom. Ames* v. *Sutherland.*

(2) 9 Ont. L.R. 631.

1906

SUTHERLAND v. SECURITIES HOLDING Co.

The defendant appealed to the Supreme Court, which heard the argument and reversed judgment. On a subsequent day the appeal was dismissed.

Appeal dismissed with costs.

Biggs K.C. for the appellant.

Tilley for the respondents.

1906
*Nov. 16, 19.

THE TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION (DEFENDANTS) .... APPELLANTS;

AND

THOMAS WALLACE (PLAINTIFF) .... RESPONDENT.

Contract—Supply of material—Payment — Certificate of engineer—Condition precedent—Improper interference — Fraud — Hindering performance of condition—Monthly estimate—Final decision.

APPEAL from the decision of the Court of Appeal for Ontario(1), reversing the judgment of Falconbridge C.J., at the trial and granting a new trial.

The action was for the price of ties supplied by the plaintiff under a contract providing for payment on the certificate of the chief engineer in charge of construction of defendants' railway. The engineer refused to certify for the ties not paid for on the ground that new commissioners appointed had objected to the quality and ordered another inspection. At the trial plaintiff was non-suited, the judge holding that there was no coercion of the engineer, and the want of the certificate was a bar to the action. A new trial was ordered by the Court of Appeal on the ground that there was some evidence of coercion for the jury. The defendants appealed.

After hearing *Tilley* for the appellants, and without calling on *Hellmuth K.C.* and *Geary* for the respondents, the Chief Justice pronounced judgment for the court as follows:

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

(1) 12 Ont. L.R. 126.

1906

TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION v. WALLACE.

The Chief Justice.

THE CHIEF JUSTICE (Oral).—Without expressing any opinion on the merits, and especially without adopting the reasons of the Court of Appeal, we are of opinion that this appeal from a judgment granting a new trial should be dismissed, and said judgment confirmed, with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Thomson, Tilley & Johnston.*

Solicitors for the respondent: *Macdonell, McMaster, Geary & Barton.*

INDEX.

ACCOUNT—*Breach of trust—Accounts—Evidence—Nova Scotia "Trustee Act," 2 Edw. VII. c.* 13—*Liability of trustee—N. S. Order XXXII., r.* 3—*Judicial discretion—Statute of Limitations.*] By his last will N. bequeathed shares of his estate to his daughters A. and C. and appointed A. executrix and trustee. C. was weak-minded and infirm and her share was directed to be invested for her benefit and the revenue paid to her half-yearly. A. proved the will, assumed the management of both shares and also the support and care of C. at their common domicile, and applied their joint incomes to meet the general expenses. No detailed acounts were kept sufficient to comply with the terms of the trust or to shew the amounts necessarily expended for the support, care and attendance of C., but A. kept books which shewed the general household expenses and consisted, principally, of admissions against her own interests. After the decease of A. and C. the plaintiffs obtained a reference to a master to ascertain the amount of the residue of the estate coming to C. (who survived A.) and the receipts and expenditures by A. on account of C. On receiving the report the judge referred it back to be varied, with further instructions and a direction that the books kept by A. should be admitted as *primâ facie* evidence of the matters therein contained. (See 37 N.B. Rep. pp. 452-464.) This order was affirmed by the Supreme Court of Nova Scotia *in banco*. *Held*, affirming the judgment appealed from (37 N.B. Rep. 451) that the allowances for such expenditures need not be restricted to amounts actually shewn to have been so expended; that, under the Nova Scotia statute, 2 Edw. VII. c. 13, and Order XXXII., rule 3, a judge may exercise judicial discretion towards relieving a trustee from liability for technical breaches of trust and, for that purpose, may direct the admission of any evidence which he may deem proper for the taking of accounts. CAIRNS *v.* MURRAY **163**

2——*"Account stated"—Admission of liability—Promise to pay—Collateral*

ACCOUNT—*Continued.*

agreement—Parol evidence.] On the dissolution of a partnership, the parties signed a statement shewing a certain amount as due to the plaintiff for his share and declaring that "for the sake of peace and quiet and to avoid friction and bother" the plaintiff waived examination of the firm's books and agreed that the amount so stated should be deemed to be the amount payable by the defendants to the plaintiff. *Held*, that a promise to pay the amount of the balance so stated to be due should be implied from the admission of liability.—In an action for the amount of the balance the defendants alleged that the plaintiff had verbally agreed that he would not sue upon the account as stated, and that the document should be treated as merely shewing what would be payable to him upon the collection of outstanding debts owing to the firm.—*Held*, that as the effect of the alleged collateral agreements was to vary and annul the terms of the written instrument they could not be proved by parol testimony. JACKSON *v.* DRAKE, JACKSON & HELMCKEN. **315**

3——*Suretyship — Collateral deposit — Ear-marked fund—Appropriation of proceeds—Set-off—Release of principal debtor—Constructive fraud—Discharge of surety — Right of action — Common counts—Equitable recourse.*] K. owed the corporation $33,527.94 on two judgments recovered on notes for $10,000 given by him to R., and a subsequent loan to him and R. for $20,000. M., at the request of and for the accommodation of R., had indorsed the notes for $10,000 and deposited certain shares and debentures as collateral security on his indorsement. K. and R. deposited further collateral securities on negotiating the second loan, but K. remained in ignorance of M.'s indorsements and collateral deposit until long after the release hereinafter mentioned. These judgments remained unsatisfied for over six years but, in the meantime, the corporation had sold all the shares deposited as col-

ACCOUNT—*Continued.*

lateral security, and placed the money received for them to the credit of a suspense account, without making any distinction between funds realized f— M.'s shares and the proceeds of the other securities and without making any appropriation of any of the funds towards either of the debts. On 28th February, 1900, after negotiations with K. to compromise the claims against him, the agent of the corporation wrote him a letter offering to compromise the whole indebtedness for $15,000, provided payment was made some time in March or April following. This offer was not acted upon until November, 1901, when the corporation carried out the offer and received the $15,000, having a few days previously appropriated the funds in the suspense account, applying the proceeds of M.'s shares to the credit of the notes he had indorsed. The negotiations and the final settlement with K. were not made known to M., and K. was not informed of his continuing liability towards M. as a surety. *Held, per* Sedgewick, Girouard, Davies and Idington JJ. (reversing the judgment appealed from (11 B.C. Rep. 402)) that the secret dealings by the corporation with K. and with respect to the debts and securities were, constructively, a fraud against both K. and M.; that the release of the principal debtor discharged M. as surety, and that he was entitled to recover the surplus of what the corporation received applicable to the notes indorsed by him as money had and received by the corporation to and for his use.—*Held,* by Maclennan J. that, on proper application of all the money received, the corporation had got more than sufficient to satisfy the amount for which M. was surety and that the surplus received in excess of what was due upon the notes was, in equity, received for the use of M. and could be recovered by him on equitable principles or as money had and received in an action at law. MILNE *v.* YORKSHIRE GUARANTEE CORPORATION. **331**

4——*Construction of deed—Ambiguity—Discharge of debtor—Contract—Illegal consideration—Right of action* **613**

See DEED 3.

5——*Tenant by sufferance—Use and occupation of lands—Art.* 1608 *C.C.—*

ACCOUNT—*Continued.*

Promise of sale—Vendor and purchaser—Reddition de compte—Actio ex vendito—Practice **627**

See ACTION 4.

ACTION—*Suretyship—Collateral deposit Ear-marked fund—Appropriation of proceeds—Set-off—Release of principal debtor—Constructive fraud—Discharge of surety—Right of action—Common counts—Equitable recourse.*] K. owed the corporation $33,527.94 on two judgments recovered on notes for $10,000 given by him to R., and a subsequent loan to him and R. for $20,000. M., at the request of and for the accommodation of R., had indorsed the notes for $10,000 and deposited certain shares and debentures as collateral security on his indorsement. K. and R. deposited further collateral securities on negotiating the second loan, but K. remained in ignorance of M.'s indorsements and collateral deposit until long after the release hereinafter mentioned. These judgments remained unsatisfied for over six years, but, in the meantime, the corporation had sold all the shares deposited as collateral security, and placed the money received for them to the credit of a suspense account, without making any distinction between funds realized from M.'s shares and the proceeds of the other securities and without making any appropriation of the funds towards either of the debts. On 28th February, 1900, after negotiations with K. to compromise the claims against him, the agent of the corporation wrote him a letter offering to compromise the whole indebtedness for $15,000, provided payment was made some time in March or April following. This offer was not acted upon until November, 1901, when the corporation carried out the offer and received the $15,000, having a few days previously appropriated the funds in the suspense account, applying the proceeds of M.'s shares to the credit of the notes he had indorsed. The negotiations and the final settlement with K. were not made known to M., and K. was not informed of his continuing liability towards M. as a surety. *Held, per* Sedgewick, Girouard, Davies and Idington JJ. (reversing the judgment appealed from (11 B.C. Rep. 402)) that the secret dealings by the corporation with K. and with respect to

ACTION—*Continued.*

the debts and securities were, constructively, a fraud against both K. and M.; that the release of the principal debtor discharged M. as surety, and that he was entitled to recover the surplus of what the corporation received applicable to the notes indorsed by him as money had and received by the corporation to and for his use.—*Held*, by Maclennan J. that, on proper application of all the money received, the corporation had got more than sufficient to satisfy the amount for which M. was surety and that the surplus received in excess of what was due upon the notes was, in equity, received for the use of M. and could be recovered by him on equitable principles or as money had and received in an action at law. MILNE *v.* YORKSHIRE GUARANTEE CORPORATION.....**331**

2——*Promissory note—Deposit receipt—Notice—Demand for payment—Action.*] In an action on an instrument in the following form: "$1,200. Edmundston, N.B., July 12th, 1899. Received from the Reverend N. P. Babineau the sum of twelve hundred dollars, for which I am responsible, with interest at the rate of seven per cent. per annum, upon production of this receipt and after three months' notice. Fred LaForest." The court below held (37 N.B. Rep. 156) that the plaintiff could recover as for a promissory note and that a demand for immediate payment made more than three months before the action was a sufficient notice. Without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal. LAFOREST *v.* BABINEAU.........................**521**

3——*Cause of action—Limitation of actions — Contract — Foreign judgment — Yukon Ordinance, c. 31 of 1890—Statute of James—Statute of Anne—Lex fori—Lex loci contractûs—Absence of debtor.*] Under the provisions of the Yukon Ordinance, c. 31 of 1890, the right to recover simple contract debts in the Territorial Court of Yukon Territory is absolutely barred after the expiration of six years from the date when the cause of action arose notwithstanding that the debtor has not been for that period resident within the jurisdiction of the court. Judgment appealed from reversed, Girouard and Davies JJ. dissenting. RUTLEDGE *v.* UNITED STATES SAVINGS AND LOAN CO.........................**546**

4——*Tenant by sufferance—Use and occupation of lands—Art. 1608 C.C.—Promise of sale—Vendor and purchaser—Reddition de compte—Actio ex vendito—Practice.*] The action for the value of the use and occupation of lands does not lie in a case where the occupation by sufferance was begun and continued under a promise of sale; in such a case the appropriate remedy would be by an action *ex vendito* or for *reddition de compte.* CANTIN *v.* BÉRUBÉ........**627**

5——*Rivers and streams—Floating sawlogs——Use of booms—Vis major—Salvage—Quantum meruit—Riparian rights.*] P. placed booms across a floatable river to hold logs at a place where he had erected a sawmill on land owned by him on the bank of the river. T. had a boom further upstream for storing pulpwood. An unusual freshet broke T.'s boom and brought a quantity of his wood down with the current into P.'s boom, where it was caught and held for some time, until removed by T., without causing any damage or expense to P. In an action by P. to recover salvage or the value of the use of his boom for the time during which T.'s wood had remained therein. *Held*, reversing the judgment appealed from (Q.R. 14 K.B. 513), that as P. had no right of property in the waters of the river where he had placed his boom those waters were *publici juris*, notwithstanding the construction of the boom; that T.'s wood came there lawfully; and that, as the service rendered in stopping the wood was involuntary and accidental, P. could recover nothing therefor. *Per* Fitzpatrick C.J.—There is no difference between the laws of the Province of Quebec and those of England in respect to the rights of riparian owners to the waters of floatable streams flowing past their lands. *Miner* v. *Gilmour* (12 Moo. P.C. 131) referred to. TANGUAY *v.* PRICE................**657**

6——*Title to land—Ownership—Artificial watercourse—Canal banks—Trespass — Possessory action — Bornage — Practice.*] The possessory action lies only in favour of persons in exclusive possession *à titre de propriétaire.*—In the present

ACTION—*Continued.*

case, the bank of a canal had fallen in at a place adjoining lands belonging to D., and the projection thus formed had been, for some years, occupied by him. A. made an entry for the purpose of removing this obstruction, and re-building a retaining wall to support the bank. In a possessory action by D.: *Held*, that, as the original boundary had become obliterated, the decision of the question of possession should be postponed until the limits of the canal bank had been re-established. *Parent* v. *The Quebec North Shore Turnpike Road Trustees* (31 Can. S.C.R. 556) followed. DELISLE *v.* ARCAND. 668

AND *see* TITLE TO LAND 5.

7——*Practice — Pleading — Amendment ordered by court — Married woman — Legal community—Right of action—Reprise d'instance—Arts.* 78, 174, 176 *C.P.Q.—R.S.C. c.* 135, *ss.* 63, 64. NORTH SHORE POWER CO. *v.* DUGUAY. 624

8——*Contract — Supply of material — Payment—Certificate of engineer—Condition precedent—Improper interference —Fraud—Hindering performance of condition—Monthly estimate—Final decision.* TEMISKAMING AND NORTHERN ONTARIO RY. COMM. v. WALLACE. . . .696

9——*Contract—Breach of conditions — Liquidated damages—Penalty — Cumulative remedy.* .430

See TRAMWAY 2.

10——*Construction of deed—Ambiguity —Discharge of debtor—Contract—Illegal consideration—Right of action* 613

See DEED 3.

ADMINISTRATION.

See SUCCESSIONS.

ADVOCATE.

See COUNSEL.
" SOLICITOR.

ATTORNEY.

See SOLICITOR.

ADMIRALTY LAW—*Maritime law—Collision—Crossing ships—Admiralty rules,* 1897, *rule* 19.] The SS. "Parisian," making for Halifax Harbour, came along the western shore, sailing almost due north to a pilot station, on reaching which she slowed down, finally stopping her engines. The "Albano," a German steamship for the same port, approached some miles to the eastward, sailing first, by error, to the north-east, and then changing her course to the south-west, apparently making for the eastern passage to the harbour. She again altered her course, however, and came almost due west towards the pilot station. When about a quarter of a mile from the "Parisian" she slowed down, and on coming within eight or nine ship's lengths gave three blasts of her whistle, indicating that she would go full speed astern. The "Parisian" then, seeing that a collision was inevitable, went full speed ahead for about 200 feet when she was struck on the starboard quarter and had to make for the dock to avoid sinking outside. The "Parisian's" engines were stopped about six minutes before the collision, and a boat from the pilot cutter was rowing up to her when she was struck. At the time of the collision, about 5 p.m., the wind was light, weather fine and clear, there was no sea running and no perceptible tide. *Held*, affirming the judgment of the local judge that the captain of the "Albano" had no right to regard the "Parisian" as a crossing ship within the meaning of rule 19 of the Admiralty Rules, 1897; and that the "Parisian" having properly stopped to take a pilot on board, and being practically in the act of doing so at the time the "Albano" was bound to avoid her and was alone to blame for the collision. OWNERS SS. "ALBANO" *v.* OWNERS SS. "PARISIAN". 284

2——*Appeal to Privy Council—Colonial Courts of Admiralty Act,* 1890 (*Imp.*)— *Right of appeal de plano—Bail for costs —Practice.*] Upon the application of the appellants (30th March, 1906), for an order to fix bail on a proposed appeal, direct to His Majesty in Council, under the rules established by the Colonial Courts of Admiralty Act, 1890 (Imp.), the Supreme Court of Canada, sitting *in banco*, after hearing counsel for and against the application, made an order, *pro formâ* (without expressing any opinion as to the right of appealing *de plano*), that the appellants should

ADMIRALTY LAW—*Continued.*

give bail to answer the costs of the proposed appeal in the sum of £300, sterling, to the satisfaction of the Registrar of the Supreme Court of Canada, on or before the 4th of April, 1906. The "Albano" *v.* The "Parisian"......301

(In *The "Cape Breton"* v. *Richelieu and Ontario Nav. Co.* (36 Can. S.C.R. 592), a similar order was made by a judge in chambers and the Judicial Committee heard the appeal without requiring the appellants to obtain leave or give other security (48 Can. Gaz. 279).

APPEAL—*Jurisdiction — Discretionary order—Stay of foreclosure proceedings—Final judgment—Controversy involved—"Winding-up Act"—R.S.C. c.* 129, *s.* 76 *—R.S.C. c.* 135, *s.* 28.] Leave to appeal to the Supreme Court of Canada under the seventy-sixth section of the "Winding-up Act" can be granted only where the judgment from which the appeal is sought is a final judgment and the amount involved exceeds two thousand dollars. A judgment setting aside an order, made under the "Winding-up Act," for the postponement of foreclosure proceedings and directing that such proceedings should be continued is not a final judgment within the meaning of the Supreme Court Act, and does not involve any controversy as to a pecuniary amount. Re Cushing Sulphite Fibre Co. 173

2——*Appeal to Privy Council—Colonial Courts of Admiralty Act,* 1890 *(Imp.)—Right of appeal de plano—Bail for costs —Practice.*] Upon the application of the appellants (30th March, 1906), for an order to fix bail on a proposed appeal direct to His Majesty in Council, under the rules established by the Colonial Courts of Admiralty Act, 1890 (Imp.), the Supreme Court of Canada, sitting *in banco,* after hearing counsel for and against the application, made an order, *pro formâ* (without expressing any opinion as to the right of appealing *de plano*), that the appellants should give bail to answer the costs of the proposed appeal in the sum of £300, sterling, to the satisfaction of the Registrar of the Supreme Court of Canada, on or before the 4th of April, 1906. The "Albano" *v.* The "Parisian"......301

And *see* Admiralty Law 2.

APPEAL—*Continued.*

3——*Jurisdiction—Annulment of procès-verbal—Injunction—Matter in controversary—Art.* 560 *C.C.—Servitude.*]—In a proceeding to set aside resolutions by a municipal corporation giving effect to a *procès-verbal,* the court followed *Toussignant* v. *County of Nicolet* (32 Can. S.C.R. 353) and quashed the appeal with costs. Art. 560 C.C. referred to. Leroux *v.* Parish of Ste. Justine.........321

4——*Board of Railway Commissioners—Jurisdiction—Appeal to Supreme Court.*] The Board of Railway Commissioners granted an application of the James Bay Railway Co. for leave to carry their line under the track of the G. T. Ry. Co., but, at the request of the latter, imposed the condition that the masonary work of such under crossing should be sufficient to allow of the construction of an additional track on the line of the G. T. Ry. Co. No evidence was given that the latter company intended to lay an additional track in the near future or at any time. The James Bay Co., by leave of a judge, appealed to the Supreme Court of Canada from the part of the order imposing such terms contending that the same was beyond the jurisdiction of the Board. *Held,* that the Board had jurisdiction to impose said terms.—*Held, per* Sedgewick, Davies and Maclennan JJ., that the question before the court was rather one of law than of jurisdiction and should have come up on appeal by leave of the Board or been carried before the Governor General in Council. James Bay Ry. Co. *v.* Grand Trunk Ry. Co.........372

5——*Jurisdiction — Winding-up order — Leave to appeal—Amount involved—R.S.C. c.* 129, *s.* 76.] In a case under the Winding-up Act (R.S.C. c. 129) an appeal may be taken to the Supreme Court of Canada by leave of a judge thereof if the amount involved exceeds $2,000. *Held,* that a judgment refusing to set aside a winding-up order does not involve any amount and leave to appeal therefrom cannot be granted. Cushing Sulphite-Fibre Co. *v.* Cushing....427

6——*Jurisdiction — Successions — Security by beneficiary—Controversy involved — Future rights — Interlocutory order.*] An application for the approval

APPEAL—*Continued.*

of security on an appeal to the Supreme Court of Canada from an order directing that a beneficiary should furnish the security required by article 663 of the Civil Code of Lower Canada was refused on the ground that it was interlocutory and could not affect the rights of the parties interested. KIRKPATRICK *v.* BIRKS. 512

7——*New trial—Judgment in court below on motion—Equal division—Jurisdiction—Charge to jury—Misdirection—Bias.*] An appeal will lie to the Supreme Court of Canada from a judgment upon a motion for a new trial which failed on account of an equal division of the court below (37 N.B. Rep. 163) which, after the formal recital, stated that "the court having taken time to consider, and being equally divided, the said rule drops and the verdict entered for the plaintiff stands." BUSTIN *v.* THORNE. 532

AND *see* NEW TRIAL 2.

8——*Jurisdiction — Declinatory exception — Interlocutory judgment — Review of judgment on exception—Practice.*] The action was dismissed in the Superior Court upon declinatory exception. The Court of King's Bench reversed this decision and remitted the cause for trial on the merits. On motion to quash a further appeal to the Supreme Court of Canada: *Held,* that such motion should be granted on the ground that the objection as to the jurisdiction of the Superior Court might be raised on a subsequent appeal from a judgment on the merits. *Per* Girouard J.—The judgment of the Court of King's Bench was not a final judgment and, consequently, no appeal could lie to the Supreme Court of Canada. WILLSON v. SHAWINIGAN CARBIDE CO. 535

9——*Jurisdiction — New trial — Discretion—Ontario appeals—60 & 61 V. c. 34—R.S.O. c. 135, s. 27.*] *Per* Fitzpatrick C.J. and Duff J.—Section 27 of R.S.C. c. 135 prohibits an appeal from a judgment of the Court of Appeal for Ontario granting, in the exercise of judicial discretion a new trial in the action. *Per* Davies J.—Under the rule in *Town of Aurora* v. *Village of Markham* (32 Can. S.C.R. 457) no appeal lies from a judgment of the Court of Appeal for Ontario on motion for a new trial unless it comes within the cases mentioned in 60 & 61 Vict. c. 34 or special leave to appeal has been obtained. Appeal from judgment of the Court of Appeal (11 Ont. L.R. 171) quashed. CANADA CARRIAGE CO. *v.* LEA. 672

10——*Title to land—Ambiguous description of grantee — "Greek Catholic Church" — Evidence — Construction of deed—Reversal of concurrent findings.* 177

See TITLE TO LAND 3.

11——*Judicial sale of railways—Interested bidder—Disqualification as purchaser — Counsel and solicitors — Art. 1484 C.C.—Construction of statute—Review by appellate court—Discretionary order—4 & 5 Edw. VII. c. 158 (D.)—Public policy.* .303

See RAILWAYS 3.

ARBITRATION—*Expropriation of land — Arbitration — Authority for submission—Trespass—2 Edw. VII. c. 104 (N.S.).*] By statute in Nova Scotia if land is taken for railway purposes the compensation therefor, and for earth, gravel, etc., removed shall be fixed by arbitrators, one chosen by each party and the third, if required, by those two. A railway company intending to expropriate, their engineer wrote to M., who had acted for the company in other cases, instructing him to ascertain if the owners had arranged their title so that the arbitration could proceed and, if so, to ask them to nominate their man who, with M., could appoint a third if they could not agree. The engineer added, "I will send an agreement of arbitration which each one can subscribe to or, if they have one already drafted, you can forward it here for approval." No such agreement was sent by, or forwarded to, the engineer, but the three arbitrators were appointed and made an award on which the owners of the land brought an action. *Held,* reversing the judgment appealed from (38 N.S. Rep. 80), that as the company had not taken the preliminary steps required by the statute which, therefore, did not govern the arbitration proceedings, the award was void for want of a proper

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submission. INVERNESS RWAY. AND COAL CO. *v.* McISAAC.............134

AND *see* EXPROPRIATION 2.

