REPORTS

OF THE

SUPREME COURT

OF

CANADA

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1922

37655—A

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Sir Louis Henry Davies C.J., K.C.M.G.

" John Idington J.

" " Lyman Poore Duff J.

" Francis Alexander Anglin J.

" Louis Philippe Brodeur J.

" Pierre Basile Mignault J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Sir Lomer Gouin K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. D. D. McKenzie K.C.

37655—A½

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF VOL. 62 OF THE SUPREME COURT REPORTS.

Brown v. *Moore* (62 Can. S.C.R. 487). Leave to appeal refused, Apr. 6, 1922.

Lincoln, Municipal Corporation of the County of, v. *The Municipal Corporation of the Township of South Grimsby* (63 Can. S.C.R. 161). Leave to appeal refused, June 15, 1922.

Marcoux v. *L'Heureux* (63 Can. S.C.R. 263). Leave to appeal refused, Mar. 6, 1922.

Watt & Scott Ltd. v. *City of Montreal* (60 Can. S.C.R. 523). Appeal dismissed with costs, Aug. 3, 1922.

"Whalen M.T.", Ship, v. *Pointe Anne Quarries Ltd.* (63 Can. S.C.R. 109). Appeal and cross-appeal dismissed with costs, Oct. 23, 1922.

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CASES

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ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

JOSEPH H. McKEAGE (DEFENDANT)..... } APPELLANT;

AND

DAME SARAH S. McKEAGE (PLAINTIFF)..... } RESPONDENT.

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*Oct. 24.
*Nov. 21.

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

Appeal—Jurisdiction—Donation—Obligation to provide home—Refusal by donee—Conversion into payment of money.

Under a deed of gift of a house from her father to the appellant, her brother, the respondent was entitled to a home with the donee as long as she remained single. Alleging failure by the appellant to fulfil his obligation, the respondent brought action to convert such obligation into a payment of money and to have the immovable charged with the amount awarded. The trial judge held that the appellant should pay the sum of $20 per month or provide the respondent with a home, but did not adjudicate upon the claim that the donated immovable be hypothecated as security, and this judgment was affirmed by the Court of King's Bench.

Held, that there was judisdiction in the Supreme Court of Canada to entertain an appeal. MIGNAULT J. *dubitante.*

*PRESENT: Idington, Duff, Anglin and Mignault JJ. and Bernier J. *ad hoc.*

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MCKEAGE v. MCKEAGE.

APPEAL by the intending appellant from an order of the Registrar affirming the jurisdiction of the Court and approving security.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

THE REGISTRAR: This is a motion to affirm jurisdiction.

The facts, from the pleadings and the papers filed, appear to be as follows:—A donation was made by plaintiff's father on 8th October, 1887, and accepted by defendant by which certain lands conveyed to the defendant were charged or hypothecated in favour of the plaintiff. The deed of donation amongst other things provided as follows:—

> The said donee or his representatives * * * to pay or cause to be paid to his sister, Sarah S. McKeage the sum of $400 * * * That the said Sarah M. McKeage shall have a home with the said donee or his representatives as long as she will remain single * * * under all which charges and conditions the said donee doth hereby accept the foregoing donation consenting that the said lands shall remain affected and mortgaged for that purpose.

Subsequently difficulties arose between the plaintiff and defendants and an action was instituted by the present plaintiff in December, 1910, in which she alleged that the defendant had failed to furnish her with a home and that his obligation in that regard was of the value to her of $200 a year and asked that the lands in question be declared hypothecated in her favour for such sum of money as would produce an annual rent of $200 a year and that the defendant be condemned to pay that sum. Judgment was pronounced in this case on the 18th December, 1911, by the Superior Court, in which was the following considerant:

Considering that at the argument the interpretation to be given to the word "home" in the donation was by mutual assent of both parties submitted to the court for an expression of opinion, it proceeded to hold that the intention of the donor was to provide the plaintiff with a home on the premises and that she be supported as a member of the family as long as she would not marry and could not be expected to be supported elsewhere.

As the donation had not been actually registered, the court dismissed the conclusions of the action which asked for payment of $200 a year for the past year's board and for a yearly allowance in money, but declared that the plaintiff had according to the terms of the donation a right to have a home with the defendant or his representatives so long as she remained single and to have the immovable property affected by mortgage for the fulfilment of the obligation.

No appeal was taken from this judgment, but trouble did arise subsequently between the parties and the present action was brought, in which the plaintiff alleged that the defendant had failed to comply with his obligation and asked that the donation should be converted into money and the defendant condemned to pay to plaintiff in lieu of the obligation imposed by the act of donation, $50 every month, and as a guarantee of such payment that the immovables in question should be hypothecated in favour of the plaintiff.

Various defenses were set up to the demand and the case went to trial before the Hon. Mr. Justice Pouliot who after reciting all the facts in his considerants gave judgment on 14th June, 1920, and awarded $20 a month to the plaintiff and condemned the defendant to pay that sum unless he should receive the plaintiff into his house as a member of his family and furnish her with support and maintenance until her marriage.

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The Registrar

This judgment was confirmed by the Court of King's Bench (appeal side) and the defendant now appeals to the Supreme Court and asks to have the jurisdiction of the court affirmed.

The disposition of the present motion depends upon the construction to be placed upon section 46 of the Supreme Court Act:—"Does the matter in controversy relate to title to lands or tenements, annual rents and other matters and things, where rights in future might be bound?" It was held in *Rodier* v. *Lapierre*, (1) that the words "annual rents" in this section mean "ground rents" (rentes foncières) and not an annuity or other like charge or obligation. The expression "rentes foncières" is discussed very fully in Pothier vol. LV, chap. 2, art. 14, by Planiol and other French authors and in its simplest form implies an obligation by a donee to make certain payments to the donor or a third party secured by a hypothèque upon the lands donated. I do not understand the respondent to take exception to this construction nor would he seriously contend that if by the present judgment a "rente foncière" was granted that the present appellant would not have a right of appeal to the Supreme Court, but he argues that the judgment in this case places no charge upon the lands mentioned in the donation, or in other words that the judgment is a security of lesser value and importance than the plaintiff already had by reason of the donation and the judgment confirming it, unappealed from, given in 1911. I cannot so construe the judgment in the present case. Although there is no express declaration as there was in the judgment of 1911 that the lands in

(1) 21 Can. S.C.R. 69.

question are charged in favour of the plaintiff, yet I think the judgment has that effect and that in the words of the statute the controversy relates to *"annual rents"*. I therefore hold that the Supreme Court has jurisdiction.

Girouard for the appellant.

Walsh K.C. for the respondent.