2——*Watercourses — Riparian rights — Expropriation — Trespass — Torts — Diversion of natural flow—Injurious affection—Damages—Execution of statutory powers — Injunction—Mandamus—Construction of statute*—59 *V. c.* 44 (*N.S.*)..........................464

See RIVERS AND STREAMS 1.

ASSESSMENT AND TAXES—*Construction of statute—"Marsh Act," R.S.N.S.* 1900, *c.* 66, *ss.* 22, 66—*Jurisdiction of marsh commissioners — Assessment of lands — Certiorari — Limitation for granting writ—Practice—Expiration of time—Delays occasioned by judge—Legal maxim—Order nunc pro tunc.*] Where a statute authorizing commissioners to assess lands provided that no writ of certiorari to review the assessment should be granted after the expiration of six months from the initiation of the commissioners' proceedings: *Held*, Girouard, J., dissenting, that an order for the issue of a writ of certiorari made after the expiration of the prescribed time was void notwithstanding that it was applied for and judgment on the application reserved before the time had expired.—*Held, per* Taschereau, C.J.—That where jurisdiction has been taken away by statute, the maxim *actus curiæ neminem gravabit* cannot be applied, after the expiration of the time prescribed, so as to validate an order either by antedating or entering it *nunc pro tunc;* that, in the present case, the order for certiorari could issue as the impeachment of the proceedings of the inferior tribunal was sought upon the ground of want of jurisdiction in the commissioners but the appellants were not entitled to it on the merits. *Per* Girouard J. (dissenting).—Under the circumstances, the order in this case ought to be treated as having been made upon the date when judgment upon the application was reserved by the judge. Upon the merits, the appeal should have been allowed as the commissioners had no jurisdiction in the absence of proper notices as required by the twenty-second section of the "Marsh Act," R.S.N.S. 1900, c. 66. *Per* Davies J.—The statute

ASSESSMENT AND TAXES—*Continued.*

allows any person aggrieved by the proceedings of the commissioners to remove the same into the Supreme Court by certiorari; the claim for the writ on the ground of jurisdiction was either abandoned or unfounded; and the statutory writ could not issue after the six months had expired. IN RE TRECOTHIC MARSH..........................79

2——*County school fund—Contributions by incorporated towns—Construction of statute*—3 *Edw. VII. c.* 6, *s.* 7.] The Supreme Court of Nova Scotia held (38 N.S. Rep. 1) that the town of Dartmouth was liable to contribute proportionately towards the School Fund of the County of Halifax for the year 1904. Without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal with costs. TOWN OF DARTMOUTH *v.* COUNTY OF HALIFAX..........................514

BIAS—*New trial—Judgment in court below on motion—Equal division—Appeal—Jurisdiction—Charge to jury—Misdirection*..........................532

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BIDDER—*Judicial sale of railways—Interested bidder — Disqualification as purchaser—Counsel and solicitors—Art.* 1484 *C.C.—Construction of statute—Review by appellate court—Discretionary order*—4 & 5 *Edw. VII. c.* 158 (*D.*)—*Public policy*..........................303

See RAILWAYS 3.

BILLS AND NOTES—*Promissory note—Deposit receipt — Notice — Demand for payment—Action.*] In an action on an instrument in the following form:—"1,200. Edmundston, N.B., July 12th, 1899. Received from the Reverend N. P. Babineau the sum of twelve hundred dollars, for which I am responsible, with interest at the rate of seven per cent. per annum, upon production of this receipt and after three months' notice. Fred. LaForest." The court below held (37 N.B. Rep. 156) that the plaintiff could recover as for a promissory note and that a demand for immediate payment more than three months before the action was a sufficient notice. Without calling upon counsel for the respondent,

BILLS AND NOTES—*Continued.*

the Supreme Court of Canada dismissed the appeal. LAFOREST *v.* BABINEAU-**521**

2——*Suretyship — Collateral deposit — Ear-marked fund—Appropriation of proceeds—Set-off—Release of principal debtor—Constructive fraud—Discharge of surety—Right of action—Common counts —Equitable recourse*. **331**

See PRINCIPAL AND SURETY.

BOARD OF RAILWAY COMMISSIONERS —*Jurisdiction — Construction of subway—Apportionment of cost—Person interested or affected—Street railway—Agreement with municipality.*] The power of the Board of Railway Commissioners, under section 186 of the "Railway Act, 1903," to order a highway to be carried over or under a railway is not restricted to the case of opening up a new highway, but may be exercised in respect to one already in existence.—The application for such order may be made by the municipality as well as by the railway company. OTTAWA ELECTRIC RY. CO. *v.* CITY OF OTTAWA AND CANADA ATLANTIC RY. CO. **354**

AND *see* RAILWAYS 4.

2——*Jurisdiction — Appeal to Supreme Court.*] The Board of Railway Commissioners granted an application of the James Bay Railway Co. for leave to carry their line under the track of the G. T. Ry. Co. but, at the request of the latter, imposed the condition that the masonry work of such under crossing should be sufficient to allow of the construction of an additional track on the line of the G. T. Ry. Co. No evidence was given that the latter company intended to lay an additional track in the near future or at any time. The James Bay Co., by leave of a judge, appealed to the Supreme Court of Canada from the part of the order imposing such terms, contending that the same was beyond the jurisdiction of the Board. *Held*, that the Board had jurisdiction to impose said terms. *Held, per* Sedgewick, Davies and Maclennan JJ., that the question before the court was rather one of law than of jurisdiction and should have come up on appeal by leave of the Board or been carried before the Gover-

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nor General in Council. JAMES BAY RY. CO. *v.* GRAND TRUNK RY. CO. **372**

AND *see* RAILWAYS 5.

3——*Jurisdiction — Traffic accommodation—Restoring connections—3 Edw. VII. c.* 58, *ss.* 176, 214, 253.] On an application to the Board of Railway Commissioners for Canada, under the provisions of the "Railway Act, 1903," for a direction that a railway company should replace a siding, where traffic facilities had been formerly provided for the respondents with connections upon their lands, and for other appropriate relief for such purposes: *Held*, that, under the circumstances, the Board had jurisdiction to make an order directing the railway company to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch and receipt of freight in carloads over, to and from the line of railway. CANADIAN NORTHERN RY. CO. *v.* ROBINSON. **541**

4——*Protection of crossings—Party interested—"Railway Act,"* 1888, *ss.* 187, 188—*"Railway Act,* 1903," *ss.* 186, 187—*Legislative powers*. **232**

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BORNAGE—*Title to land—Ownership—Artificial watercourse — Canal banks — Trespass — Possessory action — Practice.* **668**

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BROKER—*Purchase on margin — Nonpayment—Sale without notice—Liability of customer—Damages.* SUTHERLAND *v.* SECURITIES HOLDING CO. **694**

2——*Principal and agent — Sale of land—Authority to make contract—Specific performance*. **422**

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CANADIAN WATERS — *Three-mile-zone —Fishing by foreign vessels—Legislative jurisdiction—Seizure on high seas—Pursuit beyond territorial limit—International law — Constitutional law — Construction of statute—B.N.A. Act,* 1867, *s.* 91, *s.-s.* 12—*R.S.C. c.* 94, *ss.* 2, 3, 4—*Sea coast fisheries*. **385**

See CONSTITUTIONAL LAW 2.

CANAL—*Title to land—Ownership of banks—Artificial watercourse—Trespass—Possessory action—Bornage—Practice.*] The ownership of a canal serving as a tail-race for a water-mill naturally involves the ownership of the banks of the canal and the right to make use thereof for the purpose of maintaining the tail-race in efficient condition. DELISLE *v.* ARCAND................668

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2——*Lease — Water-power — Improvements on canal—Temporary stoppage of power—Compensation—Total stoppage—Measure of damages—Loss of profits*.259
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CASES—*Abrath* v. *The North Eastern Rway. Co.* (11 Q.B.D. 440), referred to. 676
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2——*Ames* v. *Sutherland* (9 Ont. L.R. 631; 11 Ont. L.R. 417) affirmed.....694
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3——*Association St. Jean Baptiste* v. *Brault* (30 Can. S.C.R. 598) followed. 613
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4——*Aurora, Town of,* v. *Village of Markham* (32 Can. S.C.R. 457) *applied by Davies J*......................672
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5——*Babineau* v. *LaForest* (37 N.B. Rep. 156) affirmed................521
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6——*Beach* v. *The King* (9 Ex. C.R. 287) affirmed....................259
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7——*Beauharnois Election Case* (32 Can. S.C.R. 111) followed...............601
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8——*Bell* v. *Corporation of Quebec* (5 App. Cas. 84) followed.............577
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9——*Bell* v. *Winnipeg Electric Street Railway Co.* (15 Man. R. 338) affirmed. 515
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10——*Birks* v. *Kirkpatrick* (Q.R. 14 K.B. 287), leave to appeal refused..512
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11——*Cairns* v. *Murray* (37 N.S. Rep. 451) affirmed 163
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12——*Canada Carriage Co.* v. *Lea* (11 Ont. L.R. 171) appeal quashed.....672
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13——*Chamberlain Metal Weather Strip Co.* v. *Peace* (9 Ex. C.R. 399) affirmed. 530
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14——*Continental Trust Co.* v. *Mineral Products Co.* (37 N.B. Rep. 140; 3 N.B. Eq. 28) affirmed..................517
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15——*Copeland-Chatterson Co.* v. *Hatton* (10 Ex. C.R. 224) affirmed.........651
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16——*Craigellachie Glenlivet Distillery Co.* v. *Bigelow* (37 N.S. Rep. 482) affirmed. 55
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17——*Gibb* v. *McMahon* (9 Ont. L.R. 522) affirmed....................362
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18——*Gilmour* v. *Simon* (15 Man. Rep. 205) affirmed....................422
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19——*Great Western Ry. Co.* v. *Braid* (11 Moo. P.C. (N.S.) 101) followed..632
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20——*Halifax, County of,* v. *Town of Dartmouth* (38 N.S. Rep. 1) affirmed.514
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21——*Hutchings* v. *National Life Assce. Co.* (38 N.S. Rep. 15) affirmed.....124
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22——*The King* v. *The Ship "North"* (11 B.C. Rep. 473) affirmed........385
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23——*Lasell* v. *Hannah* (11 B.C. Rep. 466) affirmed. 324
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24——*Lefaivre* v. *Attorney-General of Quebec* (Q.R. 14 K.B. 115) reversed and trial court judgment (Q.R. 25 S.C. 104) restored. 577
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25——*London and Lancashire Life Assce. Co.* v. *Fleming* ([1897] A.C. 499) referred to. 124
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26——*Manufacturers Accident Ins. Co.* v. *Pudsey* (27 Can. S.C.R. 374) distinguished. 124
See Insurance, Life 1.

27——*Metallic Roofing Co.* v. *City of Toronto* (3 Ont. W.R. 646; 6 Ont. W.R. 656) varied. .692
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28——*Milne* v. *Yorkshire Guarantee and Securities Co.* (11 B.C. Rep. 402) reversed. 331
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29——*Miner* v. *Gilmour* (12 Mo. P.C. 131) referred to. 657
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30——*Minister of Railways and Canals* v. *Quebec Southern Rway. Co.* (10 Ex. C.R. 139) affirmed. 303
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31——*Montreal Street Rway. Co.* v. *Deslongchamps* (Q.R. 14 K.B. 355) affirmed. 685
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32——*McIsaac* v. *Beaton* (38 N.S. Rep. 60) affirmed. 143
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33——*McIsaac* v. *County of Inverness* (38 N.S. Rep. 76) affirmed. 75
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34——*McIsaac* v. *Inverness Rway. and Coal Co.* (38 N.S. Rep. 80) reversed. .134
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35——*O'Connor* v. *Halifax Tramway Co.* (38 N.S. Rep. 212) affirmed. 523
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36——*Parent* v. *Quebec North Shore Turnpike Road Trustees* (31 Can. S.C.R. 556) followed. 668
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37——*Price* v. *Tanquay* (Q.R. 14 K.B. 513) reversed. .657
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38——*Provincial Fisheries Case* (26 Can. S.C.R. 444; [1898] A.C. 700) discussed. 577
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39——*The Queen* v. *Robertson* (6 Can. S.C.R. 52) referred to. 577
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40——*Saunby* v. *Water Commissioners of London* ([1906] A.C. 110) followed. 464
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41——*St. George Pulp and Paper Co.* v. *Rose* (37 N.B. Rep. 247). 687
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42——*St. James Election Case* (33 Can. S.C.R. 137) followed. 601
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43——*St. Onge* v. *Shawinigan Carbide Co.* (Q.R. 15 K.B. 5) affirmed. 688
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44——*Steadman* v. *Robertson* (18 N.B. Rep. 580) referred to. 577
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45——*Tattersall* v. *People's Life Ins. Co.* (9 Ont. L.R. 611; 11 Ont. L.R. 326) affirmed. 690
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46——*Thorne* v. *Bustin* (37 N.B. Rep. 163) reversed 532
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47——*Toronto, City of* v. *Toronto Rway. Co.* (10 Ont. L.R. 657) varied. 430
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48——*Toussignant* v. *County of Nicolet* (32 Can. S.C.R. 353) followed......321
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49——*Union Assurance Co.* v. *The Quebec Railway, Light and Power Company* (Q.R. 28 S.C. 289) affirmed........676
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50——*Wallace* v. *Temiskaming and Northern Ontario Rway. Co.* (12 Ont. L.R. 126) affirmed, without adopting reasons of court appealed from.....696
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CERTIORARI—*Construction of statute —"Marsh Act," R.S.N.S.* 1900, *c.* 66, *s.* 22, 66—*Jurisdiction of marsh commissioners—Assessment of lands—Limitation for granting writ—Practice—Expiration of time—Delays occasioned by judge—Legal maxim—Order nunc pro tunc.*] Where a statute authorizing commissioners to assess lands provided that no writ of certiorari to review the assessment should be granted after the expiration of six months from the initiation of the commissioners' proceedings: *Held*, Girouard J. dissenting, that an order for the issue of a writ of certiorari made after the expiration of the prescribed time was void, notwithstanding that it was applied for and judgment on the application reserved before the time had expired. *Held, per* Taschereau, C.J. —That where jurisdiction has been taken away by statute, the maxim *actus curiæ neminem gravabit* cannot be applied, after the expiration of the time prescribed, so as to validate an order either by antedating or entering it *nunc pro tunc;* that, in the present case, the order for certiorari could issue as the impeachment of the proceedings of the inferior tribunal was sought upon the ground of want of jurisdiction in the commissioners, but the appellants were not entitled to it on the merits. *Per* Girouard J. (dissenting).—Under the circumstances, the order in this case ought to be treated as having been made upon the date when judgment upon the application was reserved by the judge. Upon the merits, the appeal should be allowed as the commissioners had no jurisdiction in the absence of proper notices as required by the twenty-second

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section of the "Marsh Act," R.S.N.S. 1900, c. 66. *Per* Davies J.—The statute allows any person aggrieved by the proceedings of the commissioners to remove the same into the Supreme Court by certiorari; the claim for the writ on the ground of jurisdiction was either abandoned or unfounded; and the statutory writ could not issue after the six months had expired. IN RE TRECOTHIC MARSH. 79

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2——*Art.* 560 *C.C.* (*Servitudes*)....321
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3——*Art.* 663 (*Successions*)........512
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4——*Arts.* 400, 414, 503 (*Property, Ownership, Servitude*)............577
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COMMUNITY — *Practice — Pleading — Amendment ordered by court—Married woman—Legal community—Right of action—Reprise d'instance—Arts.* 78, 174, 176 *C.P.Q.—R.S.C. c.* 135, *ss.* 63, 64. NORTH SHORE POWER CO. *v.* DUGUAY.624

COMPANY LAW—*Act of directors—Unauthorized expenditure—Liability of innocent directors.*] The directors of a limited company, without authority from the

COMPANY LAW—*Continued.*

shareholders, passed a resolution providing that, in consideration of a firm of which two directors were members carrying on business of a similar character continuing the same until the company could take it over, the company indemnified it from all loss occasioned thereby. K. and F., two members of the firm, refused their assent to the terms of this resolution and declared their intention, of which the majority of the directors were made aware, to retire from the firm. F. subsequently wrote to the president and another director reiterating her intention to retire and declared that she would not be responsible for any further liability. The company afterwards took over the business of the firm, paying therefor $30,000 and receiving assets worth $12,000, and having eventually gone into liquidation the liquidator brought an action to recover from the members of the firm the difference. The Court of Appeal held that K. and F. were not liable though their partners were. *Held*, that K. and F., having received the benefit of the money paid by the company, were also liable to repay the loss. WADE *v.* KENDRICK........**32**

2——*Incorporation—Secret arrangement—Illegal consideration for shares—Fraud—Breach of trust.*] With a view to concealing the financial difficulties of a mining company and securing control of its property, the manager entered into a secret arrangement with the respondent whereby the latter was to acquire the liabilities, obtain judgment thereon, bring the property to sale under execution and purchase it for a new company to be organized in which the respondent was to have a large interest. The manager, who was a creditor of the company, was to have his debt secured and to receive an allotment of shares in the new company proportionate to those held by him in the old company and he agreed that he would not reveal this understanding to the other shareholders. *Held*, affirming the judgment appealed from (11 B.C. Rep. 466) Sedgewick J. dissenting, that the agreement could not be enforced as the consideration was illegal and a breach of trust by which the other shareholders were defrauded. LASELL *v.* HANNAH......**324**

CONSTITUTIONAL LAW—*Parliament—Power to legislate—Railways—Railway Act,* 1888, *ss.* 187, 188—*Protection of crossings — Party interested — Railway committee—Board of Railway Commissioners—"Railway Act,* 1903."] Sections 187 and 188 of the "Railway Act, 1888," empowering the Railway Committee of the Privy Council to order any crossing over a highway of a railway subject to its jurisdiction to be protected by gates or otherwise, are *intra vires* of the Parliament of Canada. Idington J. dissenting. (Sections 186 and 187 of the "Railway Act, 1903," confer similar powers on the Board of Railway Commissioners.) These sections also authorize the committee to apportion the cost of providing and maintaining such protection between the railway company and "any person interested." *Held*, Idington J. dissenting, that the municipality in which the highway crossed by the railway is situate is a "person interested" under said sections. CITY OF TORONTO *v.* GRAND TRUNK RY. CO....**232**

2——*Canadian waters—Three-mile-zone—Fishing by foreign vessels—Legislative jurisdiction—Seizure on high seas—Pursuit beyond territorial limit—International law—Constitutional law—B.N.A. Act,* 1867, *s.* 91, *s.-s.* 12—*Sea-coast fisheries—R.S.C. c.* 94, *ss.* 2, 3, 4.] Under the provisions of the British North America Act, 1867, s. 91, s.-s. 12, the Parliament of Canada has exclusive jurisdiction to legislate with respect to fisheries within the three-mile-zone off the sea-coasts of Canada. A foreign vessel found violating the fishery laws of Canada within three marine miles off the sea-coasts of the Dominion may be immediately pursued beyond the three-mile-zone and lawfully seized on the high seas. Girouard J. dissenting. The judgment appealed from (11 B.C. Rep. 473) was affirmed. THE SHIP "NORTH" *v.* THE KING.........................**385**

CONTRACT—*Sale of goods—Contract by correspondence—Statute of Frauds—Delivery—Principal and agent—Statutory prohibition—Illicit sale of intoxicating liquors—Knowledge of seller—Validity of contract.*] B., a trader, in Truro, N.S., ordered goods from a company in Glasgow, Scotland, through its agents, in Halifax, N.S., whose authority was limited to receiving and transmitting such

CONTRACT—*Continued.*

orders to Glasgow for acceptance. B.'s order was sent to and accepted by the company and the goods delivered to a carrier in Glasgow to be forwarded to B. in Nova Scotia. *Held*, affirming the judgment appealed from (37 N.S. Rep. 482) Idington J. dissenting, that the contract was made and completed in Glasgow.—Where a contract was made and completed in Glasgow, Scotland, for the sale of liquor by parties there to a trader in a county in Nova Scotia where liquor was forbidden by law to be sold on pain of fine or imprisonment and the vendors had no actual knowledge that the purchaser intended to re-sell the liquors illegally, the contract was not void and the vendors could recover the price of the goods. BIGELOW *v.* CRAIGELLACHIE GLENLIVET DISTILLERY CO. 55

2——*Municipal corporation — Railway aid—Construction of agreement—Expropriation—Description of lands—Reference to plans—R.S.N.S.* 1900, *c.* 99—3 *Edw. VII. c.* 97 (*N.S.*).] A municipality passed a resolution by which it agreed to pay for lands required for the right of way, station grounds, sidings and other purposes of a railway as shewn upon a plan filed under the provisions of the general railway Act. At the time of the resolution there were four such plans filed, each shewing a portion of the land proposed to be taken for these purposes and including, in the aggregate, a greater area than could be expropriated for right of way and station grounds under the provisions of the Acts applicable to the undertaking of the railway company. The Legislature passed an Act confirming such resolution. To an action by the owner of the land taken, on an award fixing the value of that in excess of what could be so expropriated, the corporation pleaded no liability on account of such excess and also, that there was no specific plan on file describing the land. *Held*, affirming the judgment appealed from (38 N.S. Rep. 76) that the first defence failed because of the Act confirming the resolution and, as to the second, that the four plans should be read together and considered to be the plan referred to in such resolution. COUNTY OF INVERNESS *v.* MCISAAC. 75

CONTRACT—*Continued.*

3——*Trust—Co-trustees—Joint action—Delegation of trust.*] A trustee in Toronto wrote to a co-trustee in St. Mary's stating that an offer had been made to purchase a portion of the trust estate for $12,000 and giving reasons why it should be accepted. The co-trustee replied concurring in said reasons and consenting to the proposed sale. The Toronto trustee afterwards had negotiations with the solicitors of G. and at their suggestion offered to sell the same property to G. for $13,000, but without further notice to his co-trustee. The offer was accepted by the solicitors, whereupon the party who had offered $12,000 raised his offer to $14,000 and the trustee notified the solicitors of G. that the sale to him was cancelled. In a suit by G. for specific performance: *Held*, affirming the judgment of the Court of Appeal (9 Ont. L.R. 522) that the letter written by the co-trustee in St. Mary's contained a consent to the particular sale mentioned therein only and could not be construed as a general consent to a sale to any person even for a higher price. Even if it could there were circumstances which occurred between the time it was written and the signing of the contract with G., which should have been communicated to the co-trustee before he could be bound by said contract. GIBB *v.* MCMAHON. 362

4——*Principal and agent—Sale of land—Authority to make contract—Specific performance.*] The defendant gave a real estate agent the exclusive right within a stipulated time, to sell, on commission, a lot of land for $4,270 (the price being calculated at the rate of $40 per acre on its supposed area), an instalment of $1,000 to be paid in cash and the balance, secured by mortgage, payable in four annual instalments. The agent entered into a contract for sale of the lot to the plaintiff at $40 per acre, $50 being deposited on account of the price, the balance of the cash to be paid "on acceptance of title," the remainder of the purchase money payable in four consecutive yearly instalments and with the privilege of "paying off the mortgage at any time." This contract was in the form of a receipt for the deposit and signed by the broker as agent for the defendant. *Held*, affirming the judg-

CONTRACT—*Continued.*

ment appealed from (15 Man. Rep. 205) that the agent had not the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal.—*Held,* further, that the term allowing the privilege of paying off the mortgage at any time was not authorized and could not be enforced against the defendant. GILMOUR *v.* SIMON **422**

5——*Breach of conditions — Liquidated damages—Penalty—Cumulative remedy—Operation of tramway—Construction and location of lines—Use of highways—Car service—Time-tables—Municipal control — Territory annexed after contract — Abandonment of monopoly*—55 *V. c.* 99 (*Ont.*).] Except where otherwise specially provided in the agreement between the Toronto Railway Company and the City of Toronto set forth in the schedules to chapter 99 of the statutes of Ontario, 55 V., in 1892, the right of the city to determine, decide upon and direct the establishment of new lines of tracks and tramway service, in the manner therein prescribed, applies only within the territorial limits of the city as constituted at the date of the contract. Judgment appealed from (10 Ont. L.R. 657) reversed, Girouard J. dissenting.—The city, and not the company, is the proper authority to determine, decide upon and direct the establishment of new lines, and the service, time-tables and routes thereon. Judgment appealed from affirmed, Sedgewick J. dissenting.—As between the contracting parties, the company, and not the city, is the proper authority to determine, decide upon and direct the time at which the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heated. Judgment appealed from reversed, Girouard J. dissenting.—Upon the failure of the company to comply with requisitions for extensions as provided in the agreement, it has no right of action against the city for grants of the privilege to others; the right of making such grants accrues, *ipso facto,* to the city, but is not the only remedy which the city is entitled to invoke. Judgment appealed from affirmed, Sedgewick J. dissenting.—Cars starting out before midnight as day cars may be required by the city to complete their routes, although it may be necessary for them to run after midnight or transfer their passengers to a car which would carry them to their destinations without payment of extra fares, but at midnight their character would be changed to night cars and all passengers entering them after that hour could be obliged to pay night fares. Sedgewick J. dissenting. TORONTO RY. CO. *v.* CITY OF TORONTO. **430**

6——*Street railway—Carriage of passengers—Contract—Continuous passage.*] The plaintiff wished to proceed to a certain part of Halifax and, when a car came along labelled as going in the required direction, boarded a trailer attached to it which, however, was not so labelled. There was an unusual amount of travel on the street cars that day and when the car containing plaintiff had proceeded a certain distance it was stopped and the passengers informed that it would not go farther in that direction. The plaintiff insisted on his right to be carried to his destination in that car, refused a transfer and hired a cab. In an action for damages the courts below held (38 N.S. Rep. 212) that there was no obligation on the company's part to carry plaintiff to his destination on that particular car, that it was his duty to inquire of the conductor and ascertain where such car was going and he could not recover. This judgment was affirmed, Idington J. dissenting. O'CONNOR *v.* HALIFAX TRAMWAY CO............**523**

7——*Construction of deed—Ambiguity—Discharge of debtor—Illegal consideration—Right of action.*] Where the language of an instrument is ambiguous or obscure, the intention of the parties should be ascertained by consideration of the circumstances attending the execution of the agreement.—A deed of settlement between B. and a bank declared that he owed the bank $4,731.61 for interest on an advance in respect to a lottery scheme and a further sum of $18,762.02 for advances on an account for the purchase of stock, two notes being given for these amounts, respectively, and the shares of stock being pledged as security for the large note only. Subsequently, the directors of the bank

CONTRACT—*Continued.*

passed a resolution authorizing the discharge of B., on payment of $15,000 by one V., *"jusqu'a concurrence de la dite somme de* $15,000" and the transfer of the shares to V. This resolution was followed by a deed of compromise, V. paying the $15,000 and obtaining a transfer of the shares, and it was thereby declared that, by the transaction, B. was discharged in so far as concerned the bank's advances on the stock account *"vis-à-vis la banque des avances qu'elle lui a faites du chef susdit mentionnées en un acte de règlement," etc.*, the resolution being annexed and the deed of settlement referred to for imputation of the payment, and V. was to become creditor of B. under conditions mentioned, *"jusqu'à concurrence de* $15,000," the note which had not become due and the securities being allowed to remain in possession of the bank. In an action by D. to whom the notes held by the bank were assigned: *Held,* reversing the judgment appealed from, that the effect of the deed of compromise was to discharge B. merely to the extent of the $15,000 on account of the larger note; and further, affirming the judgment appealed from, that no action could lie upon the smaller note as it represented interest on a claim in relation to a contract of an illegal nature. *L'Association St. Jean Baptiste* v. *Brault* (30 Can. S.C.R. 598) followed. DESERRES *v.* BRAULT . **613**

8——*Patent of invention—Infringement of patent—Sale for a reasonable price—Use of patented device—"Patent Act," R.S.C c. 61, s. 37—Evidence.*] The patentee of a device for binding loose sheets sold the defendant H. binders subject to the condition that they should be used only in connection with sheets supplied by or under the authority of the patentee. H. used the binders with sheets obtained from the other defendants, contrary to the condition. In an action for infringement of the patent: *Held,* that the condition in the contract with H. imposing the restriction upon the manner in which he should use the binders was not a contravention of the provisions of section 37 of the "Patent Act," R.S.C. c. 61, in respect to supplying the patented invention at a reasonable price to persons desiring to use it, and that the use so made of the binders by H. was in breach of the condition of the contract licensing him to make use of the patented device and an infringement of the patent. Judgment appealed from (10 Ex. C.R. 224) affirmed. HATTON *v.* COPELAND-CHATTERSON CO.... **651**

9——*Sale of pulp wood—Measurement—Scaling of timber.* THE ST. GEORGE PULP AND PAPER CO *v.* ROSE....... **687**

10——*Construction of building—Work and materials—Faulty work—Extras—Dismissal.* METALLIC ROOFING CO. *v.* CITY OF TORONTO.................. **692**

11——*Supply of material — Payment—Certificate of engineer—Condition precedent — Improper interference — Fraud—Hindering performance of condition — Monthly estimate—Final decision.*. TEMISKAMING AND NORTHERN ONTARIO RY. CO. *v.* WALLACE................... **696**

12——*Incorporation of company—Secret agreement — Illegal consideration for Shares—Fraud—Breach of trust*..... **324**
See COMPANY LAW 2.

13——*Jurisdiction of Board of Railway Commissioners—Construction of subway—Apportionment of cost—Person interested or affected—Street railway—Agreement with municipality*............ **354**
See RAILWAYS 4.

14——*Cause of action — Limitation of actions—Foreign judgment—Yukon Ordinance, c. 31 of 1890—Statute of James—Statute of Anne—Lex fori—Lex loci contractus—Absence of debtor*...... **546**
See LIMITATION OF ACTIONS.

CONTROVERTED ELECTIONS.
See ELECTION LAW.

COUNSEL — *Judicial sales — Interested bidders—Disqualification as purchaser—Art. 1484 C.C.—Public policy.*] Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by article 1484 of the Civil Code of Lower Canada. Judgment appealed from (10 Ex. C.R. 139) affirmed. RUTLAND RAILROAD CO. *v.* BÉIQUE; WHITE *v.* BÉIQUE; MORGAN *v.* BÉIQUE.
.... **303**
AND *see* RAILWAYS 3.

CROWN—*Lease — Canal — Water-power — Improvements on canal — Temporary stoppage of power—Compensation—Total stoppage—Measure of damages—Loss of profits*. 259

See LEASE 1.

CROWN LANDS——*Title to land —Ambiguous description of grantee—"Greek Catholic Church"—Evidence—Construction of deed—Reversal of concurrent findings*. 177

See TITLE TO LAND 3.

2——*Equitable mortgage — Mines and minerals — Lease of mining lands — Sheriff's sale — Purchase by judgment creditor of mortgagee—Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B.* (1903), *c.* 30, *s.* 139. 517

See MINES AND MINERALS.

3——*Rivers and streams—Navigable and floatable waters—Obstructions to navigation—Letters patent of grant—Evidence—Collateral circumstances leading to grant—Limitation of terms of grant—Title to land—Riparian rights—Fisheries—Arts.* 400, 414, 503 *C.C.*. 577

See RIVERS AND STREAMS 2.

DAMAGES—*Lease—Canal—Water-power —Improvements on canal—Temporary stoppage of power—Compensation—Total stoppage—Measure of damages—Loss of profits.*] A mill was operated by water-power taken from the surplus water of the Galops Canal under a lease from the Crown. The lease provided that in case of a temporary stoppage in the supply caused by repairs or alterations in the canal system the lessee would not be entitled to compensation unless the same continued for six months, and then only to an abatement of rent. *Held*, Idington J. *dubitante*, that a stoppage of the supply for two whole seasons necessarily and *bonâ fide* caused by alterations in the system was a temporary stoppage under this provision. The lease also provided that, in case the flow of surplus water should at any time be required for the use of the canal or any public purpose whatever, the Crown could, on giving notice to the lessee, cancel the lease in which case the lessee should be entitled to be paid the value of all the buildings and fixtures thereon

DAMAGES—*Continued.*

belonging to him with ten per cent. added thereto. The Crown unwatered the canal in order to execute works for its enlargement and improvement, contemplating at the time only a temporary stoppage of the supply of water to the lessee, but later changes were made in the proposed work which caused a total stoppage and the lessee, by petition of right, claimed damages.—*Held*, Girouard J. dissenting, that as the Crown had not given notice of its intention to the lease the lessee was not entitled to the damages provided for in case of cancellation.—*Held*, also, that the lessee was not entitled to damages for loss of profits during the time his mill was idle owing to the water being out of the canal. Judgment of the Exchequer Court (9 Ex. C.R. 287) affirmed, Girouard and Idington JJ. dissenting. BEACH *v.* THE KING. 259

2——*Watercourses — Riparian rights — Expropriation—Trespass—Torts—Diversion of natural flow—Injurious affection—Damages.*] A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a watercourse may recover damages therefor and may also obtain relief by injunction restraining the continuation of the tortious acts so committed. LEAHY *v.* TOWN OF NORTH SYDNEY. 464

AND *see* RIVERS AND STREAMS 1.

DEBTOR AND CREDITOR—*Construction of deed—Ambiguity—Discharge of debtor—Contract — Illegal consideration — Right of action.*] Where the language of an instrument is ambiguous or obscure, the intention of the parties should be ascertained by consideration of the circumstances attending the execution of the agreement.—A deed of settlement between B. and a bank declared that he owed the bank $4,731.61 for interest on an advance in respect to a lottery scheme and a further sum of $18,762.02 for advances on an account for the purchase of stock, two notes being given for these amounts, respectively, and the shares of stock being pledged as security for the large note only. Subsequently, the directors of the bank passed a resolution authorizing the discharge of B., on payment of $15,000 by one V.,

DEBTOR AND CREDITOR—*Continued.*

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2——*Suretyship — Collateral deposit — Ear-marked fund—Appropriation of proceeds—Set-off—Release of principal debtor—Constructive fraud—Discharge of surety—Right of action—Common counts —Equitable recourse*. 331

See PRINCIPAL AND SURETY.

3——*Equitable mortgage — Mines and Minerals — Lease of mining lands — Sheriff's sale — Purchase by judgment creditor of mortgagee—Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B.* (1903), *c.* 30, *s.* 139..........................517

See MINES AND MINERALS.

4——*Cause of action—Limitation of actions—Contract—Foreign judgment—Yukon Ordinance, c.* 31 *of* 1890*—Statute of James—Statute of Anne—Lex fori—Lex loci contractus—Absence of debtor.* 546

See LIMITATION OF ACTIONS.

DEDICATION — *Highway* — *Conveyance —Acceptance by public—User.*] An action was brought by the City of Toronto against the G. T. Ry. Co. to determine whether or not a street crossed by the railway was a public highway prior to 1857, when the company obtained its right of way. It appeared on the hearing that, in 1850, the Trustees of the General Hospital conveyed land adjoining the street describing it in the deed as the western boundary of allowance for road, and in another conveyance, made in 1853, they mention in the description a street running south along said lot. Subsequent conveyances of the same land prior to 1857 also recognized the allowance for a road. *Held*, Idington J. dissenting, that the said conveyances were acts of dedication of the street as a public highway—The first deed executed by the Hospital Trustees, and a plan produced at the hearing, shewed that the street extended across the railway track and down to the River Don, but at the time the portion between the track and the river was a marsh. Evidence was given of use by the public of the street down to the edge of the marsh. —*Held*, Idington J. dissenting, that the use of such portion was applicable to the whole dedicated road down to the river, and the evidence of user was sufficient to shew an acceptance by the public of the highway. GRAND TRUNK RAILWAY COMPANY v. CITY OF TORONTO. 210

DEED—*Title to land—Ambiguous description of grantee—"Greek Catholic Church" — Evidence — Construction of deed—Reversal of concurrent findings.*] Where Crown lands were granted "in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake," N.W.T., and it appeared that this description was ambiguous and might mean either the Greek Orthodox Church or the Greek Church in communion with the Church of Rome, it was held that the construction of the grant should be determined by the facts and circumstances antecedent to and attending the issue of the grant and that, in view of the evidence adduced, the words did not mean a church united with the Roman Catholic Church and subject to the jurisdiction of the Pope. Judgment appealed from reversed, the Chief Justice and Girouard J. dissenting

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on the ground that the concurrent findings of the courts below upon matters of fact ought not to be disturbed. POLUSHIE *v.* ZACKLYNSKI 177

2——*Highway — Dedication — Acceptance by public—User.*] An action was brought by the City of Toronto against the G. T. Ry. Co., to determine whether or not a street crossed by the railway was a public highway prior to 1857, when the company obtained its right of way. It appeared on the hearing that, in 1850, the Trustees of the General Hospital conveyed land adjoining the street describing it in the deed as the western boundary of allowance for road, and in another conveyance, made in 1853, they mention in the description a street running south along said lot. Subsequent conveyances of the same land prior to 1857 also recognized the allowance for a road.—*Held*, Idington J. dissenting, that the said conveyances were acts of dedication of the street as a public highway.—The first deed executed by the Hospital Trustees, and a plan produced at the hearing, shewed that the street extended across the railway track and down to the River Don, but at the time the portion between the track and the river was a marsh. Evidence was given of use by the public of the street down to the edge of the marsh.—*Held*, Idington J. dissenting, that the use of such portion was applicable to the whole dedicated road down to the river, and the evidence of user was sufficient to shew an acceptance by the public of the highway. GRAND TRUNK RWAY. CO. *v.* CITY OF TORONTO. 210

3——*Construction of deed—Ambiguity—Discharge of debtor—Contract—Illegal consideration—Right of action.*] Where the language of an instrument is ambiguous or obscure, the intention of the parties should be ascertained by consideration of the circumstances attending the execution of the agreement.—A deed of settlement between B. and a bank declared that he owed the bank $4,731.61 for interest on an advance in respect to a lottery scheme and a further sum of $18,762.02 for advances on an account for the purchase of stock, two notes being given for these amounts, respectively, and the shares of stock being pledged as security for the large note only. Subsequently, the directors of the bank passed a resolution authorizing the discharge of B., on payment of $15,000 by one V., *"jusqu'à concurrence de la dite somme de* $15,000," and the transfer of the shares to V. This resolution was followed by a deed of compromise, V. paying the $15,000 and obtaining a transfer of the shares, and it was thereby declared that, by the transaction, B. was discharged in so far as concerned the bank's advances on the stock account *"vis-à-vis la banque des avances qu'elle lui a faites du chef susdit mentionnées en un acte de règlement,"* etc., the resolution being annexed and the deed of settlement referred to for imputation of the payment, and V. was to become creditor of B. under conditions mentioned, *"jusqu'à concurrence de* $15,000," the note which had not become due and the securities being allowed to remain in possession of the bank. In an action by D. to whom the notes held by the bank were assigned: *Held*, reversing the judgment appealed from, that the effect of the deed of compromise was to discharge B. merely to the extent of the $15,000 on account of the larger note; and further, affirming the judgment appealed from, that no action could lie upon the smaller note as it represented interest on a claim in relation to a contract of an illegal nature. *L'Association St. Jean Baptiste* v. *Brault* (30 Can. S.C.R. 598) followed. DESERRES *v.* BRAULT. 613

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DELIVERY—*Sale of goods—Contract by correspondence — Statute of Frauds — Principal and agent—Statutory prohibition—Illicit sale of intoxicating liquors —Knowledge of seller—Validity of contract*. 55

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DILATORY EXCEPTION.

See EXCEPTION.

DISCHARGE.

See RELEASE.

DRAINAGE—*Construction of statute—"Marsh Act," R.S.N.S.* 1900, *c.* 66, *ss.* 22, 66—*Jurisdiction of Marsh Commis-*

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sioners—Assessment of lands—Certiorari—Limitation for granting writ—Practice—Expiration of time limit—Delays occasioned by judge—Legal maxim—Order nunc pro tunc....................79

See CERTIORARI.

EDUCATION—*Assessment and taxes—County School Fund—Contributions by incorporated towns — Construction of statute—3 Edw. VII. c. 6, s. 7 (N.S.).* 514

See ASSESSMENT AND TAXES 2.

ELECTION LAW—*Controverted election — Petition — Preliminary objections — Status of petitioner—Evidence—Premature service—Return of member.*] On the hearing of preliminary objections to an election petition the status of the petitioner may be established by oral evidence not objected to by the respondent. —A petition alleging "an undue election" or "undue return" of a candidate at an election for the House of Commons cannot be presented and served before the candidate has been declared elected by the returning officer. Girouard and Idington JJ. dissented. YUKON ELECTION CASE....................495

2——*Controverted election — Personal corruption—Charge in petition—Judge's report — Adjudication — Amendment — Evidence.*] On a charge of personal corruption by the respondent if the adjudication by the trial judges does not contain a formal finding of such corruption this court may insert it if the recitals and reasons given by the judges warrant it.—Respondent, the night before the election, took a sum of over $4,000 and divided it into several parcels of sums ranging from $250 to $1,500. He then, after midnight, visited all his committee rooms and gave to the chairman of each committee, personally and secretly, one of such parcels. His financial agent had no knowledge of this distribution and no evidence was produced of the application of the money to legitimate objects. *Held,* that the inference was irresistible, that the money was intended for corruption of the electors and respondent was properly held guilty of

ELECTION LAW—*Continued.*

personal corruption.—Allegations in the petition that respondent had himself given and procured, undertaken to give and procure money and value to electors and others named, his agents, to induce them to favour his election and vote for him, for the purpose of having such moneys and value employed in corrupt practice were sufficient to cover the offence of which the respondent was found guilty. ST. ANN'S ELECTION CASE. 563

3——*Controverted election — Commencement of trial—Extension of time.*]. An order fixing the time for the trial of an election petition at a date beyond the time prescribed under the Act operates as an enlargement of the time. *St. James Election Case* (33 Can. S.C.R. 137); *Beauharnois Election Case* (32 Can. S.C.R. 111), followed. HALIFAX ELECTION CASES....................601

4——*Controvered election—Trial of petition — Evidence — Corrupt acts at former election—Agency—System of corruption.*] A petition against the return of a member for the House of Commons at a general election in 1904 contained allegations of corrupt acts by respondent at the election in 1900 which were struck out on preliminary objections. On the trial of the petition evidence of payments by respondents of accounts in connection with the former election was offered to prove agency and a system and was admitted on the first ground. A question as to the amount of one account so paid was objected to and rejected. *Held,* that such rejection was proper; that the question was not admissible to prove agency for agency was admitted or proved otherwise; nor as proof of a system which could not be established by evidence of an isolated corrupt act.—*Held,* also, that where evidence is tendered on one ground other grounds cannot be set up in a Court of Appeal. SHELBURNE AND QUEEN'S ELECTION CASE...........604

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2——*Negligence—Electrical installations —Necessary protection of employees— Onus of proof—Voluntary exposure to danger.* SHAWINIGAN CARBIDE CO. *v.* ST. ONGE. 688

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EMPLOYERS LIABILITY—*Negligence— Electrical installations—Necessary protection of employees—Onus of proof— Voluntary exposure to danger.* SHAWINIGAN CARBIDE CO. *v.* ST. ONGE....688

ESTOPPEL—*Life insurance—Payment of premium—Thirty days' grace—Death of insured after premium due.* PEOPLE'S LIFE INS. CO. *v.* TATTERSALL......690

EVIDENCE—*Execution of will—Promoter—Evidence—Testamentary capacity.*] Where the promoter of, and a residuary legatee under, a will executed two days before the testator's death and attacked by his widow and a residuary legatee under a former will, the devise to the latter of whom was revoked, failed to furnish evidence to corroborate his own testimony that the will was read over to the testator who seemed to understand what he was doing, and there was a doubt under all the evidence of his testamentary capacity, the will was set aside.—Girouard J. dissenting, held that the evidence was sufficient to establish the will as expressing the wishes of the testator.—*Per* Davies J. The will should stand except the portion disposing of the residue of the estate, the devise of which, in the former will should be admitted to probate with it. BRITISH AND FOREIGN BIBLE SOCIETY *v.* TUPPER. 100

2——*Account stated — Admission of liability — Promise to pay — Collateral agreement—Parol evidence.*] On the dissolution of a partnership, the parties signed a statement shewing a certain amount as due to the plaintiff for his share and declaring that "for the sake of peace and quiet and to avoid friction and bother" the plaintiff waived examination of the firm's books and agreed that the amount so stated should be deemed

EVIDENCE—*Continued.*

to be the amount payable by the defendants to the plaintiff. *Held,* that a promise to pay the amount of the balance so stated to be due should be implied from the admission of liability. In an action for the amount of the balance, the defendants alleged that the plaintiff had verbally agreed that he would not sue upon the account as stated, and that the document should be treated as merely shewing what would be payable to him upon the collection of outstanding debts owing to the firm.—*Held,* that as the effect of the alleged collateral agreements was to vary and annul the terms of the written instrument they could not be proved by parol testimony. JACKSON *v.* DRAKE, JACKSON & HELMCKEN....315

3——*Will—Promoter—Subsequent conduct of testator—Residuary devise— Trust.*] In proceedings for probate by the executors of a will which was opposed on the ground that it was prepared by one of the executors who was also a beneficiary there was evidence, though contradictory, that before the will was executed it was read over to the testator who seemed to understand its provisions. *Held,* Idington J. dissenting, that such evidence and the facts that the testator lived for several years after it was executed and on several occasions during that time spoke of having made his will and never revoked nor altered it, satisfied the onus, if it existed, on the executor to satisfy the court that the testator knew and approved of its provisions.—*Held,* also, that where the testator's estate was worth some $50,000 and he had no children it was doubtful if a bequest to the propounder, his brother, of $1,000 was such a substantial benefit that it would give rise to the onus contended for by those opposing the will. CONNELL *v.* CONNELL........404

4——*Controverted election — Petition — Preliminary objections—Status of petitioner — Premature service — Return of member.*] On the hearing of preliminary objections to an election petition the status of the petitioner may be established by oral evidence not objected to by the respondent. YUKON ELECTION CASE. 495

AND *see* ELECTION LAW 1.

EVIDENCE—*Continued.*

5——*Controverted election — Personal corruption—Inferences.*] Respondent, the night before the election, took a sum of over $4,000 and divided it into several parcels of sums ranging from $250 to $1,500. He then, after midnight, visited all his committee rooms and gave to the chairman of each committee, personally and secretly, one of such parcels. His financial agent had no knowledge of this distribution and no evidence was produced of the application of the money to legitimate objects: *Held,* that the inference was irresistible, that the money was intended for corruption of the electors and respondent was properly held guilty of personal corruption. ST. ANN'S ELECTION CASE..............563

AND *see* ELECTION LAW 2.