IDINGTON J.—I agree that this appeal is, according to the jurisprudence of this court, within its jurisdiction and, therefore, that this appeal from the registrar's ruling should be dismissed with costs.

DUFF J.—I am of the opinion that the appeal from the registrar's judgment should be dismissed with costs.

ANGLIN J.—The intended respondent appeals from an order of the registrar affirming the jurisdiction of this court.

Under a deed of gift from her father to her brother the plaintiff was entitled to a home with the donee (the defendant) so long as she should remain single, and also to be paid a sum of $400. In litigation between the present parties in 1911 the plaintiff was declared entitled to a home according to the terms of the donation and to have the immovable property, which was the subject of the donation, affected by a mortgage for the fulfilment of the donee's obligation to provide her with such a home. In the present action, instituted in 1919, and therefore subject to the Supreme Court Act as it stood before the amendment of 1920, the respondent sought to have the obligation

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Anglin J.

to furnish her a home converted into a payment of money and the immovable donated declared subject to a charge in her favour for payment of whatever sum or sums she should be held entitled to. By the judgment of the Superior Court the appellant-defendant's obligation to provide a home for the respondent was so converted and he was condemned to pay the respondent $20 per month while she remained single, reserving to him however the right, instead of paying that sum monthly, to provide her with the home to the furnishing of which the donation to him had been made subject. No adjudication was made on the claim that the donated immovable should be declared charged with the payment of the sums so awarded. This judgment was affirmed on appeal to the Court of King's Bench. An appeal having been taken to this court by the defendant, the registrar on motion made on his behalf affirmed our jurisdiction. From that order the present appeal is brought.

It has been established by many decisions that in applying sec. 46 of the Supreme Court Act "the matter in controversy" means not the matter to be determined upon the appeal, or that disposed of by the judgment *a quo*, but the subject of the plaintiff's claim as disclosed by the declaration. That principle of construction is not confined to cases in which the jurisdiction of the court depends upon the value of the matter in controversy. It extends to the other cases covered by sec. 46 as well. *Bisaillon* v. *City of Montreal* (1). In my opinion the defendant's title to the land donated to him would be affected by the plaintiff's obligation if established as a charge upon such land, as she sought.

(1) Cameron's Supreme Court Practice, Vol. 2, App. C. 15.

I am further of the opinion that this case also falls within the concluding words of paragraph (b) of s. 46— "other matters or things where rights in future might be bound". If the amount allowed the respondent should hereafter be found insufficient and she should desire to have it increased she would find herself bound by the judgment in this case. On the other hand, the representatives of the defendant, should the plaintiff survive him, would also find their rights in the land subject to the charge of the plaintiff's claim, had the judgment accorded her the declaration of such a charge. *Les Ecclésiastiques de St. Sulpice de Montréal* v. *Cité de Montréal* (1).

I am therefore of the opinion that the order affirming jurisdiction was rightly made and that this appeal from it should be dismissed with costs.

MIGNAULT J.—The majority of the court being of opinion that we have jurisdiction to hear this case I will not enter a formal dissent, although I would be inclined to consider our jurisdiction as extremely doubtful, in view of the meaning placed on the words "annual rents" by *Rodier* v. *Lapierre* (2).

BERNIER J.—I am of the opinion that the appeal from the registrar's judgment should be dismissed with costs.

Appeal dismissed with costs.

(1) 16 Can. S.C.R. 399.

(2) 21 Can. S.C.R. 69.

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*Oct. 14.

1922
*Feb. 7.

RURAL MUNICIPALITY OF STREAMSTOWN (DEFENDANT) } APPELLANT;

AND

A. L. REVENTLOW - CRIMINIL (PLAINTIFF)..... } RESPONDENT.

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

Municipal corporation—Non-payment of taxes—Proceedings for forfeiture—Notice to owner—Alien—State of war—Illegality—"Rural Municipality Act", Alta. S. [1911-12] c. 3, ss. 309 to 319.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Stuart J. at the trial (2) and maintaining the respondent's action.

The respondent, a subject of the Empire of Austria-Hungary residing at Fiume, then within that empire, was in 1914, the registered owner of land in the municipality appellant; and, at the time the European war supervened, she was indebted for the 1914 taxes. Under the "Rural Municipality Act", the treasurer is required to prepare a statement known as "the tax enforcement return" containing the names and addresses of persons indebted for taxes. Application

*PRESENT:—Idington, Duff, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

(1) [1920] 1 W.W. R. 577. (2) [1919] 2 W.W.R. 478.

is then made to a judge for the appointment of a time and place for the holding of a court of confirmation of the return, notice of which must be sent by registered mail to each person interested at the post office address shewn by said return or by the records of the registry office for the land registration district, In this case, the notice was mailed to the respondent by registered letter addressed to Fiume, Austria-Hungary, which was her address as shewn in such records. The tax enforcement return was confirmed by the judge, no appearance having been entered on behalf of the respondent; and, after the statutory delay, the land was forfeited to the appellant and afterwards sold by it to a third party. Just before the sale a New York attorney advised the treasurer of the appellant that a sister of the respondent desired to pay the taxes and redeem the land, but the answer was that it was too late. The assessment roll was produced and, upon its face, non-resident owners were apparently assessed at higher figure than residents. After the above-mentioned sale the respondent, through her attorneys, offered to pay the taxes due, and, upon refusal, registered a *caveat*. The respondent, in her action, attacked the appellant's taxation as being based on a discriminatory and fraudulent assessment and also alleged that the required formalities for the forfeiture of the land were not carried out.

Eug. Lafleur K.C. and *Woods K.C.* for the appellant.

Newell K.C. for the respondent.

The Supreme Court of Canada dismissed the appeal with costs.

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RURAL MUNICIPALITY OF STREAMSTOWN v. REVENTLOW-CRIMINIL.

Idington J.

MR. JUSTICE IDINGTON held that, upon the evidence and according to the roll produced at the trial, the assessment was fraudulent as showing discrimination between the valuation placed on the lands of resident and non-resident owners respectively; and he held, also, that the appellant, on which the onus rested, did not prove sufficiently the fulfilment of the statutory provisions as to the notices to be given in the newspapers and to the parties interested. But he did not agree with the principle that "the war had so "precluded the possibility of respondent receiving notice "that therefore the alleged notice was of no avail."

MR. JUSTICE DUFF was of opinion that "so long as the title remains in the municipality, there was a right of redemption vested in the taxpayer," and he held also, that, owing to irregularities in the proceedings under the statute no title had passed to the purchasers, who "not having acquired any vested interest in the lands (were) not entitled" to any claim as against the respondent.