6——*Rivers and streams—Navigable and floatable waters—Obstructions to navigation—Crown lands—Letters patent of grant—Collateral circumstances leading to grant—Limitation of terms of grant—Title to land—Riparian rights—Fisheries—Arts.* 400, 414, 503 *C.C.*] A river is navigable when, with the assistance of the tide, it can be navigated in a practicable and profitable manner, notwithstanding that, at low tide, it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth. *Bell* v. *The Corporation of Quebec* (5 App. Cas. 84), followed.—Evidence of the circumstances and correspondence leading to grants by the Crown of lands on the banks of a navigable river cannot be admitted for the purpose of shewing an intention to enlarge the terms of letters patent of grant of the lands, subsequently issued, so as to include the bed of the river and the right of fishing therein. The judgment appealed from (Q.R. 14 K.B. 115) was reversed and the judgment of the Superior Court (Q.R. 25 S.C. 104) was restored. *Steadman* v. *Robertson* (18 N.B. Rep. 580) and *The Queen* v. *Robertson* (6 Can. S.C.R. 52) referred to; *In re Provincial Fisheries* (26 Can. S.C.R. 444; (1898) A.C. 700) discussed. ATTY.-GEN. OF QUEBEC *v.* FRASER; ATTY.-GEN. OF QUEBEC *v.* ADAMS..............577

7——*Controverted election—Trial of petition—Corrupt acts at former election—Agency—System of corruption.*] A petition against the return of a member for the House of Commons at a general election in 1904 contained allegations of corrupt acts by respondent at the election in 1900 which were struck out on preliminary objections. On the trial of the petition evidence of payments by respondents of accounts in connection with the former election was offered to prove agency and a system and was admitted on the first ground. A question as to the amount of one account so paid was objected to and rejected. *Held,* that such rejection was proper; that the question was not admissible to prove agency for agency was admitted or proved otherwise; nor as proof of a system which could not be established by evidence of an isolated corrupt act. —*Held,* also, that where evidence is tendered on one ground other grounds cannot be set up in a Court of Appeal. SHELBURNE AND QUEEN'S ELECTION CASE. 604

8——*Railways — Negligence — Defective construction of road-bed—Dangerous way—Vis major—Onus of proof—Latent defect.*] The road-bed of appellants' railway was constructed, in 1893, at a place where it followed a curve round the side of a hill, a cutting being made into the slope and an embankment formed to carry the rails, the grade being one and one half per cent. or 78.2 feet to the mile. The whole of the embankment was built on the natural surface, which consisted, as afterwards discovered, of a lair of sandy loam of three or four feet in depth resting upon clay subsoil. No borings or other examinations were made in order to ascertain the nature of the subsoil and the road-bed remained for a number of years without shewing any subsidence except such as was considered to be due to natural causes and required only occasional repairs; the necessity for such repairs had become more frequent, however, for a couple of months immediately prior to the accident which occasioned the injury complained of. Water, coming either from the berm-ditch, or from a natural spring formed beneath the sandy loam, had gradually run down the slope, lubricated the surface of the clay and, finally, caused the entire embankment and sandy lair to slide away about

EVIDENCE—*Continued.*

the time a train was approaching, on the evening of 20th September, 1904. The train was derailed and wrecked and the engine-driver was killed. In an action by his widow for the recovery of damages: *Held,* that in constructing the road-bed, without sufficient examination, upon treacherous soil and failing to maintain it in a safe and proper condition, the railway company was, *primâ facie,* guilty of negligence which cast upon them the onus of shewing that the accident was due to some undiscoverable cause; that this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and guarded against, and that, consequently, the company was liable in damages. Judgment appealed from affirmed, following *The Great Western Railway Co. of Canada* v. *Braid* (1 Moo. P.C. (N.S.) 101). QUEBEC AND LAKE ST. JOHN RY. CO. *v.* JULIEN.......632

9——*Negligence—Electrical installations—Cause of fire—Defective transformer—Improper installations—Onus of proof.*] In an action to recover the amount of a policy of fire insurance paid by the plaintiffs upon the destruction of the premises insured by fire caused, as alleged, through the defective condition of a transformer of the defendant company, whereby a dangerous current of electricity was allowed to enter the insured building, the evidence failed to shew conclusively that the transformer was out of order previous to the occurrence of the fire, and at the same time it appeared that the wiring of the building may have been defective. *Held,* affirming the judgment appealed from, that the onus of proof upon the plaintiffs had not been satisfied and that they could not recover. *Abrath* v. *The North Eastern Railway Co.* (11 Q.B.D. 440) referred to. GUARDIAN FIRE AND LIFE ASSURANCE CO. *v.* QUEBEC RAILWAY, LIGHT AND POWER CO.............676

10——*Negligence — Findings of jury — Practice — Operation of railway — "The Railway Act,"* 51 *V. c.* 29.............1

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11——*Negligence — Electrical installations—Necessary protection of employees—Onus of proof—Voluntary exposure to danger.* SHAWINIGAN CARBIDE CO. *v.* ST. ONGE.........................688

12——*Breach of trust—Accounts—Nova Scotia "Trusts Act"—2 Edw. VII. c.* 13 *— Liability of trustee — N.S. Order XXXII., r.* 3 *— Judicial discretion — Statute of Limitations*............163

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EXCEPTION—*Appeal — Jurisdiction — Declinatory exception — Interlocutory judgment—Review of judgment on exception—Practice*....................535

See APPEAL 8.

EXECUTORS—*Probate of will—Promoter—Evidence—Subsequent conduct of testator—Residuary devise—Trust*...404

See WILL 3.
AND *see* SUCCESSIONS.

EXPROPRIATION—*Municipal corporation — Railway aid — Construction of agreement—Description of lands—Reference to plans—R.S.N.S.* 1900, *c.* 99—3 *Edw. VII. c.* 97 *(N.S.).*] A municipality passed a resolution by which it agreed to pay for lands required for the right of way, station grounds, sidings and other purposes of a railway as shewn upon a plan filed under the provisions of the general railway Act. At the time of the resolution there were four such plans filed, each shewing a portion of the land proposed to be taken for these purposes and including, in the aggregate, a greater area than could be expropriated for right of way and station grounds under the provisions of the Acts applicable to the undertaking of the railway company. The Legislature passed an Act confirming such resolution. To an action by the owner of the land taken, on an award fixing the value of that in excess of what could be so expropriated, the corporation pleaded no liability on account of such excess and also, that there was no specific plan on file describing the land. *Held,* affirming the judgment appealed from (38 N.S. Rep. 76) that the first defence failed because of the Act confirming the resolution and, as to the second, that the four plans

EXPROPRIATION—*Continued.*

should be read together and considered to be the plan referred to in such resolution. COUNTY OF INVERNESS *v.* MCISAAC. 75

2——*Expropriation of land—Arbitration—Authority for submission—Trespass—2 Edw. VII. c.* 104 (*N.S.*).] By statute in Nova Scotia if land is taken for railway purposes the compensation therefor, and for earth, gravel, etc., removed shall be fixed by arbitrators, one chosen by each party and the third, if required, by those two. A railway company intending to expropriate, their engineer wrote to M., who had acted for the company in other cases, instructing him to ascertain whether the owners had arranged their title so that the arbitration could proceed and, if so, to ask them to nominate their man who, with M., could appoint a third if they could not agree. The engineer added, "I will send an agreement of arbitration which each one can subscribe to or, if they have one already drafted, you can forward it here for approval." No such agreement was sent by, or forwarded to, the engineer, but the three arbitrators were appointed and made an award on which the owners of the land brought an action. *Held*, reversing the judgment appealed from (38 N.S. Rep. 80), that as the company had not taken the preliminary steps required by the statute which, therefore, did not govern the arbitration proceedings, the award was void for want of a proper submission.—The company entered upon land and cut down trees and removed gravel therefrom without giving the owners the notice required by statute of their intention to take their property. The owners, by their action above mentioned, claimed damages for trespass as well as the amount of the award.—*Held*, that as the act of the company was not authorized by statute the owners could sue for trespass and as, at the trial, the action on this claim was dismissed on the ground that such action was prohibited there should be a new trial. INVERNESS RAILWAY AND COAL CO. *v.* MCISAAC. 134

3——*Watercourses — Riparian rights — Trespass—Torts—Diversion of natural flow — Injurious affection — Damages — Execution of statutory powers—Arbitration—Injunction—Mandamus—Construction of statute*—59 *V. c.* 44 (*N.S.*).] A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a watercourse may recover damages therefor and may also obtain relief by injunction restraining the continuation of the tortious acts so committed.—The powers conferred upon the town council of the Town of North Sydney, N.S., by the Nova Scotia statute, 59 V. c. 44, for the purpose of obtaining a water supply give them no rights in respect to the diversion of watercourses except subject to the provisions of the fourth section of the Act, and after arbitration proceedings taken to settle compensation for injurious affection to property resulting from the construction or operation of the waterworks. *Saunby* v. *The Water Commissioners of London* ([1906] A.C. 110) followed. LEAHY v. TOWN OF NORTH SYDNEY. 464

FISHERIES—*Canadian waters — Three-mile-zone—Fishing by foreign vessels—Legislative jurisdiction—Seizure on high seas—Pursuit beyond territorial limit—International law—Constitutional law—B.N.A. Act,* 1867, *s.* 91, *s.-s.* 12—*Sea-coast fisheries—R.S.C.* 94, *ss.* 2, 3, 4.] Under the provisions of the "British North America Act, 1867," s. 91, s.-s. 12, the Parliament of Canada has exclusive jurisdiction to legislate with respect to fisheries within the three-mile-zone off the sea-coasts of Canada.—A foreign vessel found violating the fishery laws of Canada within three marine miles off the sea-coasts of the Dominion may be immediately pursued beyond the three-mile-zone and lawfully seized on the high seas. Girouard J. dissenting. The judgment appealed from (11 B.C. Rep. 473) was affirmed. THE SHIP "NORTH" *v.* THE KING. 385

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See RIVERS AND STREAMS 2.

FORECLOSURE—*Appeal — Jurisdiction —Discretionary order—Stay of proceedings—Final judgment—Controversy involved—R.S.C. c.* 129, *s.* 76—*R.S.C. c.* 135, *s.* 28........................**173**

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FOREIGN VESSELS—*Canadian waters —Three-mile-zone—Fishing by foreign vessels—Legislative jurisdiction—Seizure on high seas—Pursuit beyond territorial limit—International law—Constitutional law—Construction of statute—B.N.A. Act,* 1867, *s.* 91, *s.-s.* 12—*R.S.C. c.* 94, *ss.* 2, 3, 4—*Sea-coast fisheries*.......**385**

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2——*Suretyship—Collateral deposit—Ear-marked fund—Appropriation of proceeds—Set-off—Release of principal debtor—Constructive fraud—Discharge of surety—Right of action—Common counts —Equitable recourse*.............**331**

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3——*Contract—Supply of material—Payment—Certificate of engineer—Condition precedent—Improper interference—Fraud—Hindering performance of condition—Monthly estimate—Final decision.* TEMISKAMING AND NORTHERN ONTARIO RY. COMM. *v.* WALLACE...........**696**

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HIGHWAYS—*Dedication — Acceptance by public—User.*] An action was brought by the City of Toronto against the G. T. Ry. Co., to determine whether or not a street crossed by the railway was a public highway prior to 1857, when the company obtained its right of way. It appeared on the hearing that, in 1850, the Trustees of the General Hospital conveyed land adjoining the street describing it in the deed as the western boundary of allowance for road, and in another conveyance, made in 1853, they mention in the description a street running south along said lot. Subsequent conveyances of the said land prior to 1857 also recognized the allowance for a road. *Held,* Idington J. dissenting, that the said conveyances were acts of dedication of the street as a public highway.—The first deed executed by the Hospital Trustees, and a plan produced at the hearing, shewed that the street extended across the railway track and down to the River Don, but at the time the portion between the track and the river was a marsh. Evidence was given of use by the public of the street down to the edge of the marsh.—*Held,* Idington J. dissenting, that the use of such portion was applicable to the whole dedicated road down to the river, and the evidence of user was sufficient to shew an acceptance by the public of the highway. GRAND TRUNK RY. CO. *v.* CITY OF TORONTO.....................**210**

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3——*"Railway Act,* 1903," *ss.* 47, 186—*Board of Railway Commissioners—Jurisdiction—Construction of subway—Apportionment of cost—Person interested or affected—Street railway—Agreement with municipality*...............**354**

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4——*Operation of tramway—Construction and location of lines—Use of highways—Car service—Time-tables—Municipal control—Territory annexed after contract—Abandonment of monopoly—* 55 *V. c.* 99 *(Ont.)*.................**430**

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2——*Watercourses—Riparian rights—Expropriation—Trespass—Torts—Diversion of natural flow—Injurious affection*

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INSURANCE, LIFE—*Condition of policy —Premium note—Payment of premium.*] When the renewal premium on a policy of life assurance became due the assured gave the local agent of the insurance company a note for the amount of the premium, with interest added, which the agent discounted, placing the proceeds to his own credit in his bank account. The renewal receipt was not countersigned nor delivered to the assured and the agent did not remit the amount of the premium to the company. When the note fell due it was not paid in full and a renewal note was given for the balance which remained unpaid at the time of the death of the assured. The conditions of the policy declared that if any note given for a premium was not paid when due the policy should cease to be in force. *Held*, affirming the judgment appealed from (38 N.S. Rep. 15) Davies and Maclennan JJ. dissenting, that the transactions that took place between the assured and the agent did not constitute a payment of the premium and that the policy had lapsed on default to meet the note when it became due. *The Manufacturers Accident Ins. Co.* v. *Pudsey* (27 Can. S.C.R. 374) distinguished; *London and Lancashire Life Assurance Co.* v. *Fleming* ([1897] A.C. 499) referred to. HUTCHINGS *v.* NATIONAL LIFE ASSURANCE CO..................124

2——*Payment of premium—Thirty days' grace—Death of insured after premium due—Estoppel.* PEOPLE'S LIFE INS. CO. *v.* TATTERSALL....................690

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2——*Judicial sale of railways—Interested bidder — Disqualification as purchaser — Counsel and solicitors — Art.* 1484 *C.C.*—*Construction of statute—Review by appellate court—Discretionary order*—4 & 5 *Edw. VII. c.* 158 (*D.*)— *Public policy*...................303
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3——*New trial—Judgment in court below on motion—Equal division—Appeal —Jurisdiction—Charge to jury—Misdirection—Bias*...................532
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4——*Cause of action—Limitation of actions — Contract — Foreign judgment — Yukon Ordinance, c.* 31 *of* 1890—*Statute of James—Statute of Anne—Lex fori— Lex loci contractus—Absence of debtor.* 546
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JUDGMENT — *Appeal* — *Jurisdiction —Discretionary order—Stay of foreclosure proceedings—Final judgment—Controversy involved—R.S.C. c.* 129, *s.* 76 —*R.S.C. c.* 135, *s.* 28.] Leave to appeal to the Supreme Court of Canada under the seventy-sixth section of the "Winding-up Act" can be granted only where the judgment from which the appeal is sought is a final judgment and the amount involved exceeds two thousand dollars. A judgment setting aside an order, made under the "Winding-up Act," for the postponement of foreclosure proceedings and directing that such proceedings should be continued is not a final judgment within the meaning of the Supreme Court Act, and does not

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involve any controversy as to a pecuniary amount. RE CUSHING SULPHITE FIBRE CO. 173

2——*Appeal—Jurisdiction—Declinatory exception—Interlocutory judgment—Review of judgment on exception—Practice.*] The action was dismissed in the Superior Court upon declinatory exception. The Court of King's Bench reversed this decision and remitted the cause for trial on the merits. On motion to quash a further appeal to the Supreme Court of Canada: *Held,* that such motion should be granted on the ground that the objection as to the jurisdiction of the Superior Court might be raised on a subsequent appeal from a judgment on the merits. *Per* Girouard J.—The judgment of the Court of King's Bench was not a final judgment and, consequently, no appeal could lie to the Supreme Court of Canada. WILLSON *v.* SHAWINIGAN CARBIDE CO. 535

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4——*Foreign judgment—Action on—Statute of Limitations.* 546

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JURISDICTION — *Board of Railway Commissioners — Construction of subway — Apportionment of cost — Person interested or affected — Street railway — Agreement with municipality.*] The power of the Board of Railway Commissioners, under section 186 of the Railway Act, 1903, to order a highway to be carried over or under a railway is not restricted to the case of opening up a new highway, but may be exercised in respect to one already in existence.—The application for such order may be made by the municipality as well as by the railway company. OTTAWA ELECTRIC RY. CO. *v.* CITY OF OTTAWA AND CANADA ATLANTIC RY. CO. 354

AND *see* RAILWAYS 4.

2——*Board of Railway Commissioners—Appeal to Supreme Court.*] The Board of Railway Commissioners granted an application of the James Bay Railway Co. for leave to carry their line under the track of the G. T. Ry. Co. but, at the request of the latter, imposed the condition that the masonry work of such under crossing should be sufficient to allow of the construction of an additional track on the line of the G. T. Ry. Co. No evidence was given that the latter company intended to lay an additional track in the near future or at any time. The James Bay Co., by leave of a judge, appealed to the Supreme Court of Canada from the part of the order imposing such terms contending that the same was beyond the jurisdiction of the Board. *Held,* that the Board had jurisdiction to impose said terms.—*Held, per* Sedgewick, Davies and Maclennan JJ., that the question before the court was rather one of law than of jurisdiction and should have come up on appeal by leave of the Board or been carried before the Governor General in Council. JAMES BAY RY. CO. *v.* GRAND TRUNK RY. CO. 372

3——*Canadian waters—Three-mile-zone—Fishing by foreign vessels—Legislative jurisdiction—Seizure on high seas—Pursuit beyond territorial limit—International law—Constitutional law—B.N.A. Act,* 1867, *s.* 91, *sub-s.* 12—*Sea-coast fisheries—R.S.C. c.* 94, *ss.* 2, 3, 4.] Under the provisions of the "British North America Act, 1867," s. 91, sub-s. 12, the Parliament of Canada has exclusive jurisdiction to legislate with respect to fisheries within the three-mile-zone off the sea-coasts of Canada.—A foreign vessel found violating the fishery laws of Canada within three marine miles off the sea-coasts of the Dominion may be immediately pursued beyond the three-mile-zone and lawfully seized on the high seas. Girouard J. dissenting. The judgment appealed from (11 B.C. Rep. 473) was affirmed. THE SHIP "NORTH" *v.* THE KING. 385

4——*Board of Railway Commissioners—Jurisdiction—Traffic accommodation—Restoring connections—3 Edw. VII. c.* 58, *ss.* 176, 214, 253.] On an application to the Board of Railway Commissioners for Canada, under the provisions

JURISDICTION—*Continued.*

of the "Railway Act, 1903," for a direction that a railway company should replace a siding, where traffic facilities had been formerly provided for the respondents with connections upon their lands, and for other appropriate relief for such purposes: *Held*, that, under the circumstances, the Board had jurisdiction to make an order directing the railway company to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch and receipt of freight in carloads over, to and from the line of railway. CANADIAN NORTHERN RY. CO. *v.* ROBINSON.....**541**

5——*Construction of statute—"Marsh Act," R.S.N.S. 1900, c. 66, ss. 22, 66—Jurisdiction of Marsh Commissioners—Assessment of lands—Certiorari—Limitation for granting writ—Practice—Expiration of time limit—Delays occasioned by judge—Legal maxim—Order nunc pro tunc*......................**79**

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2——*Negligence—Trial—Finding of jury—Exercise of statutory privilege*......**94**

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LANDLORD AND TENANT—*Tenant by sufferance—Use and occupation of lands—Art. 1608 C.C.—Promise of sale—Vendor and purchaser—Reddition de compte—Actio ex vendito—Practice.*] The action for the value of the use and occupation of lands does not lie in a case where the occupation by sufferance was begun and continued under a promise of sale; in such a case the appropriate remedy would be by an action *ex vendito* or for *reddition de compte.* CANTIN *v.* BÉRUBÉ.......................**627**

LEASE — *Canal — Water-power — Improvements on canal—Temporary stoppage of power — Compensation — Total stoppage—Measure of damages—Loss of profits.*] A mill was operated by water-power taken from the surplus water of the Galops Canal under a lease from the Crown. The lease provided that in case of a temporary stoppage in the supply caused by repairs or alterations in the canal system the lessee would not be entitled to compensation unless the same continued for six months, and then only to an abatement of rent. *Held*, Idington J. *dubitante*, that a stoppage of the supply for two whole seasons necessarily and *bonâ fide* caused by alterations in the system was a temporary stoppage under this provision.—The lease also provided that, in case the flow of surplus water should at any time be required for the use of the canal or any public purpose whatever, the Crown could, on giving notice to the lessee, cancel the lease in which case the lessee should be entitled to be paid the value of all the buildings and fixtures thereon belonging to him with ten per cent. added thereto. The Crown unwatered the canal in order to execute works for its enlargement and improvement, contemplating at the time only a temporary stoppage of the supply of water to the lessee, but later changes were made in the proposed work which caused a total stoppage and the lessee, by petition of right, claimed damages.—*Held*, Girouard J. dissenting, that as the Crown had not given notice of its intention to cancel the lease the lessee was not entitled to the damages provided for in case of cancellation.—*Held*, also, that the lessee was not entitled to damages for loss of profits during the time his mill was idle owing to the water being out of the canal. Judgment of the Exchequer Court (9 Ex. C.R. 287) affirmed, Girouard and Idington JJ. dissenting. BEACH *v.* THE KING....**259**

2——*Equitable mortgage — Mines and minerals — Lease of mining lands — Sheriff's sale—Purchase by judgment creditor of mortgagee—Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B. (1903), c. 30, s. 139*.......................**517**

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See CONSTITUTIONAL LAW 2.

LIEN—*Equitable mortgage—Mines and minerals — Lease of mining lands — Sheriff's sale — Purchase by judgment creditor of mortgagee—Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B.* (1903), *c.* 30, *s.* 139........................517
See MINES AND MINERALS.

LIMITATION OF ACTIONS—*Cause of action—Contract—Foreign judgment — Yukon Ordinance, c.* 31 *of* 1890—*Statute of James—Statute of Anne—Lex fori—Lex loci contractus—Absence of debtor.*] Under the provisions of the Yukon Ordinance, c. 31 of 1890, the right to recover simple contract debts in the Territorial Court of Yukon Territory is absolutely barred after the expiration of six years from the date when the cause of action arose notwithstanding that the debtor had not been for that period resident within the jurisdiction of the court. Judgment appealed from reversed, Girouard and Davies JJ., dissenting. RUTLEDGE *v.* UNITED STATES SAVINGS AND LOAN CO.............546

LIQUOR LAWS—*Sale of goods—Contract by correspondence — Statute of Frauds—Delivery—Principal and agent—Statutory prohibition—Illicit sale of intoxicating liquors—Knowledge of seller—Validity of contract*............55
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MANDAMUS—*Watercourses — Riparian rights — Expropriation — Trespass — Torts—Diversion of natural flow—Injurious affection—Damages—Execution of statutory powers — Arbitration — Construction of statute*—59 *V. c.* 44 (*N.S.*).
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MINES AND MINERALS — *Equitable mortgage — Lease of mining lands — Sheriff's sale—Purchase by judgment creditor of mortgagee—Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B. c.* 30, *s.* 139.] The judgment appealed from (37 N.B. Rep. 140; 3 N.B. Eq. 28) held that mining leases of lands in the Province of New Brunswick and of the minerals therein, issued by the Crown to the appellant subsequent to a mortgage executed by it in the State of New York in favour of the respondent, a company incorporated under the laws of that state, which do not reserve the minerals to the state, were subject to the mortgage; that a judgment creditor of the mortgagor (who purchased the leases at a sheriff's sale in execution of his own judgment and afterwards obtained new leases in his own name from the Crown), took the new leases subject to the mortgage; that the mortgage, though not registered under the "General Mining Act," C.S.N.B. (1903) c. 30, s. 139, was not void as against a judgment creditor who had actual notice of the mortgage and whose judgment was not registered under that section at the time of the commencement of the suit, and that the judgment creditor was not entitled to a prior lien for rent paid to the Crown on the licenses declared to be held in trust for the mortgagee. An appeal to the Supreme Court of Canada was dismissed, Maclennan J. dissenting. MINERAL PRODUCTS CO. *v.* CONTINENTAL TRUST CO.....................517

MORTGAGE — *Equitable mortgage — Mines and minerals——Lease of mining lands—Sheriff's sale—Purchase by judgment creditor of mortgagee — Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B. c. 30, s. 139.*] The courts below (37 N.B. Rep. 140; 3 N.B. Eq. 28) held that mining leases of lands in the Province of New Brunswick and of the minerals therein, issued by the Crown to the appellant subsequent to a mortgage executed by it in the State of New York in favour of the respondent, a company incorporated under the laws of that state, which do not reserve the minerals to the state, were subject to the mortgage; that a judgment creditor of the mortgagor (who purchased the leases at a sheriff's sale in execution of his own judgment and afterwards obtained new leases in his own name from the Crown), took the new leases subject to the mortgage; that the mortgage, though not registered under the "General Mining Act," C.S.N.B. (1903) c. 30, s. 139, was not void as against a judgment creditor who had actual notice of the mortgage and whose judgment was not registered under that section at the time of the commencement of the suit, and that the judgment creditor was not entitled to a prior lien for rent paid to the Crown on the licenses declared to be held in trust for the mortgagee. An appeal to the Supreme Court of Canada was dismissed, Maclennan J. dissenting. MINERAL PRODUCTS CO. *v.* CONTINENTAL TRUST CO. **517**

2——*Appeal—Jurisdiction — Discretionary order—Stay of proceedings—Final judgment—Controversy involved—R.S.C. c.* 129, *s.* 76—*R.S.C. c.* 135, *s.* 28——**173**
See APPEAL 1.

MUNICIPAL CORPORATION—*Appeal—Jurisdiction—Annulment of procès-verbal—Injunction—Matter in controversy —Art.* 560 *C.C.—Servitude.*] In a proceeding to set aside resolutions by a municipal corporation giving effect to a *procès-verbal*, the court followed *Toussignant* v. *County of Nicolet* (32 Can. S.C.R. 353) and quashed the appeal with costs. Article 560 C.C. referred to. LEBOUX *v.* PARISH OF STE. JUSTINE. . . .**321**

2——*Jurisdiction of Board of Railway Commissioners—Construction of subway*

MUNICIPAL CORPORATION—*Con.*

—*Apportionment of cost—Person interested or affected—Street railway—Agreement with municipality.*] An application for a subway crossing of a highway, under section 186 of the "Railway Act, 1903," may be made on behalf of a municipality interested or affected. The Board, on application by the City of Ottawa, ordered a subway to be made under the track of the Canada Atlantic Railway Co. where it crosses Bank Street, the cost to be apportioned among the city, the C. A. Ry. Co. and the Ottawa Electric Ry. Co. By an agreement between the Electric Company and the city the company was given the right to run its cars along Bank Street and over the railway crossing, paying therefor a specific sum per mile. The company appealed from that portion of the order making them contribute to the cost of the subway, contending that the city was obliged to furnish them with a street over which to run their cars and they could not be subjected to greater burdens than those imposed by the agreement. *Held,* that the Electric Co. was a company "interested or affected" in or by the said work within the meaning of section 47 of the said Railway Act, and could properly be ordered to contribute to the cost thereof.—*Held,* further, that there was nothing in the agreement between said company and the city to prevent the Board making said order or to alter the liability of the company so to contribute. OTTAWA ELECTRIC RY. CO. *v.* CITY OF OTTAWA AND CANADA ATLANTIC RY. CO. **354**
AND *see* RAILWAYS 4.

3——*Railway aid — Construction of agreement—Expropriation — Description of lands—Reference to plans—R.S.N.S.* 1900, *c.* 99—3 *Edw. VII. c.* 97 (*N.S.*) .**75**
See CONTRACT 2.

4——*Highway—Dedication —Acceptance by public—User.* **210**
See HIGHWAYS 1.

5——*Contract—Breach of conditions—Liquidated damages—Penalty—Cumulative remedy—Operation of tramway—Construction and location of lines—Use of highways—Car service—Time-tables—Municipal control — Territory annexed*

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after contract — Abandonment of monopoly—55 *V. c.* 99 (*Ont.*)..........430

See TRAMWAY 2.

6——*Assessment and taxes — County School Fund—Contributions by incorporated towns—Construction of statute* —3 *Edw. VII. c.* 6, *s.* 7 (*N.S.*)......514

See ASSESSMENT AND TAXES 2.

NAVIGABLE WATERS.

See RIVERS AND STREAMS.

NAVIGATION—*Maritime law—Collision —Crossing ships—Admiralty rules,* 1897, *rule* 19.] The SS. "Parisian," making for Halifax Harbour, came along the western shore, sailing almost due north to a pilot station, on reaching which she slowed down, finally stopping her engines. The "Albano," a German steamship for the same port, approached some miles to the eastward, sailing first, by error, to the north-east, and then changing her course to the south-west, apparently making for the eastern passage to the harbour. She again altered her course, however, and came almost due west towards the pilot station. When about a quarter of a mile from the "Parisian" she slowed down, and on coming within eight or nine ship's lengths gave three blasts of her whistle, indicating that she would go full speed astern. The "Parisian" then, seeing that a collision was inevitable, went full speed ahead for about 200 feet when she was struck on the starboard quarter and had to make for the dock to avoid sinking outside. The "Parisian's" engines were stopped about six minutes before the collision, and a boat from the pilot cutter was rowing up to her when she was struck. At the time of the collision, about 5 p.m., the wind was light, weather fine and clear, there was no sea running and no perceptible tide.—*Held*, affirming the judgment of the local judge that the captain of the "Albano" had no right to regard the "Parisian" as a crossing ship within the meaning of rule 19 of the Admiralty Rules, 1897; and that the "Parisian" having properly stopped to take a pilot on board, and being practically in the act of doing so at the time, the "Albano" was bound to avoid her

NAVIGATION—*Continued.*

and was alone to blame for the collision. OWNERS SS. "ALBANO" *v.* OWNERS SS. "PARISIAN"......................284

AND *see* ADMIRALTY LAW 2.

NEGLIGENCE—*Operation of railway—Finding of jury—Evidence.*] A. brought an action, as administratrix of the estate of her husband, against the C.P.R. Co., claiming compensation for his death by negligence and alleging in her declaration that the negligence consisted in running a train at a greater speed than six miles an hour through a thickly populated district and in failing to give the statutory warning on approaching the crossing where the accident happened. At the trial questions were submitted to the jury who found that the train was running at a speed of 25 miles an hour, that such speed was dangerous for the locality, and that the death of deceased was caused by neglect or omission of the company in failing to reduce speed as provided by "The Railway Act." A verdict was entered for the plaintiff and on motion to the court, *en banc*, to have it set aside and judgment entered for defendants a new trial was ordered on the ground that questions as to the bell having been rung and the whistle sounded should have been submitted to the jury. The plaintiff appealed to the Supreme Court of Canada to have the verdict at the trial restored and the defendants, by cross-appeal, asked for judgment. *Held*, Idington J. dissenting, that by the above findings the jury must be held to have considered the other grounds of negligence charged, as to which they were properly directed by the judge, and to have exonerated the defendants from liability thereon, and the new trial was improperly granted on the ground mentioned.—*Held*, also, that though there was no express finding that the place at which the accident happened was a thickly peopled portion of the district it was necessarily imported in the findings given above, that this fact had to be proved by the plaintiff and there was no evidence to support it; and that, as the evidence shewed it was not a thickly peopled portion, the plaintiff could not recover and the defendants should have judgment on their cross-appeal. ANDREAS *v.* CANADIAN PACIFIC RY. CO...1

NEGLIGENCE—*Continued.*

2——*Trial—Finding of jury—Exercise of statutory privilege.*] Where on the trial of an action based on negligence questions are submitted to the jury they should be asked specifically to find what was the negligence of the defendant which caused the injury and general findings of negligence will not support a verdict unless the same is shewn to be the direct cause of the injury.—Where a street car company has by its charter privileges in regard to the removal of snow from its tracks and the city engineer is given power to determine the condition in which the highway shall be left after a snow storm a duty is cast upon the company to exercise its privilege in the first instance in a reasonable and proper way and without negligence. MADER *v.* HALIFAX ELECTRIC TRAMWAY CO. 94

3——*Operation of tramway—Precautions for safety of passengers—Crossing cars—Sounding gong—Slackening speed at dangerous places—Neglect of rules—Passenger alighting from front of car—Contributory negligence.*] A passenger on a crowded tram-car, being near the front of the car, on reaching his destination, made his way past several persons standing in the aisle and front vestibule and alighted from the front steps on the side next the parallel track upon which another car was coming at considerable speed in the opposite direction and was injured. The space between the crossing cars was about 44 inches and there was no rule of the company to prevent passengers alighting from the front steps. The passenger was not aware of the car approaching from the opposite direction when he alighted and the motorman of the car which struck him had neglected to observe a rule of the company requiring that speed should be slackened and the gong rung continuously while cars were passing each other on the double tracks. The courts below held (15 Man. Rep. 338) that the company was liable in damages on account of the motorman's negligence; that the plaintiff had not been guilty of contributory negligence, under the circumstances; and that the company was obliged to take proper precautions for the safety of passengers, even after they had alighted upon the street beside the tracks. Without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal with costs. WINNIPEG ELECTRIC ST. RY. CO. *v.* BELL. 515

4——*Railways — Defective construction of road-bed—Dangerous way—Vis major—Evidence—Onus of proof—Latent defect.*] The road-bed of appellants' railway was constructed, in 1893, at a place where it followed a curve round the side of a hill, a cutting being made into the slope and an embankment formed to carry the rails, the grade being one and one-half per cent., or 78.2 feet to the mile. The whole of the embankment was built on the natural surface, which consisted, as afterwards discovered, of a lair of sandy loam of three or four feet in depth resting upon clay subsoil. No borings or other examinations were made in order to ascertain the nature of the subsoil and the road-bed remained for a number of years without shewing any subsidence except such as was considered to be due to natural causes and required only occasional repairs; the necessity for such repairs had become more frequent, however, for a couple of months immediately prior to the accident which occasioned the injury complained of. Water, coming either from the berm-ditch, or from a natural spring formed beneath the sandy loam, had gradually run down the slope, lubricated the surface of the clay and, finally, caused the entire embankment and sandy lair to slide away about the time a train was approaching, on the evening of 20th September, 1904. The train was derailed and wrecked and the engine-driver was killed. In an action by his widow for the recovery of damages: *Held*, that in constructing the road-bed, without sufficient examination, upon treacherous soil and failing to maintain it in a safe and proper condition, the railway company was, *primâ facie*, guilty of negligence which cast upon them the onus of shewing that the accident was due to some undiscoverable cause; that this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and

NEGLIGENCE—*Continued.*

guarded against, and that, consequently, the company was liable in damages. Judgment appealed from affirmed, following *The Great Western Railway Co. of Canada* v. *Braid* (1 Moo. P.C. (N.S.) 101). QUEBEC AND LAKE ST. JOHN RY. CO. *v.* JULIEN **632**

5——*Electrical installations — Cause of fire — Defective transformer — Improper installations—Evidence—Onus of proof.*] In an action to recover the amount of a policy of fire insurance paid by the plaintiffs upon the destruction of the premises insured by fire caused, as alleged, through the defective condition of a transformer of the defendant company, whereby a dangerous current of electricity was allowed to enter the insured building, the evidence failed to shew conclusively that the transformer was out of order previous to the occurrence of the fire, and at the same time it appeared that the wiring of the building may have been defective. *Held*, affirming the judgment appealed from, that the onus of proof upon the plaintiffs had not been satisfied and that they could not recover. *Abrath* v. *The North Eastern Railway Co.* (11 Q.B.D. 440) referred to. GUARDIAN FIRE AND LIFE ASSURANCE CO. *v.* QUEBEC RAILWAY, LIGHT AND POWER CO. **676**

6——*Operation of tramway—Carriage of passengers—Crossing cars—Undue speed — Sounding gong — Findings of jury.* MONTREAL STREET RAILWAY CO. *v.* DESLONGCHAMPS. **685**

7——*Electrical installations—Necessary protection of employees—Onus of proof —Voluntary exposure to danger.* THE SHAWINIGAN CARBIDE CO. *v.* ST. ONGE. **688**

8——*Maritime law—Collision—Crossing ships—Admiralty Rules*, 1897, *r.* 19..**284**

See ADMIRALTY LAW 1.

NEW TRIAL—*Findings of jury—Alternative relief—Cross-appeal.*] Where a defendant obtained an order for a new trial in the court below and the plaintiff appealed to the Supreme Court of Canada, on a cross-appeal by the defendant the order for a new trial was set aside and the action was dismissed.—Cf. *The Mutual Reserve Fund Life Association* v. *Dillon* (34 Can. S.C.R. 141). ANDREAS *v.* CANADIAN PACIFIC RWAY. CO. 1

AND *see* NEGLIGENCE 1.

2——*Charge to the jury—Misdirection—Bias.*] Where the charge of the trial judge to the jury shewed passion and bias and was improper, a new trial was ordered. Judgment appealed from (37 N.B. Rep. 163) reversed, Davies J. dissenting. BUSTIN *v.* THORNE........ **532**

AND *see* APPEAL 7.

3——*Appeal—Jurisdiction—New trial—Discretion—Ontario appeals*—60 & 61 *V. c.* 34—*R.S.C. c.* 135, s. 27.] *Per* Fitzpatrick C.J. and Duff J.—Section 27 of R.S.C. c. 135, prohibits an appeal from a judgment of the Court of Appeal for Ontario, granting, in the exercise of judicial discretion, a new trial in the action. *Per* Davies J.—Under the rule in *Town of Aurora* v. *Village of Markham* (32 Can. S.C.R. 457) no appeal lies from a judgment of the Court of Appeal for Ontario on motion for a new trial unless it comes within the cases mentioned in 60 & 61 V. c. 34, or special leave to appeal has been obtained. Appeal from judgment of the Court of Appeal (11 Ont. L.R. 171) quashed. CANADA CARRIAGE CO. *v.* LEA........... **672**

4——*Negligence—Trial—Finding of jury —Exercise of statutory privilege*..... **94**

See NEGLIGENCE 2.

NOTICE—*Promissory note—Deposit receipt — Demand for payment — Action.*] In an action on an instrument in the following form: "$1,200. Edmundston, N.B., July 12th, 1899. Received from the Reverend N. P. Babineau the sum of twelve hundred dollars, for which I am responsible, with interest at the rate of seven per cent. per annum, upon production of this receipt and after three months' notice. Fred. LaForest." The court below held (37 N.B. Rep. 156) that the plaintiff could recover as for a promissory note and that a demand for immediate payment made more than three months before the action was a sufficient notice. Without calling upon

NOTICE—*Continued.*

counsel for the respondent, the Supreme Court of Canada dismissed the appeal. LAFOREST *v.* BABINEAU............521

2——*Broker — Purchase on margin — Non-payment—Sale without notice—Liability of customer—Damages.* SUTHERLAND *v.* SECURITIES HOLDING CO.....694

3——*Lease — Canal — Water-power — Improvements on canal — Temporary stoppage of power—Compensation—Total stoppage—Measure of damages—Loss of profits*..........................259

See LEASE 1.

4——*Equitable mortgage — Mines and minerals — Lease of mining lands — Sheriff's sale — Purchase by judgment creditor of mortgagee—Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B.* (1903), *c.* 30, *s.* 139........................517

See MINES AND MINERALS.

NULLITY—*Construction of deed—Ambiguity—Discharge of debtor—Contract—Illegal consideration—Right of action.*..............................613

See DEED 3.

PARLIAMENTARY ELECTIONS.

See ELECTION LAW.

PARTNERSHIP—*Formation of limited company—Act of directors—Unauthorized expenditure—Liability of innocent directors*..........................32

See COMPANY LAW 1.

2——*Account stated—Admission of liability — Promise to pay — Collateral agreement—Parol evidence*.........315

See EVIDENCE 2.

PATENT OF INVENTION — *Canadian patent — Infringement — Prior foreign patent.*] In an action for infringement of a Canadian patent of invention for improvements in weather strips and guides for windows, it appeared that the defendants had manufactured weather strips in Canada more similar to those described in an American patent of a prior date than to any of the forms shewn and described in the Canadian

PATENT OF INVENTION—*Continued.*

patent. The court below in dismissing the action (9 Ex. C.R. 399) held that, if the plaintiffs' patent was good, it was good only for the forms of weather strips particularly specified therein of which the evidence failed to shew any infringement. This decision was affirmed by the Supreme Court of Canada. CHAMBERLAIN METAL WEATHER STRIP CO. *v.* PEACE..........................530

2——*Infringement of patent—Sale for a reasonable price—Use of patented device—Contract—"Patent Act," R.S.C. c. 61, s. 37—Evidence.*] The patentee of a devise for binding loose sheets sold the defendant H. binders subject to the condition that they should be used only in connection with sheets supplied by or under the authority of the patentee. H. used the binders with sheets obtained from the other defendants, contrary to the condition. In an action for infringement of the patent: *Held*, that the condition in the contract with H. imposing the restriction upon the manner in which he should use the binders was not a contravention of the provisions of section 37 of the "Patent Act," R.S.C. c. 61, in respect to supplying the patented invention at a reasonable price to persons desiring to use it, and that the use so made of the binders by H. was in breach of the condition of the contract licensing him to make use of the patented device and an infringement of the patent. Judgment appealed from (10 Ex. C.R. 224) affirmed. HATTON *v.* COPELAND-CHATTERSON CO..........................651

PAYMENT—*Life insurance — Condition of policy—Premium note—Payment of premium.*] When the renewal premium on a policy of life assurance became due the assured gave the local agent of the insurance company a note for the amount of the premium, with interest added, which the agent discounted, placing the proceeds to his own credit in his bank account. The renewal receipt was not countersigned nor delivered to the assured and the agent did not remit the amount of the premium to the company. When the note fell due, it was not paid in full and a renewal note was given for the balance which remained unpaid at the time of the death of the assured. The conditions of the policy declared

PAYMENT—*Continued.*

that if any note given for a premium was not paid when due the policy should cease to be in force. *Held,* affirming the judgment appealed from (38 N.S. Rep. 15) Davies and Maclennan JJ. dissenting, that the transactions that took place between the assured and the agent did not constitute a payment of the premium and that the policy had lapsed on default to meet the note when it became due. *The Manufacturers Accident Insurance Co.* v. *Pudsey* (27 Can. S.C.R. 374) distinguished; *London and Lancashire Life Assurance Co.* v. *Fleming* ([1897] A.C. 499) referred to. HUTCHINS *v.* NATIONAL LIFE ASSURANCE CO...**124**

2——*Contract — Supply of material — Certificate of engineer—Condition precedent — Improper interference — Fraud— Hindering performance of condition— Monthly estimate — Final decision.* TEMISKAMING AND NORTHERN ONTARIO RY. CO. *v.* WALLACE..............**696**

3——*Suretyship — Collateral deposit— Ear-marked fund — Appropriation of proceeds—Set-off — Release of principal debtor—Constructive fraud — Discharge of surety — Right of action — Common counts—Equitable recourse.* **331**

See PRINCIPAL AND SURETY.

PENALTY—*Contract—Breach of conditions—Liquidated damages — Penalty — Cumulative remedy—Operation of tramway—Construction and location of lines —Use of highways—Car service—Timetables—Municipal control—Territory annexed after contract—Abandonment of monopoly*—55 *V. c.* 99 (*Ont.*)......**430**

See TRAMWAY 2.

PLANS—*Municipal corporation — Railway aid—Construction of agreement— Expropriation — Description of lands — Reference to plans—R.S.N.S.* 1900, *c.* 99 —3 *Edw. VII. c.* 97 (*N.S.*).........**75**

See CONTRACT 2.

PLEADING—*Controverted election—Personal corruption—Charge in petition— Judge's report—Adjudication — Amendment.*] On a charge of personal corruption by the respondent if the adjudication by the trial judges does not claim a formal finding of such corruption this court may insert it if the recitals and reasons given by the judges warrant it.—Allegations in the petition that respondent had himself given and procured, undertook to give and procure money and value to electors and others named, his agents, to induce them to favour his election and vote for him for the purpose of having such moneys and value employed in corrupt practices were sufficient to cover the offence of which the respondent was found guilty. ST. ANN'S ELECTION CASE..........**563**

AND *see* ELECTION LAW 2.

2——*Practice — Amendment ordered by court—Married woman—Legal community—Right of action—Reprise d'instance —Arts.* 78, 174, 176 *C.P.Q.—R.S.C. c.* 135, *ss.* 63, 64. NORTH SHORE POWER CO. *v.* DUGUAY...................**624**

POSSESSION—*Statute of limitations— Possession of land—Constructive possession—Colourable title—Effect of sheriff's sale.* **157**

See TITLE TO LAND 2.

2——*Title to land—Ownership—Artificial watercourse—Canal banks—Trespass —Possessory action—Bornage—Practice.* **668**

See TITLE TO LAND 5.

PRACTICE—*Negligence — Trial — Findings of jury — Exercise of statutory privilege.*] Where on the trial of an action based on negligence questions are submitted to the jury they should be asked specifically to find what was the negligence of the defendant which caused the injury and general findings of negligence will not support a verdict unless the same is shewn to be the direct cause of the injury. MADER *v.* HALIFAX ELECTRIC TRAMWAY CO................**94**

2——*Appeal to Privy Council—Colonial Courts of Admiralty Act,* 1890 (*Imp.*)— *Right of appeal de plano — Bail for costs.*] Upon the application of the appellants (30th March, 1906), for an order to fix bail on a proposed appeal direct to His Majesty in Council, under the rules established by the Colonial Courts of Admiralty Act, 1890, (Imp.), the Supreme Court of Canada, sitting *in*

PRACTICE—*Continued.*

banco, after hearing counsel for and against the application, made an order *pro formâ* (without expressing any opinion as to the right of appealing *de plano*), that the appellants should give bail to answer the costs of the proposed appeal in the sum of £300 sterling, to the satisfaction of the Registrar of the Supreme Court of Canada, on or before the 4th of April, 1906. THE "ALBANO" *v.* THE "PARISIAN"................301

(In *The "Cape Breton"* v. *Richelieu and Ontario Nav. Co.* (36 Can. S.C.R. 592) a similar order was made by a judge in chambers and the appeal was heard by the Judicial Committee without an order for leave, 48 Can. Gaz. 279.)

3——*Controverted election — Petition — Preliminary objections—Status of petitioner—Evidence—Premature service — Return of member.*] A petition alleging "an undue election" or "undue return" of a candidate at an election for the House of Commons cannot be presented and served before the candidate has been declared elected by the returning officer. Girouard and Idington JJ. dissenting. YUKON ELECTION CASE..495

4——*Controverted election — Personal corruption—Charge in petition—Judge's report — Adjudication — Amendment — Evidence.*] On a charge of personal corruption by the respondent if the adjudication by the trial judges does not contain a formal finding of such corruption this court may insert it if the recitals and reasons given by the judges warrant it.—Allegations in the petition that respondent had himself given and procured, undertaken to give and procure money and value to electors and others named, his agents, to induce them to favour his election and vote for him, for the purpose of having such moneys and value employed in corrupt practices were sufficient to cover the offence of which the respondent was found guilty. ST. ANN'S ELECTION CASE.............563

5——*Controverted election—Commencement of trial—Extension of time.*] An order fixing the time for the trial of an election petition at a date beyond the time prescribed under the Act operates as an enlargement of the time. *St. James Election Case* (33 Can. S.C.R. 137); *Beauharnois Election Case* (32 Can. S.C.R. 111), followed. HALIFAX ELECTION CASES.................601

6——*Controverted election—Trial of petition — Evidence — Corrupt acts at former election — Agency — System of corruption.*] A petition against the return of a member for the House of Commons at a general election in 1904 contained allegations of corrupt acts by respondent at the election in 1900 which were struck out on preliminary objections. On the trial of the petition evidence of payments by respondents of accounts in connection with the former election was offered to prove agency and a system and was admitted on the first ground. A question as to the amount of one account so paid was objected to and rejected. *Held,* that such rejection was proper; that the question was not admissible to prove agency for agency was admitted or proved otherwise; nor as proof of a system which could not be established by evidence of an isolated corrupt act.—*Held,* also, that where evidence is tendered on one ground other grounds cannot be set up in a Court of Appeal. SHELBURNE AND QUEEN'S ELECTION CASE.........................604

7——*Pleading—Amendment ordered by the court—Married women—Legal community—Right of action—Reprise d'instance—Arts.* 78, 174, 176 *C.P.Q.—R.S.C. c.* 135, *ss.* 63, 64. NORTH SHORE POWER CO. *v.* DUGUAY.............624

8——*Negligence—Findings by jury—Evidence*.............................1

See NEGLIGENCE 1.

9——*Construction of statute — "Marsh Act." R.S.N.S.* 1900, *c.* 66, *ss.* 22, 66—*Jurisdiction of Marsh Commissioners—Assessment of lands—Certiorari—Limitation for granting writ—Expiration of time limit—Delays occasioned by judge —Legal maxim—Order nunc pro tunc.* 79

See CERTIORARI.