MR. JUSTICE MIGNAULT, with whom Mr. Justice Anglin and Mr. Justice Cassels concurred, held that, as "the proceedings for the confirmation of a tax en- "forcement return are undoubtedly judicial proceedings" leading up to the forfeiture of the lands of the tax debtor, notification to her under the statute was "a condition precedent to the jurisdiction of the judge to confirm the tax enforcement return"; that since that condition could not be performed, *i.e.* because "notice could not be sent to the interested party on account of the war", the judge was without jurisdiction when he confirmed the return.

Appeal dismissed with costs.

O. SAMSON Es-qual (PLAINTIFF). APPELLANT;

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*Oct. 24, 25.
*Nov. 21.

AND

ALPHONSE DECARIE (DEFENDANT)..... RESPONDENT.

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

Sale—Immoveable—Registration—Priority—Fraud—Title from the same vendor—Registration of notice of verbal sale—Effect as to third parties—Arts. 1025, 1027, 2082, 2085, 2089, 2098 *C.C.*

On the 15th of October, 1910, the appellant's wife bought an immoveable property by oral contract from one D. She having died the appellant was appointed tutor to her children, heirs to the estate. On the 29th of November, 1910, D. was legally asked to sign a deed of sale but refused to do so. The next day D. died, leaving his wife B. as usufructuary legatee of his estate and naming her testamentary executrix with power to sell. In January, 1911, an action *en passation de titre* was brought by the appellant against B. In February, 1911, the appellant registered a notice or *bordereau* alleging the *mis-en-demeure* served upon D. On the 23rd of June, 1913, judgment was rendered maintaining the appellant's action, which judgment was confirmed on appeal, both judgments being registered as soon as rendered. On the 3rd of March, 1911, B. sold the same property to the respondent, who had knowledge of the alleged sale to appellant's wife and of the institution of the action *en passation de titre*, this deed of sale being registered some days later. After judgment had been rendered by the appellate court in the above action, the appellant brought the present action *au petitoire* against the respondent in order to be put in possession of the immoveable property.

Held that the mere fact of the respondent's knowledge of the anterior sale did not deprive him of the benefit of priority of registration of his own title.

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*PRESENT.—Idington, Duff, Anglin and Mignault JJ. and Bernier J. *ad hoc.*

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Held, also, that the registration by the appellant of a *bordereau* indicating a verbal sale to him of the property is not equivalent to the registration of a right in or to that property within the purview of the registration provisions of the code.

Held, also, that the appellant and the respondent "derive their respective titles from the same person" within the terms of art. 2089 C.C., although the first bought the property from the owner and the second from his universal legatee and testamentary executrix.

Per Duff, Mignault and Bernier J J.—Although there is *res judicata* against the respondent as to the validity of an anterior title to the appellant, that does not deprive the respondent of the benefit of the prior registration of his own title.

Judgment of the Court of King's Bench (Q.R. 29 K. B. 273) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of the Superior Court sitting in review and affirming the judgment of the trial court by which the appellant's action was dismissed.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Paul St.-Germain K.C. for the appellant: The registration of the *bordereau* was sufficient within the terms of article 2085 C.C. to give knowledge to third parties of appellant's rights to the property.

The appellant and the respondent did not "derive their respective titles from the same person" within the terms of article 2089 C.C.

There is *res judicata* against the respondent as to the validity of appellant's title.

The respondent's title is void on account of fraud.

Aimé Geoffrion K.C. and *Alphonse Décary K.C.* for the respondent:—The notice received or knowledge

(1) Q. R. 29 K. B. 273.

acquired of an unregistered right cannot prejudice the rights of a subsequent purchaser whose title is duly registered (art. 2085 C.C.).

IDINGTON J.—I would dismiss this appeal with costs. I agree that there are some suspicious circumstances tending to establish fraud but when the mere fact of knowledge is eliminated therefrom by virtue of art. 2085 C.C. I cannot say that the courts below have clearly erred in failing to find fraud, and thereby render inoperative the provision in said article.

DUFF J.—On the whole I think the charge of fraud fails and as on that point I agree with the view taken in the courts below it is unnecessary to discuss it. I observe only with respect to article 2085 C.C that while it deprives notice or knowledge of an unregistered right of any effect as prejudicing the title of the purchaser who complies with the provisions of the law in relation to registration, it does not follow that such knowledge may not be cogent evidence which coupled with other circumstances may afford adequate proof of fraud on part of such purchaser disentitling him to rely upon the rights which otherwise would be his. On the other hand it is important to be on one's guard against applying this process of inference in such a way as virtually to equiparate knowledge itself with fraud thereby in effect sterilizing the enactment of the article.

Mr. St. Germain's contentions subdivide themselves under two heads. 1st, he invokes article 2089 C.C. and argues that the respondent did not derive his title from a person who is "the same person" as

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the appellant's auteur. The provisions requiring consideration under this head are articles 2082, 2089 and the first two paragraphs of 2098. Textually they are as follows:—

2082.—Registration gives effect to real rights and establishes their order of priority according to the provisions contained in this title.

2089.—The preference which results from the prior registration of the deed of conveyance of an immoveable obtains only between purchasers who derive their respective titles from the same person.

2098.—All acts *inter vivos* conveying the ownership of an immoveable must be registered at length, or by memorial.

In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the same property from the same vendor for a valuable consideration and whose title is registered.

The farm in question was orally sold in October, 1910, to the appellant's wife by J. B. Brien dit Desrochers, who died in the following month leaving a will by which he appointed his wife usufructuary for life of his estate and his sole testamentary executrix with power to dispose of the estate. In January, 1911, she sold the farm to the respondent by a notarial deed which was registered in the following August. In February, 1911, the appellant's wife filed in the registry a declaration setting forth the facts in relation to the oral sale (a declaration admittedly without effect under the registration provisions of the code) and, on some day prior to July, 1911, she commenced an action to enforce her rights under this sale. In this action judgment was given in her favour in June, 1913, by the Superior Court and this judgment was confirmed in September, 1914, by the Court of King's Bench.

Mr. St. Germain argues that the respondent's title is derived at least in part through a sale by Madame Desrochers as devisee under her husband's will and that Madame Desrochers in her quality as

such devisee is not within the meaning of the article "the same person" as her husband, the contract with whom constitutes in essence the basis of his client's title. Whether the respondent does in truth take his title in part from Madame Desrochers as devisee or whether it ought not rather to be held that he derives his title in its entirety from her as executrix of her husband's will is a debatable point. I assume that Madame Desrochers, who in the deed of conveyance professed to act as testamentary executrix of her husband as well as in her own personal right, did convey the interest vested in her by the devise to her as usufructuary in her capacity as owner of the usufruct and not in her capacity as executrix.