10——*Breach of trust—Accounts—Evidence — Nova Scotia "Trusts Act" — 2 Edw. VII. c.* 13—*Liability of trustee—*

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N.S. Order XXXII., r. 3—Judicial discretion—Statute of Limitations.......**163**
See TRUSTS 2.

11——*Judicial sale of railways—Interested bidder—Disqualification as purchaser—Counsel and solicitors—Art. 1484 C.C.—Construction of statute—Discretionary order—Review by appellate court—4 & 5 Edw. VII. c. 158 (D.)—Public policy*..................**303**
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12——*New trial—Judgment in court below on motion—Equal division—Appeal—Jurisdiction—Charge to jury—Misdirection—Bias*..................**532**
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13——*Appeal—Jurisdiction—Declinatory exception—Interlocutory judgment—Review of judgment on exception*.**535**
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14——*Tenant by sufferance—Use and occupation of lands—Art. 1608 C.C.—Promise of sale—Vendor and purchaser—Reddition de compte—Actio ex vendito*. **627**
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15——*Title to land—Ownership—Artificial watercourse—Canal banks—Trespass—Possessory action—Bornage*...**668**
See TITLE TO LAND 5.

16——*Appeals from Ontario—Jurisdiction—New trial—Discretionary order—R.S.C. c. 135, s. 27—60 & 61 V. c. 24 (D.)*...........................**672**
See APPEAL 9.

PRINCIPAL AND AGENT—*Sale of land—Authority to make contract—Specific performance.*] The defendant gave a real estate agent the exclusive right, within a stipulated time, to sell, on commission, a lot of land for $4,270 (the price being calculated at the rate of $40 per acre on its supposed area), an instalment of $1,000 to be paid in cash and the balance, secured by mortgage, payable in four annual instalments. The agent entered into a contract for sale of the lot to the plaintiff at $40 per acre, $50 being deposited on account of the price, the balance of the cash to be paid "on acceptance of title," the remainder of the purchase money payable in four consecutive yearly instalments and with the privilege of "paying off the mortgage at any time." This contract was in the form of a receipt for the deposit and signed by the broker as agent for the defendant.—*Held*, affirming the judgment appealed from (15 Man. Rep. 205) that the agent had not the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal.—*Held*, further, that the term allowing the privilege of paying off the mortgage at any time was not authorized and could not be enforced against the defendant. GILMOUR *v.* SIMON.......................**422**

2——*Sale of goods—Contract by correspondence—Statute of Frauds—Delivery by agent—Statutory prohibition—Illicit sale of intoxicating liquors—Knowledge of seller—Validity of contract*...........................**55**
See CONTRACT 1.

3——*Election petition—Trial—Corruption at former election—Evidence to prove agency*....................**604**
See ELECTION LAW 4.

PRINCIPAL AND SURETY—*Suretyship—Collateral deposit—Ear-marked fund—Appropriation of proceeds—Set-off—Release of principal debtor—Constructive fraud—Discharge of surety—Right of action—Common counts—Equitable recourse.*] K. owed the corporation $33,527.94 on two judgments recovered on notes for $10,000 given by him to R., and a subsequent loan to him and R. for $20,000. M., at the request of and for the accommodation of R., had indorsed the notes for $10,000 and deposited certain shares and debentures as collateral security on his indorsement. K. and R. deposited further collateral securities on negotiating the second loan, but K. remained in ignorance of M.'s indorsements and collateral deposit until long after the release hereinafter mentioned. These judgments remained unsatisfied for over six years, but, in the meantime, the corporation had sold all the shares deposited as collateral security, and placed

PRINCIPAL AND SURETY—*Continued.*

the money received for them to the credit of a suspense account, without making any distinction between funds realized from M.'s shares and the proceeds of the other securities and without making any appropriation of any of the funds towards either of the debts. On 28th February, 1900, after negotiations with K. to compromise the claims against him, the agent of the corporation wrote him a letter offering to compromise the whole indebtedness for $15,000, provided payment was made some time in March or April following. This offer was not acted upon until November, 1901, when the corporation carried out the offer and received the $15,000, having a few days previously appropriated the funds in the suspense account, applying the proceeds of M.'s shares to the credit of the notes he had indorsed. The negotiations and the final settlement with K. were not made known to M., and K. was not informed of his continuing liability towards M. as a surety. *Held, per* Sedgewick, Girouard, Davies and Idington JJ (reversing the judgment appealed from (11 B.C. Rep. 402)) that the secret dealings by the corporation with K. and with respect to the debts and securities were, constructively, a fraud against both K. and M.; that the release of the principal debtor discharged M. as surety, and that he was entitled to recover the surplus of what the corporation received applicable to the notes indorsed by him as money had and received by the corporation to and for his use.—*Held*, by Maclennan J. that, on proper application of all the money received, the corporation had got more than sufficient to satisfy the amount for which M. was surety and that the surplus received in excess of what was due upon the notes was, in equity, received for the use of M. and could be recovered by him on equitable principles or as money had and received in an action at law. MILNE *v.* YORKSHIRE GUARANTEE CORPORATION. **331**

PRIVY COUNCIL — *Appeal to Privy Council—"Colonial Courts of Admiralty Act,"* 1890, (*Imp.*)—*Right of appeal de plano—Bail for costs—Practice.*] Upon the application of the appellants (30th March, 1906), for an order to fix bail on a proposed appeal, direct to His Majesty in Council, under the rules established by the "Colonial Courts of Admiralty Act," 1890, (Imp.), the Supreme Court of Canada, sitting *in banco*, after hearing counsel for and against the application, made an order, *pro formâ* (without expressing any opinion as to the right of appealing *de plano*), that the appellants should give bail to answer the costs of the proposed appeal in the sum of £300 sterling, to the satisfaction of the Registrar of the Supreme Court of Canada, on or before the 4th of April, 1906. THE "ALBANO" *v.* THE "PARISIAN.". **301**

(In *The "Cape Breton"* v. *Richelieu and Ontario Nav. Co.* (36 Can. S.C.R. 592), a similar order was made in chambers and the appeal was argued before the Judicial Committee without leave granted, 48 Can. Gaz. 279.)

PROCES-VERBAL — *Appeal* — *Jurisdiction—Annulment of procès-verbal—Injunction—Matter in controversy—Art.* 560 *C.C.—Servitude.* **321**

See APPEAL 3.

PUBLIC POLICY—*Judicial sale of railways — Interested bidder— Disqualification as purchaser—Counsel and solicitors — Art.* 1484 *C.C. — Construction of statute—Review by appellate court—Discretionary order*—4 & 5 *Edw. VII. c.* 158 (*D.*). **303**

See RAILWAYS 3.

PUBLIC WORKS — *Lease* — *Canal* — *Water-power—Improvements on canal—Temporary stoppage of power—Compensation — Total stoppage — Measure of damages—Loss of profits.*] A mill was operated by water-power taken from the surplus water of the Galops Canal under a lease from the Crown. The lease provided that in case of a temporary stoppage in the supply caused by repairs or alterations in the canal system the lessee would not be entitled to compensation unless the same continued for six months, and then only to an abatement of rent. *Held*, Idington J. *dubitante*, that a stoppage of the supply for two whole seasons necessarily and *bonâ fide* caused by alterations in the system was a temporary stoppage under this provision.—The lease also provided that,

PUBLIC WORKS—*Continued.*

in case the flow of surplus water should at any time be required for the use of the canal or any public purpose whatever, the Crown could, on giving notice to the lessee, cancel the lease in which case the lessee should be entitled to be paid the value of all the buildings and fixtures thereon belonging to him with ten per cent. added thereto. The Crown unwatered the canal in order to execute works for its enlargement and improvement, contemplating at the time only a temporary stoppage of the supply of water to the lessee, but later changes were made in the proposed work which caused a total stoppage and the lessee, by petition of right, claimed damages. —*Held*, Girouard J. dissenting, that as the Crown had not given notice of its intention to cancel the lease the lessee was not entitled to the damages provided for in case of cancellation.—*Held*, also, that the lessee was not entitled to damages for loss of profits during the time his mill was idle owing to the water being out of the canal. Judgment of the Exchequer Court (9 Ex. C.R. 287) affirmed, Girouard and Idington JJ. dissenting. BEACH *v.* THE KING......**259**

QUEBEC SOUTHERN RAILWAY.
See RAILWAYS.

RAILWAYS—*Negligence — Finding of jury—Evidence.*] A. brought an action, as administratrix of the estate of her husband, against the C.P.R. Co., claiming compensation for his death by negligence and alleging in her declaration that the negligence consisted in running a train at a greater speed than six miles an hour through a thickly populated district and in failing to give the statutory warning on approaching the crossing where the accident happened. At the trial questions were submitted to the jury who found that the train was running at a speed of 25 miles an hour, that such speed was dangerous for the locality and that the death of deceased was caused by neglect or omission of the company in failing to reduce speed as provided by "The Railway Act." The verdict was entered for the plaintiff and on motion to the court, *en banc*, to have it set aside and judgment entered for defendants a new trial was ordered on the ground that questions

RAILWAYS—*Continued.*

as to the bell having been rung and the whistle sounded should have been submitted to the jury. The plaintiff appealed to the Supreme Court of Canada to have the verdict at the trial restored and the defendants, by cross-appeal, asked for judgment. *Held*, Idington J. dissenting, that by the above findings the jury must be held to have considered the other grounds of negligence charged, as to which they were properly directed by the judge, and to have exonerated the defendants from liability thereon, and the new trial was improperly granted on the ground mentioned.—*Held*, also, that though there was no express finding that the place at which the accident happened was a thickly peopled portion of the district it was necessarily imported in the findings given above; that this fact had to be proved by the plaintiff and there was no evidence to support it; and that, as the evidence shewed it was not a thickly peopled portion, the plaintiff could not recover and the defendants should have judgment on their cross-appeal. ANDREAS *v.* CANADIAN PACIFIC RY. CO....................**1**

2——*Constitutional law — Parliament— Power to legislate — "Railway Act," 1888, ss. 187, 188—Protection of crossings—Party interested—Railway committee—Board of Railway Commissioners —"Railway Act, 1903."*] Sections 187 and 188 of "The Railway Act, 1888," empowering the Railway Committee of the Privy Council to order any crossing over a highway of a railway subject to its jurisdiction to be protected by gates or otherwise, are *intra vires* of the Parliament of Canada. Idington J. dissented.—(Sections 186 and 187 of "The Railway Act, 1903," confer similar powers on the Board of Railway Commissioners.) These sections also authorize the committee to apportion the cost of providing and maintaining such protection between the railway company and "any person interested." *Held*, Idington J. dissenting, that the municipality in which the highway crossed by the railway is situate is a "person interested" under said sections. CITY OF TORONTO *v.* GRAND TRUNK RY. CO...**232**

3——*Judicial sale of railways---Interested bidder—Disqualification as purchaser— Counsel and solicitors—Art.* 1484 *C.C.*—

RAILWAYS—*Continued.*

Construction of statute — Discretionary order—Review by appellate court—4 & 5 *Edw. VII. c.* 158 (*D.*) —*Public policy.*] Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by article 1484 of the Civil Code of Lower Canada.—The Act. 4 & 5 Edw. VII. c. 158, directed the sale of certain railways separately or together as in the opinion of the Exchequer Court might be for the best interests of creditors, in such mode as that court might provide, and that such sale should have the same effect as a sheriff's sale of immovables under the laws of the Province of Quebec. The judge of the Exchequer Court directed the sale to be by tender for the railways *en bloc* or for the purchase of each or any two of the lines of which they were constituted. *Held*, that the judge had properly exercised the discretion vested in him by the statute in accepting a tender for the whole system, in preference to two separate tenders for the several lines of railway at a slightly increased amount, and that his decision should not be disturbed on appeal. Judgment appealed from (10 Ex. C.R. 139) affirmed. RUTLAND RAILROAD CO. *v.* BÉIQUE; WHITE *v.* BÉIQUE; MORGAN *v.* BÉIQUE.........**303**

4——*Board of Railway Commissioners—Jurisdiction—Construction of subway—Apportionment of cost—Person interested or affected—Street railway—Agreement with municipality.*] The power of the Board of Railway Commissioners, under section 186 of the "Railway Act, 1903," to order a highway to be carried over or under a railway is not restricted to the case of opening up a new highway, but may be exercised in respect to one already in existence.—The application for such order may be made by the municipality as well as by the railway company.—The Board, on application by the City of Ottawa, ordered a subway to be made under the track of the Canada Atlantic Railway Co. where it crosses Bank Street, the cost to be apportioned among the city, the C. A. Ry. Co. and the Ottawa Electric Ry. Co. By an agreement between the Electric Company and the city the company was given the right to run its cars along Bank Street and over the railway crossing, paying therefor a specific sum per mile. The company appealed from that portion of the order, making them contribute to the cost of the subway, contending that the city was obliged to furnish them with a street over which to run their cars and they could not be subjected to greater burdens than those imposed by the agreement. *Held*, that the Electric Co. was a company "interested or affected" in or by the said work within the meaning of section 47 of the said Railway Act, and could properly be ordered to contribute to the cost thereof.—*Held*, further, that there was nothing in the agreement between said company and the city to prevent the Board making said order or to alter the liability of the company so to contribute. OTTAWA ELECTRIC RY. CO. *v.* CITY OF OTTAWA AND CANADA ATLANTIC RY. CO. **354**

5——*Board of Railway Commissioners—Jurisdiction—Appeal to Supreme Court.*] The Board of Railway Commissioners granted an application of the James Bay Railway Co. for leave to carry their line under the track of the G. T. Ry. Co. but, at the request of the latter, imposed the condition that the masonry work of such under crossing should be sufficient to allow of the construction of an additional track on the line of the G. T. Ry. Co. No evidence was given that the latter company intended to lay an additional track in the near future or at any time. The James Bay Co., by leave of a judge, appealed to the Supreme Court of Canada from the part of the order imposing such terms contending that the same was beyond the jurisdiction of the Board. *Held*, that the Board had jurisdiction to impose said terms.—*Held, per* Sedgewick, Davies and Maclennan JJ., that the question before the court was rather one of law than of jurisdiction and should have come up on appeal by leave of the Board or been carried before the Governor General in Council. JAMES BAY RY. CO. *v.* GRAND TRUNK RY. CO...........**372**

6——*Board of Railway Commissioners—Jurisdiction — Traffic accommodation — Restoring connections*—3 *Edw. VII. c.* 58, *ss.* 176, 214, 253.] On an application to the Board of Railway Commis-

RAILWAYS—*Continued.*

sioners for Canada, under the provisions of the "Railway Act, 1903," for a direction that a railway company should replace a siding, where traffic facilities had been formerly provided for the respondents with connections upon their lands, and for other appropriate relief for such purposes: *Held*, that, under the circumstances, the Board had jurisdiction to make an order directing the railway company to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch and receipt of freight in carloads over, to and from the line of railway. CANADIAN NORTHERN RY. CO. *v.* ROBINSON....**541**

7——*Negligence—Defective construction of road-bed—Dangerous way—Vis major—Evidence—Onus of proof—Latent defect.*] The road-bed of appellants' railway was constructed, in 1893, at a place where it followed a curve round the side of a hill, a cutting being made into the slope and an embankment formed to carry the rails, the grade being one and one-half per cent. or 78.2 feet to the mile. The whole of the embankment was built on the natural surface, which consisted, as afterwards discovered, of a lair of sandy loam of three or four feet in depth resting upon clay subsoil. No borings or other examinations were made in order to ascertain the nature of the subsoil and the road-bed remained for a number of years without shewing any subsidence except such as was considered to be due to natural causes and required only occasional repairs; the necessity for such repairs had become more frequent, however, for a couple of months immediately prior to the accident which occasioned the injury complained of. Water, coming either from the berm-ditch, or from a natural spring formed beneath the sandy loam, had gradually run down the slope, lubricated the surface of the clay and, finally, caused the entire embankment and sandy lair to slide away about the time a train was approaching, on the evening of 20th September, 1904. The train was derailed and wrecked and the engine-driver was killed.—In an action by his widow for the recovery of damages: *Held*, that in constructing the road-bed, without sufficient examination upon treacherous soil and failing to maintain it in a safe and proper condition, the railway company was, *primâ facie*, guilty of negligence which cast upon them the onus of shewing that the accident was due to some undiscoverable cause; that this onus was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and guarded against, and that, consequently, the company was liable in damages. Judgment appealed from affirmed, following *The Great Western Railway Co. of Canada* v. *Braid* (1 Moo. P.C. (N.S.) 101). QUEBEC AND LAKE ST. JOHN RY. CO. *v.* JULIEN.......................**632**

8——*Municipal corporation — Railway aid—Construction of agreement—Expropriation—Description of lands—Reference to plans—R.S.N.S.* 1900, *c.* 99—3 *Edw. VII. c.* 97 (*N.S.*).............**75**

See CONTRACT 2.

9——*Expropriation of land—Arbitration—Authority for submission—Trespass—* 2 *Edw. VII. c.* 104 (*N.S.*).........**134**

See EXPROPRIATION 2.

10——*Highway — Dedication — Acceptance by public—User*...............**210**

See HIGHWAYS 1.

AND *see* TRAMWAYS.

RAILWAY COMMISSIONERS.

See BOARD OF RAILWAY COMMISSIONERS.

RAILWAY COMMITTEE OF THE PRIVY COUNCIL.

See RAILWAYS 2.

REGISTRY LAWS—*Equitable mortgage—Mines and minerals—Lease of mining lands—Sheriff's sale—Purchase by judgment creditor of mortgagee—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B. c.* 30, *s.* 139.] The courts below (37 N.B. Rep. 140; 3 N.B. Eq. 28) held that mining leases of lands in the Province of New Brunswick and of the minerals therein, issued by the Crown to the appellant subsequent to a mortgage executed by it in the State of New York

REGISTRY LAWS—*Continued.*

in favour of the respondent, a company incorporated under the laws of that state, which do not reserve the minerals to the state, were subject to the mortgage; that a judgment creditor of the mortgagor (who purchased the leases at a sheriff's sale in execution of his own judgment and afterwards obtained new leases in his own name from the Crown), took the new leases subject to the mortgage; that the mortgage, though not registered under the "General Mining Act," C.S.N.B. (1903), c. 30, s. 139, was not void as against a judgment creditor who had actual notice of the mortgage and whose judgment was not registered under that section at the time of the commencement of the suit, and that the judgment creditor was not entitled to a prior lien for rent paid to the Crown on the license declared to be held in trust for the mortgagee. An appeal to the Supreme Court of Canada was dismissed, Maclennan J. dissenting. MINERAL PRODUCTS CO. *v.* CONTINENTAL TRUST CO. **517**

RELEASE — *Suretyship — Collateral deposit—Ear-marked fund—Appropriation of proceeds—Set-off—Release of principal debtor — Constructive fraud — Discharge of surety—Right of action—Common counts—Equitable recourse*..... **331**

See PRINCIPAL AND SURETY.

RIPARIAN RIGHTS — *Rivers and streams—Floating sawlogs—Use of booms — Vis major—Action—Salvage — Quantum meruit.*] P. placed booms across a floatable river to hold logs at a place where he had erected a sawmill on land owned by him on the banks of the river. T. had a boom further upstream for storing pulpwood. An unusual freshet broke T.'s boom and brought a quantity of his wood down with the current into P.'s boom, where it was caught and held for some time, until removed by T., without causing any damage or expense to P. In an action by P. to recover salvage or the value of the use of his boom for the time during which T.'s wood had remained therein: *Held*, reversing the judgment appealed from (Q.R. 14 K.B. 513), that as P. had no right of property in the waters of the river where he had placed his boom those waters were *publici juris*, notwithstanding the

RIPARIAN RIGHTS—*Continued.*

construction of the boom; that T.'s wood came there lawfully; and that, as the service rendered in stopping the wood was involuntary and accidental, J. could recover nothing therefor. *Per* Fitzpatrick C.J.—There is no difference between the laws of the Province of Quebec and those of England in respect to the rights of riparian owners to the waters of floatable streams flowing past their lands. *Miner* v. *Gilmour* (12 Moo. P.C. 131) referred to. TANGUAY *v.* PRICE. **657**

2——*Watercourses — Trespass — Torts —Diversion of natural flow—Injurious affection—Damages—Execution of statutory powers — Arbitration — Injunction — Mandamus — Construction of statute*—59 *V. c.* 44 (*N.S.*)......... **464**

See RIVERS AND STREAMS 1.

3——*Rivers and streams—Navigable and floatable waters—Obstructions to navigation—Crown lands—Letters patent of grant — Evidence — Collateral circumstances leading to grant—Limitation of terms of grant—Title to land—Fisheries —Arts.* 400, 414, 503 *C.C.*.......... **577**

See RIVERS AND STREAMS 2.

4——*Title to land—Ownership — Artificial watercourse—Canal banks—Trespass —Possessory action—Bornage—Practice.* **668**

See TITLE TO LAND 5.

RIVERS AND STREAMS—*Watercourses —Riparian rights—Expropriation—Trespass—Torts—Diversion of natural flow —Injurious affection—Damages—Execution of statutory powers—Arbitration—Injunction—Mandamus—Construction of statute*—59 *V. c.* 44 (*N.S.*).] A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a watercourse may recover damages therefor and may also obtain relief by injunction restraining the continuation of the tortious acts so committed.—The powers conferred upon the town council of the Town of North Sydney, N.S., by the Nova Scotia statute, 59 V. c. 44, for the purpose of obtaining a water supply give them no rights in respect to the diversion of watercourses except subject to the provisions of the fourth section of

RIVERS AND STREAMS—*Continued.*

the Act, and after arbitration proceedings taken to settle compensation for injurious affection to property resulting from the construction or operation of the waterworks. *Saunby* v. *The Water Commissioners of London* ([1906] A.C. 110) followed. LEAHY *v.* TOWN OF NORTH SYDNEY....................464

2——*Navigable and floatable waters—Obstructions to navigation—Crown lands—Letters patent of grant—Evidence—Collateral circumstances leading to grant—Limitation of terms of grant—Title to land—Riparian rights—Fisheries—Arts. 400, 414, 503 C.C.*] A river is navigable when, with the assistance of the tide, it can be navigated in a practicable and profitable manner, notwithstanding that, at low tides, it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth. *Bell* v. *The Corporation of Quebec* (5 App. Cas. 84), followed. Evidence of the circumstances and correspondence leading to grants by the Crown of lands on the banks of a navigable river cannot be admitted for the purpose of shewing an intention to enlarge the terms of letters patent of grant of the lands; subsequently issued, so as to include the bed of the river and the right of fishing therein. The judgment appealed from (Q.R. 14 K.B. 115) was reversed and the judgment of the Superior Court (Q.R. 25 S.C. 104) was restored. *Steadman* v. *Robertson* (18 N.B. Rep. 580) and *The Queen* v. *Robertson* (6 Can. S.C.R. 52) referred to; *In re Provincial Fisheries* (26 Can. S.C.R. 444; (1898) A.C. 700) discussed. ATTY.-GEN. OF QUEBEC *v.* FRASER; ATTY.-GEN. OF QUEBEC *v.* ADAMS..............577

3——*Floating sawlogs—Use of booms—Vis major—Action—Salvage—Quantum meruit—Riparian rights.*] P. placed booms across a floatable river to hold logs at a place where he had erected a sawmill on land owned by him on the bank of the river. T. had a boom further upstream for storing pulpwood. An unusual freshet broke T.'s boom and brought a quantity of his wood down with the current into P.'s boom, where it was caught and held for some time until removed by T., without causing any damage or expense to P. In an action by P. to recover salvage or the value of the use of his boom for the time during which T.'s wood had remained therein: *Held*, reversing the judgment appealed from (Q.R. 14 K.B. 513), that as P. had no right of property in the waters of the river where he had placed his boom those waters were *publici juris*, notwithstanding the construction of the boom; that T.'s wood came there lawfully; and that, as the service rendered in stopping the wood was involuntary and accidental, P. could recover nothing therefor.—*Per* Fitzpatrick C.J.—There is no difference between the laws of the Province of Quebec and those of England in respect to the rights of riparian owners to the waters of floatable streams flowing past their lands. *Miner* v. *Gilmour* (12 Moo. P.C. 131) referred to. TANGUAY *v.* PRICE................657

4——*Title to land—Ownership—Artificial watercourse—Canal banks—Trespass—Possessory action—Bornage—Practice.* 668

See TITLE TO LAND 5.