The question then arises whether article 2085 C.C. applies where the "titles" coming into competition are on the one hand a "title" derived directly by a sale for valuable consideration from the owner and on the other hand a "title" derived by such a sale from a donatee, devisee or legatee of the same owner.

Before proceeding to an examination of the language of article 2089 C.C. and of 2098 C.C., which must be considered with it, let us note the general effect of these provisions of the code on the subject of registration. By the first of the articles above quoted registration "gives effect to real rights and establishes their priority." Certain classes of rights are, by article 2087 C.C., exempt from registration, but this provision does not concern us here. The object of the provisions as of all analogous systems is to facilitate the acquisition of title to land and to enhance the security of the possessors of such titles by diminishing the causes and occasions of uncertainty, an object too obviously important to require comment. The common law rule that one can give a title only to

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that of which one is owner is profoundly modified by these provisions. Speaking generally notwithstanding one has made a sale of one's real property for valuable consideration and notwithstanding the property has, as between the parties, passed to the purchaser yet the title of the earlier purchaser may be displaced outright through the superior activity of a subsequent purchaser (for valuable consideration) in registering his own.

On the other hand it must be noted that the system of registration set up by these provisions of the code is, broadly, a system of registration of instruments rather than a system of registration of titles. Speaking without reference to some possible exceptions at present immaterial, registration does not in itself afford protection *erga omnes*. As usual in a system of registration of instruments as contrasted with a system of registration of titles, registration is available only in favour of the recipient of a given title through transfer or devolution as against another claiming to have acquired the same title, that is to say, claiming to have acquired a title from the same ultimate source. Registration may protect A. who has acquired the title of B. either directly or mediately as against C., who claims also to have acquired the title of B., and would have been able to make good his claim but for the obstacle created by the competition of A; but registration would not assist a purchaser relying upon a transfer from a grantee under a patent from the Dominion Government as against another deriving his title by grant from the Crown in right of the province where the property was prior to its transfer in point of law the property of the province. This appears to be the characteristic of the system which articles 2089 C.C. and 2098 C.C. are intended to

mark, the first speaking from the point of view of the advantages attached to prior registration and the second envisaging the situation with special reference to the penalty incurred in consequence of default in registration. Referring to the language of article 2089 C.C. the words "purchasers who derive their respective titles from the same person" seem on the fair construction of them to apply to and to include purchasers who claim to have acquired the same title. The language of article 2098 C.C. ought to be read with that of 2089 C.C. and construed by the light of it. The narrow construction contended for by Mr. St. Germain would greatly restrict the operation of these provisions and impair their efficacy in furtherance of the object designed to be secured by them.

Under the second head Mr. St. Germain contends that the question in controversy was determined by earlier litigation. Mr. St. Germain is on solid ground when he argues that where a title to real estate is in controversy *res judicata* is not necessarily limited in its effect to the immediate parties to the action. It has often been said that the real basis of the *res judicata* doctrine is to be found in the considerations indicated in the *brocard, interest rei publicae ut sit finis litium.* From this point of view the rule would entirely fail of its purpose if it were possible to evade it by successive transfers of the property in dispute. But here again we are under the dominion of this system of registration. I find nothing in these articles implying such an exception as Mr. St. Germain must establish in order to make good his argument. There is nothing here to indicate that a registered title is subject to a claim based upon some unregistered transaction merely because that claim has been put

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in suit prior to the date of the instrument or contract upon which the registered title rests. It is perhaps unfortunate that the articles contain no provision for the registration of *lis pendens*. But that *lis pendens* should override rights which otherwise would follow from registration—*lis pendens* necessarily unregistered because there is no provision for such registration—would constitute a most serious defect which one is not sorry to find is not disclosed on a scrutiny of these provisions.

ANGLIN J.—This appeal in my opinion fails. The deposit and recording in the registry office of a protest formulating the claim of the plaintiff to the property in question was not registration of the right in or to that property which the court subsequently held that her oral contract gave her.

The plaintiff and the defendant were purchasers who derived their respective titles from the same person (*auteur*). The contract of the former was with the testator, Desrochers; her title was the judgment of the court declared to be equivalent to a deed from his executrix. The contract and title of the latter were with and from the executrix *es-qual.* The defendant is entitled to the benefit of priority of registration established by art. 2089 C.C.

The plaintiff's judgment against Desrochers' executrix, recovered after the conveyance to the defendant, was nothing more than an enforcement of the rights conferred by Desrochers' unregistered oral contract with the plaintiff. Those rights, declared by Art. 1025 C.C. are, by Art. 1027 C.C., expressly made subject to the special provisions of the code for the registration of titles and claims to property. The

plaintiff's judgment gave her no higher right than the contract which it purported to enforce. The prior registration of the defendant's deed therefore prevails against it.

While there is not a little in the evidence to suggest fraud, it is not so clearly shown as to warrant our making the finding for the plaintiff on that issue which she failed to obtain in the Superior Court, the Court of Review, and the Court of King's Bench. Notice or knowledge of a prior unregistered right, however direct and distinct, does not suffice to render subject to it the registered title of a subsequent purchaser for value.

MIGNAULT J.—Cette cause présente un conflit entre deux parties qui réclament le même immeuble en vertu de deux titres translatifs de propriété, et le jugement dont l'appelant se plaint a résolu ce conflit en faveur de l'intimé qui a la priorité d'enregistrement.

Le 15 octobre 1910, l'épouse de l'appelant, maintenant décédée et que l'appelant représente comme tuteur de ses enfants héritiers de leur mère, a acheté cet immeuble du nommé Jean-Baptiste Brien dit Desrochers par une vente verbale. Celui-ci mourut peu après, laissant un testament par lequel il donnait l'usufruit de ses biens à sa femme, Dame Marguerite Bricault, qu'il nommait son exécutrice testamentaire avec des pouvoirs d'aliénation très étendus

Mise en demeure de signer un acte de vente en faveur de Mde. Samson, Marguerite Bricault s'y refusa, et une action fut intentée contre elle pour l'y contraindre. Marguerite Bricault contesta cette action, prétendant qu'il n'y avait eu que des pourparlers et non pas une vente conclue, mais la Cour Supérieure donna raison à l'appelant et à son épouse

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par jugement rendu le 23 juin, 1913, et Marguerite Bricault ayant porté la cause en appel, ce jugement fut confirmé par la Cour du Banc du Roi le 30 septembre, 1914 (1). Chacun de ces jugements fut enregistré peu après sa reddition.

Jusqu'à ce qu'il eût obtenu jugement dans l'action en passation de titre, l'appelant n'avait pas de titre qui pût être enregistré, la vente étant verbale, mais, en février 1911, avant la date du titre de l'intimé, sa femme fit enregistrer un avis, sous forme de bordereau, de sa prétention d'avoir acheté l'immeuble par vente verbale.