SALE—*Sale of goods—Contract by correspondence — Statute of Frauds — Delivery—Principal and agent—Statutory prohibition—Illicit sale of intoxicating liquors—Knowledge of seller—Validity of contract.*] B., a trader, in Truro, N.S., ordered goods from a company in Glasgow, Scotland, through its agents, in Halifax, N.S., whose authority was limited to receiving and transmitting such orders to Glasgow for acceptance. B.'s order was sent to and and accepted by the company and the goods delivered to a carrier in Glasgow to be forwarded to B. in Nova Scotia. *Held*, affirming the judgment appealed from (37 N.S. Rep. 482) Idington J. dissenting, that the contract was made and completed in Glasgow.—Where a contract was made and completed in Glasgow, Scotland, for the sale of liquor by parties there to a trader in a county in Nova Scotia where liquor was forbidden by law to be sold on pain of fine or imprisonment and the vendors had no actual knowledge that the purchaser intended to re-sell the liquors illegally, the contract was not void and the vendors could recover

SALE—*Continued.*

the price of the goods. BIGELOW *v.* CRAIGELLACHIE GLENLIVET DISTILLERY Co. **55**

2——*Judicial sale of railways—Interested bidder—Disqualification as purchaser — Counsel and solicitors — Art. 1484 C.C.—Construction of statute—Discretionary order—Review by appellate court—4 & 5 Edw. VII. c. 158 (D.)—Public policy.*] Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by article 1484 of the Civil Code of Lower Canada.—The Act, 4 & 5 Edw. VII. c. 158, directed the sale of certain railways separately or together as in the opinion of the Exchequer Court might be for the best interests of creditors, in such mode as that court might provide, and that such sale should have the same effect as a sheriff's sale of immovables under the laws of the Province of Quebec. The judge of the Exchequer Court directed the sale to be by tender for the railways *en bloc* or for the purchase of each or any two of the lines of which they were constituted. *Held*, that the judge had properly exercised the discretion vested in him by the statute in accepting a tender for the whole system, in preference to two separate tenders for the several lines of railway at a slightly increased amount, and that his decision should not be disturbed on appeal. Judgment appealed from (10 Ex. C.R. 139) affirmed. RUTLAND RAILROAD Co. *v.* BÉIQUE; WHITE *v.* BÉIQUE; MORGAN *v.* BÉIQUE. **303**

3——*Principal and agent—Sale of land—Authority to make contract—Specific performance.*] The defendant gave a real estate agent the exclusive right, within a stipulated time, to sell, on commission, a lot of land for $4,270 (the price being calculated at the rate of $40 per acre on its supposed area), an instalment of $1,000 to be paid in cash and the balance, secured by mortgage, payable in four annual instalments. The agent entered into a contract for sale of the lot to the plaintiff at $40 per acre, $50 being deposited on account of the price, the balance of the cash to be paid "on acceptance of title," the remainder of the purchase money payable in four consecutive yearly instalments and with the privilege of "paying off the mortgage at any time." This contract was in the form of a receipt for the deposit and signed by the broker as agent for the defendant. *Held*, affirming the judgment appealed from (15 Man. Rep. 205) that the agent had not the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal.—*Held*, further, that the term allowing the privilege of paying off the mortgage at any time was not authorized and could not be enforced against the defendant. GILMOUR *v.* SIMON. **422**

4——*Broker — Purchase on margin — Non-Payment—Sale without notice—Liability of customer—Damages.* SUTHERLAND *v.* SECURITIES HOLDING Co. . . . **694**

5——*Agreement for sale of lands — Transactions with co-trustees—Necessity of joint action—Delegation of trust—Specific performance of contract*. . . **362**
See TRUSTS 4.

6——*Equitable mortgage — Mines and minerals — Lease of mining lands — Sheriff's sale — Purchase by judgment creditor of mortgagee—Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B.* (1903), *c.* 30, *s.* 139. . . . . **517**
See MINES AND MINERALS.

7——*Tenant by sufferance—Use and occupation of lands—Art.* 1608 *C.C.— Promise of sale—Vendor and purchaser—Reddition de compte—Actio ex vendito—Practice*. **627**
See ACTION 4.

SAW-LOGS — *Rivers and streams — Floating sawlogs—Use of booms—Vis major—Action—Quantum meruit—Salvage—Riparian rights*. **657**
See RIVERS AND STREAMS 3.

SCHOOLS — *Assessment and taxes — County School Fund—Contributions by incorporated towns — Construction of statute—3 Edw. VII. c. 6, s. 7.*] The Supreme Court of Nova Scotia held (38 N.S. Rep. 1) that the Town of Dartmouth was liable to contribute propor-

SCHOOLS—*Continued.*

tionately towards the School Fund of the County of Halifax for the year 1904. Without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal with costs. THE TOWN OF DARTMOUTH *v.* THE COUNTY OF HALIFAX............**514**

SEA-COAST FISHERIES — *Canadian waters — Three-mile-zone — Fishing by foreign vessels — Legislative jurisdiction —Seizure on high seas—Pursuit beyond territorial limit — International law — Constitutional law — Construction of statute—B.N.A. Act,* 1867, *s.* 91, *s.-s.* 12—*R.S.C. c.* 94, *ss.* 2, 3, 4.........**385**

See CONSTITUTIONAL LAW 2.

SERVITUDE — *Appeal — Jurisdiction — Annulment of procès-verbal — Injunction—Matter in controversy—Art* 560 *C.C.—Highway*..................**321**

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SHAREHOLDER.

See COMPANY LAW.

AND *see* BROKER.

SHERIFF—*Equitable mortgage—Mines and minerals—Lease of mining lands—Sheriff's sale—Purchase by judgment creditor of mortgagee—Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B. c.* 30, *s.* 139.] The courts below (37 N.B. Rep. 140; 3 N.B. Eq. 28) held that mining leases of lands in the Province of New Brunswick and of the minerals therein, issued by the Crown to the appellant subsequent to a mortgage executed by it in the State of New York in favour of the respondent, a company incorporated under the laws of that state, which do not reserve the minerals to the state, were subject to the mortgage; that a judgment creditor of the mortgagor (who purchased the leases at a sheriff's sale in execution of his own judgment and afterwards obtained new leases in his own name from the Crown), took the new leases subject to the mortgage; that the mortgage, though not registered under the "General Mining Act," C.S. N.B. (1903) c. 30, s. 139, was not void as against a judgment creditor who had actual notice of the mortgage and whose judgment was not registered under that

SHERIFF—*Continued.*

section at the time of the commencement of the suit, and that the judgment creditor was not entitled to a prior lien for rent paid to the Crown on the licenses declared to be held in trust for the mortgagee. An appeal to the Supreme Court of Canada was dismissed, Maclennan J. dissenting. MINERAL PRODUCTS CO. *v.* CONTINENTAL TRUST CO............**517**

2——*Execution—Sale of land—Statute of Limitations—Possession of land—Constructive possession—Colourable title—Effect of sheriff's sale*..............**157**

See TITLE TO LAND 2.

SHIPS AND SHIPPING—*Maritime law—Collision — Crossing ships — Admiralty Rules,* 1897, *rule* 19...............**284**

See ADMIRALTY LAW 1.

2——*Canadian waters — Three-mile-zone —Fishing by foreign vessels—Legislative jurisdiction—Seizure on high seas—Pursuit beyond territorial limit—International law—Constitutional law—Seacoast fisheries — Construction of statute —B.N.A. Act,* 1867, *s.* 91, *s.-s.* 12—*R.S.C. c.* 94, *ss.* 2, 3, 4.............**385**

See CONSTITUTIONAL LAW 2.

SOUTH SHORE RAILWAY.

See RAILWAYS.

SOLICITOR—*Judicial sales—Interested bidders—Disqualification as purchaser—Art.* 1484 *C.C.—Public policy.*] Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by article 1484 of the Civil Code of Lower Canada. Judgment appealed from (10 Ex. C.R. 139) affirmed. RUTLAND RAILROAD CO. *v.* BÉIQUE; WHITE *v.* BÉIQUE; MORGAN *v.* BÉIQUE.....**303**

AND *see* RAILWAYS 3.

SPECIFIC PERFORMANCE — *Principal and agent—Sale of land—Authority to make contract.*] The defendant gave a real estate agent the exclusive right, within a stipulated time, to sell, on commission, a lot of land for $4,270 (the price being calculated at the rate of $40 per acre on its supposed area), an instalment of $1,000 to be paid in cash

SPECIFIC PERFORMANCE—*Con.*

and the balance, secured by mortgage, payable in four annual instalments. The agent entered into a contract for sale of the lot to the plaintiff at $40 per acre, $50 being deposited on account of the price, the balance of the cash to be paid "on acceptance of title," the remainder of the purchase money payable in four consecutive yearly instalments and with the privilege of "paying off the mortgage at any time." This contract was in the form of a receipt for the deposit and signed by the broker as agent for the defendant.—*Held*, affirming the judgment appealed from (15 Man. Rep. 205) that the agent had not the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal.—*Held*, further, that the term allowing the privilege of paying off the mortgage at any time was not authorized and could not be enforced against the defendant. GILMOUR *v.* SIMON....................**422**

2——*Agreement for sale of lands — Transactions with co-trustees—Necessity of joint action—Delegation of trust—Specific performance of contract*.....**362**

See TRUSTS 4.

STATUTE — *Construction of statute — "Marsh Act," R.S.N.S. 1900, c. 66, ss. 22, 66—Jurisdiction of marsh commissioners —Assessment of lands—Certiorari—Limitation for granting writ—Practice—Expiration of time—Delays occasioned by judge—Legal maxim—Order nunc pro tunc.*] Where a statute authorizing commissioners to assess lands provided that no writ of certiorari to review the assessment should be granted after the expiration of six months from the initiation of the commissioners' proceedings: *Held*, Girouard J. dissenting, that an order for the issue of a writ of certiorari made after the expiration of the prescribed time was void notwithstanding that it was applied for and judgment on the application reserved before the time had expired.—*Held, per* Taschereau C.J. —That where jurisdiction has been taken away by statute, the maxim *actus curiæ neminem gravabit* cannot be applied, after the expiration of the time prescribed, so as to validate an order either by antedating or entering it *nunc pro tunc;* that, in the present case, the order for certiorari could issue as the impeachment of the proceedings of the inferior tribunal was sought upon the ground of want of jurisdiction in the commissioners, but the appellants were not entitled to it on the merits. *Per* Girouard J. (dissenting).—Under the circumstances, the order in this case ought to be treated as having been made upon the date when judgment upon the application was reserved by the judge. Upon the merits, the appeal should be allowed as the commissioners had no jurisdiction in the absence of proper notices as required by the twenty-second section of the "Marsh Act," R.S.N.S. 1900. c. 66. *Per* Davies J.—The statute allows any person aggrieved by the proceedings of the commissioners to remove the same into the Supreme Court by certiorari; the claim for the writ on the ground of jurisdiction was either abandoned or unfounded; and the statutory writ could not issue after the six months had expired. IN RE TRECOTHIC MARSH...**79**

2——*Breach of trust—Accounts—Evidence—Nova Scotia "Trustee Act," 2 Edw. VII. c. 13—Liability of trustee—N.S. Order XXXII., r. 3—Judicial discretion—Statute of Limitations.*] By his last will N. bequeathed shares of his estate to his daughters A. and C. and appointed A. executrix and trustee. C. was weak-minded and infirm and her share was directed to be invested for her benefit and the revenue paid to her half-yearly. A. proved the will, assumed the management of both shares and also the support and care of C. at their common domicile, and applied their joint incomes to meet the general expenses. No detailed accounts were kept sufficient to comply with the terms of the trust nor to shew the amounts necessarily expended for the support, care and attendance of C., but A. kept books which shewed the general household expenses and consisted, principally, of admissions against her own interests. After the decease of both A. and C. the plaintiffs obtained a reference to a master to ascertain the amount of the residue of the estate coming to C. (who survived A.) and the receipts and expenditures by A. on account of C. On receiving the report the judge referred it back to be varied, with further instructions and

STATUTE—*Continued.*

a direction that the books kept by A. should be admitted as *primâ facie* evidence of the matters therein contained. (see 37 N.S. Rep. pp 452-464.) This order was affirmed by the Supreme Court of Nova Scotia *in banco*. *Held*, affirming the judgment appealed from (37 N.S. Rep. 451) that the allowances for such expenditures need not be restricted to amounts actually shewn to have been so expended; that, under the Nova Scotia statute, 2 Edw. VII. c. 13, and Order XXXII., rule 3, a judge may exercise judicial discretion towards relieving a trustee from liability for technical breaches of trust and, for that purpose, may direct the admission of any evidence which he may deem proper for the taking of accounts. CAIRNS *v.* MURRAY . 163

3——*Constitutional law—Parliament—Power to legislate—Railways—"Railway Act,"* 1888, *ss.* 187, 188—*Protection of crossings — Party interested — Railway committee—"Railway Act,* 1903"—*Board of Railway Commissioners.*] Sections 187 and 188 of "The Railway Act, 1888," empowering the Railway Committee of the Privy Council to order any crossing over a highway of a railway subject to its jurisdiction to be protected by gates or, otherwise, are *intra vires* of the Parliament of Canada. Idington J. dissenting. (Sections 186 and 187 of "The Railway Act, 1903," confer similar powers on the Board of Railway Commissioners.)—These sections also authorize the committee to apportion the cost of providing and maintaining such protection between the railway company and "any person interested." *Held*, Idington J. dissenting, that the municipality in which the highway crossed by the railway is situate is a "person interested" under said sections. CITY OF TORONTO *v.* GRAND TRUNK RAILWAY CO. 232

4——*Construction of statute—Canadian waters — Three-mile-zone — Fishing by foreign vessels—Legislative jurisdiction —Service on high seas—Pursuit beyond territorial limit — International law — Constitutional law—B.N.A. Act,* 1867, *s.* 91, *s.-s.* 12—*Sea-coast fisheries — R.S.C. c.* 94, *ss.* 2, 3, 4.] Under the provisions of the "British North America Act," 1867, s. 91, s.-s. 12, the Parliament of Canada has exclusive jurisdiction to legislate with respect to fisheries within the three-mile-zone off the sea-coasts of Canada.—A foreign vessel found violating the fishery laws of Canada within three marine miles off the sea-coasts of the Dominion may be immediately pursued beyond the three-mile-zone and lawfully seized on the high seas. Girouard J. dissenting. The judgment appealed from (11 B.C. Rep. 473) was affirmed. THE SHIP "NORTH" *v.* THE KING. 385

5——*Contract—Breach of conditions—Liquidated damages—Penalty—Cumulative remedy—Operation of tramway—Construction and location of lines—Use of highways—Car service—Time-tables—Municipal control — Territory annexed after contract—Abandonment of monopoly*—55 *V. c.* 99 (*Ont.*).] Except where otherwise specially provided in the agreement between the Toronto Railway Company and the City of Toronto set forth in the schedules to chapter 99 of the statutes of Ontario, 55 V., in 1892, the right of the city to determine, decide upon and direct the establishment of new lines of tracks and tramway service, in the manner therein prescribed, applies only within the territorial limits of the city as constituted at the date of the contract. Judgment appealed from (10 Ont. L.R. 657) reversed, Girouard J. dissenting.—The city, and not the company, is the proper authority to determine, decide upon and direct the establishment of new lines, and the service, time-tables and routes thereon. Judgment appealed from affirmed, Sedgewick J. dissenting.—As between the contracting parties, the company, and not the city, is the proper authority to determine, decide upon and direct the time at which the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heated. Judgment appealed from reversed, Girouard J. dissenting.—Upon the failure of the company to comply with requisitions for extensions as provided in the agreement, it has no right of action against the city for grants of the privilege to others; the right of making such grants accrues, *ipso facto*, to the city, but is not the only remedy

STATUTE—*Continued.*

which the city is entitled to invoke. Judgment appealed from affirmed, Sedgewick, J. dissenting.—Cars starting out before midnight as day cars may be required by the city to complete their routes, although it may be necessary for them to run after midnight or transfer their passengers to a car which would carry them to their destinations without payment of extra fares, but at midnight their character would be changed to night cars and all passengers entering them after that hour could be obliged to pay night fares. Sedgewick J. dissenting. TORONTO RY. CO. *v.* CITY OF TORONTO. **430**

6——*Execution of statutory powers—Arbitration — Injunction — Mandamus — Construction of statute—59 V. c. 44 (N.S.).*] The powers conferred upon the town council of the Town of North Sydney, N.S., by the Nova Scotia statute, 59 V. c. 44, for the purpose of obtaining a water supply give them no rights in respect to the diversion of watercourses except subject to the provisions of the fourth section of the Act, and after arbitration proceedings taken to settle compensation for injurious affection to property resulting from the construction or operation of the waterworks. *Saunby* v. *The Water Commissioners of London* ([1906] A.C. 110) followed. LEAHY *v.* TOWN OF NORTH SYDNEY. **464**

AND *see* RIVERS AND STREAMS 1.

7——*Cause of action—Limitation of actions — Contract — Foreign judgment — Yukon Ordinance, c. 31 of 1890—Statute of James—Statute of Anne—Lex fori—Lex loci contractûs—Absence of debtor.*] Under the provisions of the Yukon Ordinance, c. 31 of 1890, the right to recover simple contract debts in the Territorial Court of Yukon Territory is absolutely barred after the expiration of six years from the date when the cause of action arose notwithstanding that the debtor has not been for that period resident within the jurisdiction of the court. Judgment appealed from reversed, Girouard and Davies JJ., dissenting. RUTLEDGE *v.* UNITED STATES SAVINGS AND LOAN CO. **546**

8——*Construction of statute—R.S.C. c. 135, s. 27—Appeal—Jurisdiction — New*

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trial—Discretion—Ontario Appeals—60 & 61 V. c. 34.] *Per* Fitzpatrick C.J. and Duff J.—Section 27 of R.S.C. c. 135 prohibits an appeal from a judgment of the Court of Appeal for Ontario granting, in the exercise of judicial discretion, a new trial in the action. *Per* Davies J.—Under the rule in *Town of Aurora* v. *Village of Markham* (32 Can. S.C.R. 457) no appeal lies from a judgment of the Court of Appeal for Ontario on motion for a new trial unless it comes within the cases mentioned in 60 & 61 V. c. 34, or special leave to appeal has been obtained. Appeal from judgment of the Court of Appeal (11 Ont. L.R. 171) quashed. CANADA CARRIAGE CO. *v.* LEA. **672**

9——*Construction of statute — Negligence — Findings by jury — Evidence — Practice — Operation of railway — "The Railway Act," 51 V. c. 29*. **1**

See NEGLIGENCE 1.

10——*Construction of statute—Municipal corporation — Railway aid — Construction of agreement—Expropriation —Description of lands —Reference to plans—R.S.N.S., 1900, c. 99—3 Edw. VII. c. 97 (N.S.)* **75**

See CONTRACT 2.

11——*Negligence—Exercise of statutory privilege—Evidence*. **94**

See NEGLIGENCE 2.

12——*Expropriation of land—Arbitration—Authority for submission—Trespass—2 Edw. VII. c. 104 (N.S.)* **134**

See EXPROPRIATION 2.

13——*Judicial sale of railways—Interested bidder — Disqualification as purchaser—Counsel and solicitors—Art. 1484 C.C.—Construction of statute — Discretionary order—Review by appellate court —4 & 5 Edw. VII. c. 158 (D.)—Public policy*. **303**

See RAILWAYS 3.

14——*"Railway Act, 1903," ss. 47, 186—Board of Railway Commissioners—Jurisdiction—Construction of subway—Apportionment of cost—Person interested or affected—Street railway—Agreement with municipality*. **354**

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15——*Assessment and taxes — County School Fund—Contributions by incorporated towns—Construction of statute*—3 *Edw. VII. c.* 6, *s.* 7 (*N.S.*).........**514**
See ASSESSMENT AND TAXES 2.

16——*Equitable mortgage — Mines and minerals—Lease of mining lands—Sheriff's sale—Purchase by judgment creditor of mortgagee—Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent*—*C.S.N.B.* (1903), *c.* 30, *s.* 139..........................**517**
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STATUTES—21 *Jac. I. c.* 16 *(Imp.)* (*Limitation of actions*)...........**546**
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2——4 & 5 *Anne c.* 16 (*Imp.*) (*Limitation of actions*).....................**546**
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3——30 *V. c.* 3, *s.* 91, *sub-s.* (*Imp.*) (*B.N.A. Act*, 1867)................**385**
See CONSTITUTIONAL LAW 2.

4——53 & 54 *V. c.* 27 (*Imp.*) (*Colonial Courts of Admiralty Act*, 1890)....**301**
See ADMIRALTY LAW 2.

5——*R.S.C. c.* 61, *s.* 37 (*"Patent Act"*) **651**
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6——*R.S.C. c.* 94, *ss.* 2, 3, 4 (*Canadian Fisheries*)...................**385**
See CONSTITUTIONAL LAW 2.

7——*R.S.C. c.* 129, *s.* 76 (*Supreme and Exchequer Courts Act*)............**173**
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8——*R.S.C. c.* 129 (*Winding-up Act*). **427**
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9——*R.S.C. c.* 135, *s.* 27 (*Appeals from orders for new trial*)...............**672**
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10——*R.S.C. c.* 135, *s.* 28 (*Supreme Court Act*) **173**
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11——*R.S.C. c.* 135, *ss.* 63, 64.......**624**
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12——51 *V. c.* 29, *s.* 256 (*Railway Act*, 1888)............................**1**
See NEGLIGENCE 1.

13——51 *V. c.* 29. *ss.* 187, 188 (*D.*) (*Railway Act*, 1888)..............**232**
See RAILWAYS 2.

14——60 & 61 *V. c.* 34 (*D.*) (*Ontario appeals*).........................**672**
See APPEAL 9.

15——3 *Edw. VII. c.* 58 (*D.*) (*Railway Act*, 1903)........................**232**
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16——3 *Edw. VII. c.* 58 (*D.*) *ss.* 47 *and* 186 (*Railway Act*, 1903)..........**354**
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17——3 *Edw. VII. c.* 58, *ss.* 176, 214, 253 (*Railway Act*, 1903)...........**541**
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18——4 & 5 *Edw. VII. c.* 158 (*D.*) (*South Shore Railway and Quebec Southern Railway*)...............**303**
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19——55 *V. c.* 99 [*Ont.*] (*Toronto Railway*)..........................**430**
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20——59 *V. c.* 44 [*N.S.*] (*North Sydney Water Supply*)..................**464**
See RIVERS AND STREAMS 1.

21——*R.S.N.S.* 1900, *c.* 66, *ss.* 22, 66 (*Marsh Act*).....................**79**
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22——*R.S.N.S.* 1900, *c.* 99 (*Railways*). **75**
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23——2 *Edw. VII. c.* 13 (*N.S.*) (*Trustees*)...........................**163**
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24——2 *Edw. VII. c.* 104 (*N.S.*) (*Railways*)...........................**134**
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25——3 *Edw. VII. c.* 6, *s.* 7 [*N.S.*] (*School taxes*)....................514
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26——3 *Edw. VII. c.* 97 (*N.S.*) (*Railways*)....................75
See CONTRACT 2.

27——*R.S.N.B. c.* 96 (*Scaling of timber*)....................687
See CONTRACT 9.

28——*C.S.N.B.* (1903), *c.* 30, *s.* 139 (*Registration of mining leases*).....517
See MINES AND MINERALS.