Le 3 mars, 1911, pendant que l'action en passation de titre suivait la marche assez lente que les délais de la procédure et l'encombrement des affaires judiciaires lui imposaient, l'intimé acheta cette propriété de Marguerite Bricault ès qualité d'exécutrice testamentaire de son mari, et son contrat de vente fut enregistré au mois d'août de la même année. Lors de cette acquisition, l'intimé savait que l'épouse de l'appelant avait poursuivi Marguerite Bricault en passation de titre, mais comme il a priorité d'enregistrement, il prétend que cette connaissance n'affecte pas la validité de son achat. L'appelant, qui a maintenant un titre judiciaire, conteste cette prétention. La Cour Supérieure et la Cour du Banc du Roi ont donné raison à l'intimé contre l'appelant, qui avait eu gain de cause devant la Cour de Revision à l'unanimité des juges, et dans la Cour du Banc du Roi, l'honorable juge Pelletier aurait été d'avis de confirmer le jugement de la Cour de Revision. Cette différence d'opinion parmi les juges qui ont été saisis de cette cause fait bien voir qu'elle n'est pas d'une solution facile.

(1) Q. R. 23 K. B. 565.

On ne saurait douter de la priorité d'enregistrement de l'intimé, et si la question d'enregistrement prime toutes les autres questions que soulève l'appelant, celui-ci ne peut réussir dans son appel à cette cour; car l'enregistrement du bordereau énonçant la prétention de Mme Samson d'avoir acquis l'immeuble par vente verbale ne peut compter comme l'enregistrement du droit de propriété qui lui a été finalement reconnu par les tribunaux, et aucune disposition du code n'autorisait l'enregistrement d'un tel avis. Du reste, ce n'est qu'un avis, et précisément l'intimé invoque l'article 2085 C.C. qui rend un tel avis inefficace contre celui qui a la priorité d'enregistrement. Cet article, qui vient des statuts refondus du Bas-Canada, chapitre 37, art. 5, et de l'ordonnance de l'enregistrement de 1841, 4 Vic., ch. 30, art. 1er, se lit comme suit:

> L'avis reçu ou la connaissance acquise d'un droit non-enregistré appartenant à un tiers et sujet à la formalité de l'enregistrement ne peut préjudicier aux droits de celui qui a acquis depuis pour valeur, en vertu d'un titre dûment enregistré, sauf les cas où l'acte procède d'un failli.

Les conditions requises ici sont l'acquisition pour valeur, l'enregistrement du titre, et le défaut d'enregistrement du droit du tiers Quand ces conditions se rencontrent, malgré l'avis reçu ou la connaissance du droit du tiers, le titre enregistré le premier, sans égard à sa date, l'emporte sur le droit non enregistré ou qui n'a été enregistré que plus tard. Et bien que le titre postérieur en date, quand il s'agit de ventes successives consenties par la même personne, procède d'un non-propriétaire et ne confère aucun droit d'après les principes du droit civil, néanmoins, dans l'intérêt des tiers et pour leur protection, si ce titre postérieur en date a été enregistré le premier, il prévaudra contre la première vente qui n'a pas été enregistrée ou qui

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ne l'a été que plus tard. Comme le faisait observer Sir Alexandre Lacoste, juge-en-chef, dans la cause de *Barsalou* v. *The Royal Institution for the Advancement of Learning* (1), notre système d'enregistrement a profondément modifié notre droit. Il convient de tenir compte de cette remarque dans l'étude de la cause qui nous est soumise.

C'est ainsi qu'après avoir rendu la vente un contrat purement consensuel, sans que la délivrance soit nécessaire comme autrefois (art. 1025 C.C.), le code subordonne cette règle, quand il s'agit de la vente immobilière et des droits des tiers, aux lois de l'enregistrement (art. 1027 C.C.). Mais pour que la priorité d'enregistrement fasse préférer la seconde vente à la première, il faut que les deux ventes aient été faites par le même auteur (art. 2089 C.C.) (la version anglaise dit "*the same person*"), ou pour me servir de l'expression de l'article 2098 C.C. par le même vendeur.

L'appelant dit: "J'ai acheté de Jean-Baptiste Brien dit Desrochers, l'intimé a acheté de Marguerite Bricault, son exécutrice testamentaire. Il est vrai que j'ai poursuivi cette dernière en passation de titre, mais je ne pouvais faire autrement, Brien dit Desrochers étant mort, et son exécutrice testamentaire étant la seule personne qui pût me donner un titre. Les deux ventes ont donc été faites par deux personnes différentes."

S'il en était ainsi, les articles 2085, 2089 et 2098 C.C. ne s'appliqueraient pas à l'espèce, et la priorité d'enregistrement serait indifférente, la question à résoudre étant de savoir lequel des deux vendeurs avait le droit de vendre l'immeuble.

(1) Q.R. 5 Q.B. 383 at p. 399.

L'argument que formule ici l'appelant se rattache à une autre de ses prétentions que son avocat a soutenue avec beaucoup de talent, savoir qu'il y aurait chose jugée entre l'appelant et l'intimé quant au droit de propriété du premier.

Parlons d'abord de cette question de chose jugée. L'intimé est le successeur à titre particulier de Dame Marguerite Bricault. Or le successeur à titre particulier est lié par le jugement rendu contre son auteur avant la naissance de ses droits, ou l'accomplissement des formalités qui les ont rendus opposables aux tiers. Si la transmission des droits du successeur à titre particulier se fait pendant l'instance, il est pareillement lié par le jugement qui en détermine l'existence ou la nature puisque ce jugement rétroagit au jour de la demande. J'emprunte à Huc, tome 8, No 314, l'exposition de cette doctrine qui rencontre tous les suffrages sur le premier point, et qui, sur le second, est celle de la majorité des auteurs, (Demolombe, *Contrats*, tome 7, nos 552 et suivants, étant, autant que je puis le constater, le seul dissident):

> 314. Quant aux successeurs à titre particulier, ils auront été représentés par leur auteur dans les jugements rendus avec celui-ci antérieurement à la naissance de leurs droits ou plus exactement avant que leurs droits soient devenus opposables aux tiers par l'accomplissement, le cas échéant, des formalités requises à cet effet (Comp. art. 939; L. 23 mars 1855, art. 1, art. 1690).
>
> Si la transmission a eu lieu avant la demande, le jugement qui s'en est suivi ne sera pas opposable au successeur. Il en est des décisions judiciaires comme des conventions qui ne sauraient avoir effet à l'égard des tiers en possession de droits réels, que si elles sont antérieures à l'époque où ces droits sont devenus opposables à ceux qui n'ont pas concouru à leur établissement. C'est ce qui est admis sans difficulté pour les droits de propriété, d'usufruit et autres démembrements de ce genre. Mais il y a controverse pour l'hypothèque, et on a soutenu que le résultat d'un procès postérieur à la constitution de ce droit réel, qui est en réalité un démembrement du *jus abutendi*, nuira au créancier hypothécaire qui n'a pas été partie au procès. La raison de décider paraît cependant être la même. Nous reviendrons plus tard sur ce point.