29——*Yukon Ord. of* 1890, *c.*3 1 (*Limitation of actions*)....................546
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STATUTE OF ANNE—*Cause of action—Limitation of actions—Contract—Foreign judgment—Yukon Ordinance, c.* 31 *of* 1890—*Statute of James*—4 & 5 *Anne, c.* 16—*Lex fori—Lex loci contractus—Absence of debtor*....................546
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STATUTE OF FRAUDS—*Sale of goods—Contract by correspondence—Delivery—Principal and agent—Statutory prohibition—Illicit sale of intoxicating liquors—Knowledge of seller—Validity of contract*....................55
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STATUTE OF JAMES—*Cause of action—Limitation of actions—Contract—Foreign judgment—Yukon Ordinance, c.* 31 *of* 1890—21 *Jac. I. c.* 16—*Statute of Anne—Lex fori—Lex loci contractus—Absence of debtor*....................546
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STATUTE OF LIMITATIONS — *Possession of land—Constructive possession—Colourable title—Effect of sheriff's sale.*....................157
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2——*Breach of trust—Accounts—Evidence—Nova Scotia "Trusts Act"*—2 *Edw. VII. c.* 13—*Liability of trustee—N.S. Order XXXII., r.* 3—*Judicial discretion*....................163
See TRUSTS 2.
AND *see* LIMITATION OF ACTIONS.

SUCCESSIONS — *Appeal — Jurisdiction —Security by beneficiary—Controversy involved—Future rights — Interlocutory order.*] An application for the approval of security on an appeal to the Supreme Court of Canada from an order directing that a beneficiary should furnish the security required by article 663 of the Civil Code of Lower Canada was refused on the ground that it was interlocutory and could not affect the rights of the parties interested. KIRKPATRICK *v.* BIRKS....................512

SURETYSHIP.
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TENDER—*Judicial sale of railways—Interested bidder — Disqualification as purchaser—Counsel and solicitors—Art.* 1484 *C.C.—Construction of statute—Discretionary order—Review by appellate court*—4 & 5 *Edw. VII. c.* 158 (*D.*)—*Public policy*....................303
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THREE-MILE-ZONE—*Canadian waters —Fishing by foreign vessels—Legislative jurisdiction—Seizure on high seas—Pursuit beyond territorial limit—International law — Constitutional law — Seacoast fisheries—Construction of statute —B.N.A. Act,* 1867, *s.* 91, *s.-s.* 12—*R.S.C. c.* 94, *ss.* 2, 3, 4....................385
See CONSTITUTIONAL LAW 2.

TIME—*Construction of statute—"Marsh Act," R.S.N.S.* 1900, *s.* 66, *ss.* 22, 66—*Jurisdiction of Marsh Commissioners—Assessment of lands—Certiorari—Limitation for granting writ—Practice—Expiration of time limit—Delays occasioned by judge—Legal maxim—Order nunc pro tunc*....................79
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2——*Election petition—Time for trial—Enlargement*....................601
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TITLE TO LAND—*Will—Trust—Conditional devise.*] The property was devised by will as follows: "I give and bequeath to my beloved wife, Margaret McIsaac, all and singular the property of which I am at present possessed, whether real or personal or wherever situate, to be by her disposed of amongst my beloved children as she may judge

TITLE TO LAND—*Continued.*

most beneficial for herself and them, and also order that all my just and lawful debts be paid out of the same. And I do hereby appoint my brother, Donald McIsaac, and my brother-in-law, Donald McIsaac, tailor, my executors to carry out this my last will and testament." *Held*, affirming the judgment appealed from (38 N.S. Rep. 60), that the widow took the real estate in fee with power to dispose of it and the personalty whenever she deemed it was for the benefit of herself and her children, to do so. McIsaac *v.* Beaton...............143

2——*Statute of Limitations—Possession of land—Constructive possession—Colourable title.*] McI. by his will devised sixty acres of land to his son charged with the maintenance of his widow and daughter. Shortly afterwards the son with the widow and other heirs conveyed away four of the sixty acres and nearly thirty years later they were deeded to McD. Under a judgment against the executors of McI. the sixty acres were sold by the sheriff and fifty including the said four were conveyed by the purchaser to McI.'s son. The sheriff's sale was illegal under the Nova Scotia law. The son lived on the fifty acres for a time and then went to the United States, leaving his mother and sister in occupation until he returned twenty years later. During this time he occasionally cut hay on the four acres, which was only partly enclosed, and let his cattle pasture on it. In an action for a declaration of title to the four acres: *Held*, that the occupation by the son under colour of title of the fifty acres was not constructive possession of the four which he had conveyed away and his alleged acts of ownership over which were merely intermittent acts of trespass. McIsaac *v.* McDonald......157

3——*Ambiguous description of grantee—"Greek Catholic Church"—Evidence—Construction of deed—Reversal of concurrent findings.*] Where Crown lands were granted "in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake," N.W.T., and it appeared that this description was ambiguous and might mean either the Greek Orthodox Church or the Greek Church in communion with the Church of Rome, it was held that the construction of the grant should be determined by the facts and circumstances antecedent to and attending the issue of the grant and that, in view of the evidence adduced, the words did not mean a church united with the Roman Catholic Church and subject to the jurisdiction of the Pope. Judgment appealed from reversed, the Chief Justice and Girouard J. dissenting, on the ground that the concurrent findings of the courts below upon matters of fact ought not to be disturbed. Polushie *v.* Zacklynski..177

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4——*Tenant by sufferance—Use and occupation of lands—Art 1608 C.C.—Promise of sale—Vendor and purchaser—Reddition de compte—Actio ex vendito—Practice.*] The action for the value of the use and occupation of lands does not lie in a case where the occupation by sufferance was begun and continued under a promise of sale; in such a case the appropriate remedy would be by action *ex vendito* or for *reddition de compte*. Cantin *v.* Bérubé........627

5——*Ownership—Artificial watercourse—Canal banks—Trespass—Possessory action—Bornage—Practice.*] The possessory action lies only in favour of persons in exclusive possession *à titre de propriétaire*.—The ownership of a canal serving as a tail-race for a water-mill naturally involves the ownership of the banks of the canal and the right to make use thereof for the purpose of maintaining the tail-race in efficient condition.—In the present case, the bank of the canal had fallen in at a place adjoining lands belonging to D., and the projection thus formed had been, for some years, occupied by him. A. made an entry for the purpose of removing this obstruction, and re-building a retaining wall to support the bank. In a possessory action by D.: *Held*, that as the original boundary had become obliterated the decision of the question of possession should be postponed until the limits of the canal bank had been re-established. *Parent* v. *The Quebec North Shore Turnpike Road Trustees* (31 Can. S.C.R. 556) followed. Delisle *v.* Arcand.........................668

6——*Equitable mortgage—Mines and minerals—Lease of mining lands—*

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Sheriff's sale—Purchase by judgment creditor of mortgagee—Registry laws—Priority—Actual notice—Lien for Crown dues paid as rent—C.S.N.B. (1903), *c.* 30, *s.* 139........................517

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7——*Rivers and streams—Navigable and floatable waters—Obstructions to navigation — Crown lands — Letters patent of grant — Evidence — Collateral circumstances leading to grant—Limitation of terms of grant—Riparian rights—Fisheries—Arts.* 400, 414, 503 *C.C.* 577

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AND *see* DAMAGES; NEGLIGENCE.

TRAMWAY — *Negligence — Trial — Finding of jury—Exercise of statutory privilege.*] Where a street car company has by its charter privileges in regard to the removal of snow from its tracks and the city engineer is given power to determine the condition in which the highway shall be left after a snow storm, a duty is cast upon the company to exercise its privilege in the first instance in a reasonable and proper way and without negligence. MADER *v.* HALIFAX ELECTRIC TRAMWAY CO...............................94

2——*Contract—Breach of conditions—Liquidated damages—Penalty—Cumulative remedy—Operation of tramway—Construction and location of lines—Use of highways—Car service—Time-tables—Municipal control—Territory annexed after contract——Abandonment of monopoly*—55 *V. c.* 99 (*Ont.*).] Except where otherwise specially provided in the agreement between the Toronto Railway Company and the City of Toronto set forth in the schedules to chapter 99 of the statutes of Ontario, 55 V., in 1892, the right of the city to determine, decide upon and direct the establishment of new lines of tracks and tramway service, in the manner therein prescribed, applies only within the territorial limits of the city as constituted at the date of the contract. Judgment appealed from (10 Ont. L.R. 657) reversed, Girouard J. dissenting.—The city, and not the company, is the proper authority to determine, decide upon and direct the establishment of new lines, and the service, time-tables and routes thereon. Judgment appealed from affirmed, Sedgewick J. dissenting.—As between the contracting parties, the company, and not the city, is the proper authority to determine, decide upon and direct the time at which the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heated. Judgment appealed from reversed, Girouard J. dissenting.—Upon the failure of the company to comply with requisitions for extensions as provided in the agreement, it has no right of action against the city for grants of the privilege to others; the right of making such grants accrues, *ipso facto*, to the city, but is not the only remedy which the city is entitled to invoke. Judgment appealed from affirmed, Sedgewick J. dissenting.—Cars starting out before midnight as day-cars may be required by the city to complete their routes, although it may be necessary for them to run after midnight or transfer their passengers to a car which would carry them to their destinations without payment of extra fares, but at midnight their character would be changed to night cars and all passengers entering them after that hour could be obliged to pay night fares. Sedgewick J. dissenting. TORONTO RY. CO. *v.* CITY OF TORONTO...........................430

3——*Negligence—Operation of tramway—Precautions for safety of passengers—Crossing cars—Sounding gong—Slackening speed at dangerous places—Neglect of rules—Passenger alighting from front of car—Contributory negligence.*] A passenger on a crowded tram-car, being near the front of the car, on reaching his destination, made his way past several persons standing in the aisle and front vestibule and alighted from the front steps on the side next the parallel track upon which another car was com-

TRAMWAY—*Continued.*

ing at considerable speed in the opposite direction and was injured. The space between the crossing cars was about 44 inches and there was no rule of the company to prevent passengers alighting from the front steps. The passenger was not aware of the car approaching from the opposite direction when he alighted and the motorman of the car which struck him had neglected to observe a rule of the company requiring that speed should be slackened and the gong rung continuously while cars were passing each other on the double tracks. The courts below held (15 Man. Rep. 338), that the company was liable in damages on account of the motorman's negligence; that the plaintiff had not been guilty of contributory negligence, under the circumstances; and that the company was obliged to take proper precautions for the safety of passengers, even after they had alighted upon the street beside the tracks. Without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal with costs. WINNIPEG ELECTRIC ST. RY. CO. *v.* BELL...**515**

4——*Operation of street railway—Carriage of passengers—Contract—Continuous passage.*] The plaintiff wished to proceed to a certain part of Halifax and, when a car came along labelled as going in the required direction, boarded a trailer attached to it which, however, was not so labelled. There was an unusual amount of travel on the street cars that day and when the car containing plaintiff had proceeded a certain distance it was stopped and the passengers informed that it would not go farther in that direction. The plaintiff insisted on his right to be carried to his destination in that car, refused a transfer and hired a cab. In an action for damages the courts below held (38 N.S. Rep. 212) that there was no obligation on the company's part to carry plaintiff to his destination on that particular car, that it was his duty to inquire of the conductor and ascertain where such car was going and he could not recover. This judgment was affirmed on appeal, Idington J. dissenting. O'CONNOR *v.* HALIFAX TRAMWAY CO.................**523**

5——*Negligence—Operation of tramway—Carriage of passengers—Crossing cars—Undue speed—Sounding gong—Findings of jury.* MONTREAL STREET RAILWAY CO. *v.* DESLONGCHAMPS........**685**

6——*"Railway Act, 1903," ss. 47, 186—Board of Railway Commissioners—Jurisdiction—Construction of subway—Apportionment of cost—Person interested or affected—Street railway—Agreement with municipality*.................**354**

See RAILWAYS 4.

TRESPASS—*Expropriation of land—Arbitration proceedings—Unlawful entry.*] The company, after a void award was made under arbitration, entered upon land and cut down trees and removed gravel therefrom without giving the owners the notice required by statute of their intention to take their property. The owners, by their action above mentioned, claimed damages for trespass as well as the amount of the award. *Held*, that as the action of the company was not authorized by statute the owners could sue for trespass and as at the trial the action on this claim was dismissed on the ground that such action was prohibited there should be a new trial. INVERNESS RWAY. AND COAL CO. *v.* MCISAAC. **134**

AND *see* EXPROPRIATION 2.

2——*Watercourses — Riparian rights — Expropriation—Torts—Diversion of natural flow — Injurious affection — Damages—Execution of statutory powers—Arbitration — Injunction — Mandamus—Construction of statute—59 V. c. 44 (N.S.)*. **464**

See RIVERS AND STREAMS 1.

3——*Title to land—Ownership — Artificial watercourse—Canal banks—Possessory action—Bornage—Practice*.....**668**

See TITLE TO LAND 5.

TRUSTS — *Will* — *Conditional devise.*] The property was devised by will as follows: "I give and bequeath to my beloved wife, Margaret McIsaac, all and singular, the property of which I am at present possessed, whether real or personal or wherever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them, and also order that all

TRUSTS—*Continued.*

my just and lawful debts be paid out of the same. And I do hereby appoint my brother, Donald McIsaac, and my brother-in-law, Donald McIsaac, tailor, my executors to carry out this my last will and testament." *Held,* affirming the judgment appealed from (38 N.S. Rep. 60), that the widow took the real estate in fee with power to dispose of it and the personalty whenever she deemed it was for the benefit of herself and her children, to do so. McIsaac *v.* Beaton. 143

2——*Breach of trust — Accounts — Evidence—Nova Scotia "Trustee Act," 2 Edw. VII. c. 13—Liability of trustee—N.S. Order XXXII., r. 3—Judicial discretion—Statute of Limitations.*] By his last will N. bequeathed shares of his estate to his daughters A. and C. and appointed A. executrix and trustee. C. was weak-minded and infirm and her share was directed to be invested for her benefit and the revenue paid to her half-yearly. A. proved the will, assumed the management of both shares and also the support and care of C. at their common domicile, and applied their joint incomes to meet the general expenses. No detailed accounts were kept sufficient to comply with the terms of the trust nor to shew the amounts necessarily expended for the support, care and attendance of C., but A. kept books which shewed the general household expenses and consisted, principally, of admissions against her own interests. After the decease of both A. and C. the plaintiffs obtained a reference to a master to ascertain the amount of the residue of the estate coming to C. (who survived A.) and the receipts and expenditures by A. on account of C. On receiving the report the judge referred it back to be varied, with further instructions and a direction that the books kept by A. should be admitted as *primâ facie* evidence of the matters therein contained. (See 37 N.S. Rep., pp. 452-464.) This order was affirmed by the Supreme Court of Nova Scotia *in banco*. *Held,* affirming the judgment appealed from (37 N.S. Rep. 451) that the allowances for such expenditures need not be restricted to amounts actually shewn to have been so expended; that, under the Nova Scotia statute, 2 Edw. VII. c. 13, and Order XXXII., rule 3, a judge may exercise judicial discretion towards relieving a trustee from liability for technical breaches of trust and for that purpose, may direct the admission of any evidence which he may deem proper for the taking of accounts. Cairns *v.* Murray.163

3——*Company law—Illegal consideration for shares — Fraud — Breach of trust.*] With a view to concealing the financial difficulties of a mining company and securing control of its property, the manager entered into a secret arrangement with the respondent whereby the latter was to acquire the liabilities, obtain judgment thereon, bring the property to sale under execution and purchase it for a new company to be organized in which the respondent was to have a large interest. The manager, who was a creditor of the company, was to have his debt secured and to receive an allotment of shares in the new company proportionate to those held by him in the old company and he agreed that he would not reveal this understanding to the other shareholders. *Held,* affirming the judgment appealed from (11 B.C. Rep. 466) Sedgewick J. dissenting, that the agreement could not be enforced as the consideration was illegal and a breach of trust by which the other shareholders were defrauded. Lasell *v.* Hannah.324

4——*Co-trustees—Joint action—Delegation of trust.*] A trustee in Toronto wrote to a co-trustee in St. Mary's stating that an offer had been made to purchase a portion of the trust estate for $12,000 and giving reasons why it should be accepted. The co-trustee replied concurring in said reasons and consenting to the proposed sale. The Toronto trustee afterwards had negotiations with the solicitors of G. and at their suggestion offered to sell the same property to G. for $13,000 but without further notice to his co-trustee. The offer was accepted by the solicitors whereupon the party who had offered $12,000 raised his offer to $14,000 and the trustee notified the solicitors of G. that the sale to him was cancelled. In a suit by G. for specific performance: *Held,* affirming the judgment of the Court of Appeal (9 Ont. L.R. 522) that the letter written by the co-trustee in St. Mary's con-

TRUSTS—*Continued.*

tained a consent to the particular sale mentioned therein only and could not be construed as a general consent to a sale to any person even for a higher price. Even if it could there were circumstances which occurred between the time it was written and the signing of the contract with G., which should have been communicated to the co-trustee before he could be bound by said contract. GIBB *v.* MCMAHON.................**362**

5——*Probate of will—Promoter—Evidence—Subsequent conduct of testator—Residuary devise*. **404**

See WILL 3.

6——*Title to land—Ambiguous description of grantee — "Greek Catholic Church" — Evidence — Construction of deed—Reversal of concurrent findings.* **177**

See TITLE TO LAND 3.

USER—*Highway— Dedication — Acceptance by public*.....................**210**

See HIGHWAYS 1.

VENDOR AND PURCHASER — *Judicial sale of railways—Interested bidder—Disqualification as purchaser—Counsel and solicitors—Art.* 1484 *C.C.—Construction of statute—Discretionary order—Review by appellate court—4 & 5 Edw. VII. c.* 158 *(D.)—Public policy*. **303**

See RAILWAYS 3.

2——*Principal and agent—Sale of land —Authority to make contract—Specific performance*. **422**

See SALE 3.

3——*Tenant by sufferance—Use and occupation of lands—Art.* 1608 *C.C.—Promise of sale — Reddition de compte — Actio ex vendito—Practice*.........**627**

See ACTION 4.

VERDICT—*Negligence—Finding of jury —Evidence.*] A. brought an action, as administratrix of the estate of her husband, against the C.P.R. Co., claiming compensation for his death by negligence and alleging in her declaration that the negligence consisted in running a train

VERDICT—*Continued.*

at a greater speed than six miles an hour through a thickly populated district and in failing to give the statutory warning on approaching the crossing where the accident happened. At the trial questions were submitted to the jury who found that the train was running at a speed of 25 miles an hour, that such speed was dangerous for the locality and that the death of deceased was caused by neglect or omission of the company in failing to reduce speed as provided by "The Railway Act." A verdict was entered for the plaintiff and on motion to the court, *en banc*, to have it set aside and judgment entered for defendants a new trial was ordered on the ground that questions as to the bell having been rung and the whistle sounded should have been submitted to the jury. The plaintiff appealed to the Supreme Court of Canada to have the verdict at the trial restored and the defendants, by cross-appeal, asked for judgment. *Held*, Idington J. dissenting, that by the above findings the jury must be held to have considered the other grounds of negligence charged, as to which they were properly directed by the judge, and to have exonerated the defendants from liability thereon, and the new trial was improperly granted on the ground mentioned.—*Held*, also, that though there was no express finding that the place at which the accident happened was a thickly peopled portion of the district it was necessarily imported in the findings given above; that this fact had to be proved by the plaintiff and there was no evidence to support it; and that, as the evidence shewed it was not a thickly peopled portion, the plaintiff could not recover and the defendants should have judgment on their cross-appeal. ANDREAS *v.* CANADIAN PACIFIC RY. CO. **1**

2——*Negligence—Trial—Finding of jury —Exercise of statutory privilege*.....**94**

See NEGLIGENCE 2.

AND *see* JURY.

VIS MAJOR—*Construction of railway—Defects in road-bed — Dangerous way — Latent defect*. **632**

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2——*Rivers and streams—Floating saw-logs—Use of booms—Action—Quantum meruit—Salvage—Riparian rights*...**657**

See RIVERS AND STREAMS 3.

WATERCOURSES — *Lease* — *Canal* — *Water-power—Improvements on canal—Temporary stoppage of water—Compensation* — *Total stoppage* — *Measure of damages—Loss of profits*..........**259**

See LEASE 1.

AND *see* CANAL; RIVERS AND STREAMS.

WATERWORKS—*Watercourses—Riparian rights* — *Expropriation* — *Trespass—Torts—Diversion of natural flow—Injurious affection—Damages* — *Execution of statutory powers—Arbitration—Injunction—Mandamus* — *Construction of statute*—59 *V. c.* 44 (*N.S.*).........**464**

See RIVERS AND STREAMS 1.

WILL—*Execution of will—Promoter—Evidence* — *Testamentary capacity.*] Where the promoter of, and a residuary legatee under, a will executed two days before the testator's death and attacked by his widow and a residuary legatee under a former will, the devise to the latter of whom was revoked, failed to furnish evidence to corroborate his own testimony that the will was read over to the testator who seemed to understand what he was doing, and there was a doubt under all the evidence of his testamentary capacity, the will was set aside. Girouard J. dissenting, held that the evidence was sufficient to establish the will as expressing the wishes of the testator. *Per* Davies J.—The will should stand except the portion disposing of the residue of the estate, the devise of which, in the former will, should be admitted to probate with it. BRITISH AND FOREIGN BIBLE SOCIETY *v.* TUPPER.......**100**

2——*Trust* — *Conditional devise.*] The property was devised by will as follows: "I give and bequeath to my beloved wife, Margaret McIsaac, all and singular the property of which I am at present possessed, whether real or personal or wherever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them, and also order that all my just and lawful debts be paid out

WILL—*Continued.*

of the same. And I do hereby appoint my brother, Donald McIsaac, and my brother-in-law, Donald McIsaac, tailor, my executors to carry out this my last will and testament." *Held*, affirming the judgment appealed from (38 N.S. Rep. 60), that the widow took the real estate in fee with power to dispose of it and the personalty whenever she deemed it was for the benefit of herself and her children, to do so. MCISAAC *v.* BEATON. **143**

3——*Probate of will—Promoter—Evidence—Subsequent conduct of testator—Residuary devise—Trust.*] In proceedings for probate by the executors of a will which was opposed on the ground that it was prepared by one of the executors who was also a beneficiary there was evidence, though contradictory, that before the will was executed it was read over to the testator who seemed to understand its provisions. *Held*, Idington J. dissenting, that such evidence and the facts that the testator lived for several years after it was executed and on several occasions during that time spoke of having made his will and never revoked nor altered it, satisfied the onus, if it existed, on the executor to satisfy the court that the testator knew and approved of its provisions.—*Held*, also, that where the testator's estate was worth some $50,000 and he had no children it was doubtful if a bequest to the propounder, his brother, of $1,000 was such a substantial benefit that it would give rise to the onus contended for by those opposing the will. CONNELL *v.* CONNELL.................**404**

"WINDING-UP ACT"—*Appeal—Jurisdiction—Discretionary order—Stay of foreclosure proceedings—Final judgment—Controversy involved—R.S.C. c.* 129, *s.* 76—*R.S.C. c.* 135, *s.* 28.] Leave to appeal to the Supreme Court of Canada under the seventy-sixth section of the "Winding-up Act" can be granted only where the judgment from which the appeal is sought is a final judgment and the amount involved exceeds two thousand dollars. A judgment setting aside an order, made under the "Winding-up Act," for the postponement of foreclosure proceedings and directing that such proceedings should be con-

"WINDING-UP ACT"—*Continued.*

tinued is not a final judgment within the meaning of the Supreme Court Act, and does not involve any controversy as to a pecuniary amount. RE CUSHING SULPHITE FIBRE CO.................173

2—— *Appeal—Jurisdiction—Winding-up order—Leave to appeal—Amount involved—R.S.C. c.* 129, *s.* 76.] In a case under the "Winding-up Act," R.S.C. c. 129, an appeal may be taken to the Supreme Court of Canada by leave of a judge thereof if the amount involved exceeds $2,000. *Held,* that a judgment refusing to set aside a winding-up order does not involve any amount and leave to appeal therefrom cannot be granted. CUSHING SULPHITE FIBRE CO. *v.* CUSHING.............................427

WORDS AND TERMS—*"Greek Catholic Church."*..............................177
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2——*"Person interested."*..........232
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