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Enfin, la transmission peut se placer entre la demande et le jugement. Il semble que cette hypothèse doive rentrer dans la première, puisque le jugement ayant un effet seulement déclaratif remonte en réalité au jour de la demande. Par conséquent, il suffit que le titre d'acquisition de l'ayant cause à titre particulier soit postérieur à l'introduction de l'instance liée avec son auteur, ou que ce titre n'ait produit d'effet à l'égard du tiers qu'après l'introduction de l'instance, pour que la chose jugée entre l'auteur et le tiers puisse être opposée à l'ayant cause, acquéreur, donataire, créancier hypothécaire ou privilégié, usufruitier ou possesseur d'une servitude.

S'il y a chose jugée contre l'intimé, ce serait sur le fait que le 15 octobre, 1910, Jean-Baptiste Brien dit Desrochers a vendu à Madame Samson l'immeuble que l'intimé a subséquemment acheté de son exécutrice testamentaire, car c'est là tout ce qu'on a jugé dans l'action en passation de titre. C'est comme si l'appelant apportait un acte notarié de vente consenti ce jour-là par Brien dit Desrochers. D'après les règles du droit civil, indépendamment des lois d'enregistrement, l'appelant dans cette hypothèse devrait avoir gain de cause.

Mais précisément il y a les lois de l'enregistrement et nous avons vu qu'elles ont profondément modifié les principes du droit civil. L'article 2085 C.C. suppose que le tiers a un droit réel certain, antérieur à celui qui a été enregistré, mais ce droit, ou plutôt l'écrit qui le constate, n'a pas été enregistré, et il aurait dû l'être.

Si l'effet de la chose jugée dans l'espèce est que l'intimé ne peut contester maintenant que Mme. Samson ait acheté cet immeuble de Jean Baptiste Brien dit Desrochers le 15 octobre 1910, cela équivaut à dire qu'elle avait un titre antérieur à celui de l'intimé, tout comme si elle produisait un acte de vente devant notaire passé le 15 octobre 1910. Cependant ce titre n'a pas été enregistré avant celui de l'intimé et ce dernier, malgré la connaissance qu'il en a eu et la présomption de chose jugée qui l'empêche de le contester, peut se prévaloir de son défaut d'enregistrement.

Pour cette raison, la doctrine de la chose jugée ne fournit pas une réponse à l'objection fondée sur l'article 2085 C.C.

Mais l'appelant soutient qu'il ne s'agit pas ici de deux ventes consenties par le même auteur ou le même vendeur. Il dit avec une certaine plausibilité que la vente du 15 octobre 1910 a distrait cet immeuble de la succession de Jean-Baptiste Brien dit Desrochers, qu'il ne tombe pas sous l'empire de son testament et, partant, que l'exécutrice testamentaire n'a pas reçu mandat de le vendre.

A mon sens, c'est la principale difficulté en cette cause. Pourtant cette difficulté deviendra moindre si on peut dire, comme le prétend l'intimé, que Jean-Baptiste Brien dit Desrochers, l'auteur de Mme. Samson, et son exécutrice testamentaire, l'auteur de l'intimé, sont la même personne juridiquement parlant. Car alors nous aurons la situation même qu'envisage l'article 2098 C.C., un deuxième contrat de vente qui est consenti par un non-propriétaire, mais qui, à raison de sa priorité d'enregistrement, l'emporte sur le premier contrat.

Du reste, prenons l'hypothèse la plus favorable à l'appelant, une vente par Jean-Baptiste Brien dit Desrochers de l'immeuble en question, vente qui a distrait cet immeuble de sa succession et qui a révoqué, *pro tanto*, le mandat donné à son exécutrice testamentaire de vendre ses biens. Il est à remarquer que l'article 897 C.C. quant à la révocation tacite d'un legs par l'aliénation de la chose léguée, ne s'applique normalement qu'au legs à titre particulier, mais supposons qu'il y ait eu ici révocation, bien qu'il soit plus exact et entièrement suffisant de dire que cet immeuble a été distrait de la succession. Dans ce cas l'appelant peut-il prétendre que le titre de l'intimé est nul?

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Malheureusement je suis forcé de conclure que les lois de l'enregistrement lui barrent encore le chemin, car je suppose qu'il a maintenant un titre provenant du testateur. Mais ce titre n'a été enregistré qu'après l'enregistrement du contrat de l'intimé. D'autre part, le testament de Jean-Baptiste Brien dit Desrochers avait été dûment enregistré lors de la vente faite à l'intimé, avec, nous a dit le savant avocat de l'appelant, la déclaration requise par l'article 2098 C.C., contenant la désignation de l'immeuble en question. Dans ces circonstances l'appelant, avec sa vente non-enregistrée provenant du testateur, peut-il attaquer le titre du tiers qui a traité avec l'exécutrice testamentaire sur la foi de l'enregistrement du testament et de la déclaration de transmission désignant cet immeuble? Je réponds négativement à cette question, car autrement la protection des tiers par l'enregistrement serait entièrement illusoire. On ne devrait certainement pas donner plus d'effet au titre obtenu par l'appelant que si Jean-Baptiste Brien dit Desrochers avait, après ce titre, accordé sans droit un titre à l'intimé, et alors la priorité d'enregistrement règlerait le conflit.

Reste un seul point. Jean-Baptiste Brien dit Desrochers et Marguerite Bricault, son exécutrice testamentaire, sont-ils la même personne juridiquement parlant? L'exécuteur testamentaire est le mandataire du testateur de qui il tient tous ses pouvoirs. Or les actes accomplis par le mandataire sont les actes du mandant, car *qui facit per alium facit per se.* La loi a permis au testateur de conférer un mandat qui commencerait à l'époque même où finit le mandat ordinaire, le décès du mandant. Mais ce mandat, règle générale, produit les mêmes effets que le mandat *inter vivos,* et les actes du mardataire étant ceux du

mandant, la vente faite par l'exécutrice testamentaire en vertu de ce mandat de vendre est, juridiquement parlant, une vente faite par le testateur. Il y a donc identité juridique de personnes dans l'espèce.

Il y a bien la question de fraude. Je dois avouer que la bonne foi de l'intimé me paraît suspecte, mais je ne puis aller jusqu'à dire qu'il y a eu de sa part collusion frauduleuse avec Marguerite Bricault qui, elle, a commis une fraude bien évidente à l'égard de l'appelant. Aucun des juges, à l'exception de l'honorable Juge Pelletier, n'est arrivé à la conclusion qu'il y avait eu collusion frauduleuse, même la Cour de Révision qui a maintenu l'action de l'appelant. Si la Cour Supérieure avait décidé qu'il y avait eu fraude, je ne me serais pas cru autorisé, avec la preuve au dossier, à infirmer son jugement, mais le savant juge qui a vu tous les témoins a rejeté les allégations de fraude de l'appelant. Dans ces circonstances, je ne crois pas que cette cour, la quatrième à être saisie du procès, doive accueillir maintenant cette accusation de fraude.

A tous égards, je suis forcé d'en venir à la conclusion que l'appel est mal fondé. Cependant l'appelant est réellement à plaindre car, avec toute diligence possible, après son imprudence initiale de traiter verbalement d'une vente immobilière, il lui a été impossible d'obtenir la protection de l'enregistrement. Cela démontre qu'il y a une lacune dans la loi de la Province de Québec. Dans les autres provinces, lorsqu'on intente un procès relativement à un immeuble, on peut obtenir sommairement d'un juge l'autorisation de faire enregistrer ce qu'on appelle un *lis pendens*, et alors les tiers traitent avec le propriétaire à leurs risques et périls. Rien de tel n'existe en la province de Québec, et cette lacune devrait attirer l'attention du législateur.

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Dans cette cause je ne puis faire autrement que de suivre la loi telle qu'elle existe et il en résulte que l'appel doit être renvoyé avec dépens.

BERNIER J.—Deux appels nous sont soumis; l'un sur une action pétitoire de l'appelant contre l'intimé, et l'autre sur une action en radiation d'hypothèque de l'intimé contre l'appelant.

La Cour Supérieure a rendu jugement, dans les deux causes, en faveur de l'intimé; mais la Cour de Révision a renversé ce jugement et sur appel la Cour du Banc du Roi a maintenu le jugement de la Cour Supérieure.

Les principales questions à décider sont les suivantes:

1. Le document enregistré le 23 février 1911 par l'appelant ou son auteur, et comportant une déclaration qu'il aurait acheté par vente verbale, le 13 octobre 1910, certains biens de feu J.-B. Brien dit Desrochers, comporte-t-il l'enregistrement d'un droit réel suffisant pour protéger ses droits, aux désirs de la loi?

Je ne crois pas. Ce document est unilatéral; il n'est pas le bordereau d'un titre ou d'un contrat écrit et consenti entre deux parties; il énonce un droit d'acheteur seulement. Ce n'est pas là l'inscription ou le bordereau dont parle le code quand il s'agit d'enregistrer un acte de vente.

2. L'intimé ayant acheté les mêmes terrains de l'exécutrice testamentaire de feu Desrochers, savoir Dame Marguerite Bricault, le 3 mars 1911, et ayant fait enregistrer cet acte le 4 avril 1911, l'appelant ne pût faire enregistrer le jugement dans l'action en passation de titre, qu'il avait prise contre cette dernière, que le 15 juillet 1913.

Dans ce cas, ce jugement, ayant effet rétroactif jusqu'à la date de la prise de l'action en passation de titre, savoir à la fin de l'année 1910, ou au commencement de 1911, conférait-il à l'appelant des droits de propriété sur les biens à lui vendus?

Non, car l'enregistrement de l'acte d'achat de l'intimé ayant été fait avant l'enregistrement du jugement obtenu par l'appelant, privait ce dernier du bénifice de son achat verbal et du jugement qui lui en a accordé le titre. (Art. 1027, 2085, 2089, 2098 C.C.).

L'enrégistrement des droits réels est d'ordre public; on ne peut, partant, interpréter les articles du code qui y ont rapport, dans un sens différent de celui qu'ils indiquent très clairement. Vouloir faire des distinctions, alors que le code n'en fait pas; invoquer la rétroactivité d'un jugement pour faire primer l'enregistrement d'un jugement sur l'enregistrement antérieur d'un contrat, serait ouvrir la porte à l'arbitraire.

A l'égard des tiers par conséquent, la vente des biens immeubles n'est parfaite que par l'enregistrement du titre de vente; cette formalité est essentielle, quoiqu'en principe une vente soit parfaite par le seul consentement des parties contractantes.

Les lois d'enregistrement sont une exception à bien des principes de droit civil, puisqu'une même personne peut vendre successivement à deux acheteurs un même immeuble, et conférer au second, s'il fait enregistrer son titre avant le premier, un droit valable de propriété.

3. Les deux actes d'achat qui sont en présence dans la présente cause, proviennent-ils du même auteur, dans le sens légal?

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Bernier J.

L'auteur de l'intimé était l'exécutrice testamentaire de l'auteur de l'appelant; de plus, par le testament, elle avait le pouvoir de vendre les biens de la succession.

Elle était également héritière en usufruit de ces mêmes biens.

Je suis d'opinion qu'elle avait, en ces diverses qualités d'héritière, de mandataire et d'exécutrice la saisine légale et requise pour continuer la personnalité juridique du testateur.

Elle représentait le testateur; elle n'avait pas plus de droits que lui peut-être, de vendre les biens en question; mais elle était dans la même condition que lui, c'est-à-dire, que serait une personne qui vend un bien à deux acheteurs successifs et dont le second fait enregistrer son titre d'achat avant le premier.

4. L'appelant invoque la fraude dont se serait rendu coupable l'exécutrice testamentaire et l'intimé, pour le priver de ses droits.

Les témoignages ne sont pas absolument convaincants pour en venir à décider ce point en faveur de l'appelant.

L'intimé avait certainement connaissance des droits que prétendait, avec raison, avoir l'appelant; il a su également que ce dernier avait intenté son action en passation de titre, lorsqu'il a fait enregistrer son acte d'achat.

Mais telle connaissance n'est pas suffisante pour établir fraude de sa part. Cette connaissance, dit l'article 2085 C.C., ne peut préjudicier aux droits de celui qui a acquis pour valeur, en vertu d'un titre dûment enregistré.

En supposant même qu'il fût de mauvaise foi—ce qui n'est pas absolument prouvé—il n'y a pas de preuve suffisante pour dire qu'il y a eu fraude concertée entre lui et son auteur, pour priver l'appelant de ses droits.

Aucune preuve n'a été faite non plus, que l'acte d'achat de l'intimé, était un acte simulé.

Je suis d'opinion de renvoyer l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Germain, Guérin & Raymond.*

Solicitors for the respondent: *Décary & Décary.*

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*Oct 25.
*Nov. 21.

JOSEPH GROULX (INTERVENANT)..APPELLANT;

AND

O. BRICAULT DIT LAMARCHE AND OTHERS (PLAINTIFFS).....RESPONDENTS;

AND

THE CANADIAN NORTHERN MONTREAL LAND CO. LTD.(DEFENDANT).

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

Substitution—"Publication et insinuation"—Registration—Third party—Prescription—Arts. 939, 941, 2108, 2206 *C.C.—Ordonnance de Moulins* (1566), *arts.* 57, 58.

Norwithstanding the terms of the Ordonnance de Moulins (1566),—article 57 of which provides for the "publication et insinuation" of a donation or a will creating a substitution within six months from the date of the deed of donation or of the testator's death, the registration of a substitution after the above delay in accordance with article 941 C.C. is valid as against a person acquiring title subsequently to such registration. *Bulmer* v. *Dufresne* (Cassels Digest 2nd ed. 873) followed.

As good faith is required for the ten years prescription under the Civil Code, that prescription cannot be invoked against a substitution duly registered, such registration being sufficient to constitute any third party, who might subsequently purchase from the institute, a holder in bad faith. *Meloche* v. *Simpson* (29 Can. S.C.R. 375) followed.

The substitution created by the donation in this case provides for a substitution of two degrees of consanguinity.

Judgment of the Court of King's Bench (Q.R. 31 K.B. 287) affirmed.

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*PRESENT:—Idington, Duff, Anglin and Mignault JJ. and Bernier J. *ad hoc.*

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APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), affirming the judgment of the Superior Court sitting in Review, which had reversed the judgment of the trial court, and dismissing the appellant's intervention.

On the 25th of October, 1819, Jacques Rochon and his wife made a donation *inter vivos* to their son, Pierre Rochon, of two land properties. The deed contained the following substitution:

A condition en outre que les dites terres et dépendances d'icelle ainsi que le bois susdit seront et demeureront substitués, comme les dits donateurs les substituent par les presentes: 1. Au profit des enfants et descendants du dit donataire, soit d'un premier mariage, soit d'un second, ou d'autres mariages subséquents, et ce, par égale portion sans préférence des enfants du premier mariage à ceux d'autres mariages subséquents, et au profit de leurs descendants dans tous les degrés. Et si le dit donataire vient à mourir sans enfants, ou si ses enfants, qui auraient recueilli la dite substitution au premier degré, venaient à mourir sans enfants et qu'il n'y eût aucun autre descendant du dit donataire, la dite substitution aura lieu au profit de Marie-Louise Rochon, fille des dits donateurs, soeur du dit donataire, etc., ou si elle était décédée, au profit de ses enfants ou descendants dans tous les degrés, et si le dit donataire et sa dite soeur venaient à mourir sans aucun enfant ni descendant, la dite substitution aurait lieu au profit des parents les plus proches des dits donateurs, et habiles à leur succeder suivant la loi.

Jacques Rochon died on the 5th of December, 1819, and his wife, on the 1st of November, 1846. The deed of donation was never "insinué" nor "publié;" but it had been registered on the 6th of July, 1880. The donatee, Pierre Rochon, died on the 20th of September, 1891, leaving six children. One of his daughters, Flavie Rochon, sold her rights to a brother, Denis Rochon; the latter, with his other brothers and sisters, sold the property to Félix Rochon, who then transferred his rights to the appellant; and the appellant sold the property to the defendant. The respond-

(1) Q. R. 31 K.B. 287.

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ents are the children and grand-children of Dame Flavie Rochon; they claim that the substitution was providing for a substitution of two degrees; that their mother was only "grevée" and not "appelée" and that she had not the right to sell her part of the estate; and the respondents, claiming the rights of "appelés" to the substitution, brought the present action in order to interrupt the prescription of thirty years against their rights. The appellant intervened in the action and contested the action in the place of the defendant, towards whom the appellant was guarantor. The trial court held in favour of the appellant that the substitution was one of one degree; but the Court of Review reversed this judgment, holding that it was one of two degrees. In the Court of King's Bench, the appellant raised a new question: that the substitution was void, because it has not been "publiée et insinuée" within six months from the date of the death of the donators, as required by the Ordonnance de Moulins. And before the Supreme Court of Canada, the appellant, by consent, raised another plea, claiming the benefit of the prescription of ten years provided by the Civil Code.

Aimé Geoffrion K.C. and *W. A. Handfield K.C.* for the appellant.

Chs. Champoux for the respondent.

IDINGTON J.—I think this appeal should be dismissed with costs for the reasons assigned in the court below.

And the doctrine laid down in the case of *Meloche* v. *Simpson* (1), answers the plea of prescription suggested by the late Mr. Justice Pelletier and allowed here by consent.

(1) [1898] 29 Can.S.C.R. 375.

DUFF J.—This appeal must be dismissed. The determination of the point in dispute is governed by two decisions of this court, *Meloche* v. *Simpson* (1), and *Bulmer* v. *Dufresne* (2) the effect of which appears from the judgment of Taschereau J. (who dissented).

ANGLIN J.—For the reasons assigned in the Court of Review and the Court of King's Bench I have no doubt that the donation in question in this action provided for a substitution of two degrees.

The Court of King's Bench having allowed the appellant to raise the contention that this substitution became null because it was not recorded (*insinuée*) as prescribed by the Ordonnance de Moulins (Art. 57) within six months from the date of the deed which created it, although no such plea is included in his defence, he cannot be denied that right here. We are therefore again confronted with the question raised, but not decided, in *Leroux* v. *McIntosh* (3), whether, although not recorded as required by that ordonnance, a substitution subsequently registered under article 941 C.C. is or is not good as against a person whose interest was acquired after it had been so registered.

It appears to have been authoritatively determined in *Bulmer* v. *Dufresne* (2), by the Court of Queen's Bench and by this court, to quote the head-note of that report,

that even before the registry laws in Lower Canada, the want of *publication et insinuation* of a will creating a substitution within six months after the death of the testator did not invalidate the substitution.

(1) 29 Can. S.C.R. 375 (2) [1878] 3 Dor. Q.B. 90.
(3) [1915] 52 Can. S.C.R. 1.

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The note of this decision in our digests (Cassels, 2 ed., p. 873; Coutlee, p. 1380) would appear to be incomplete. Although diligent search has been made by the court reporters for the original opinions delivered in this court they have not been found. The only report of them available is that of the dissenting opinion delivered by Taschereau J. (1), which he concludes by saying: "I am, however, alone on this point," i.e., in holding that the nullity arising from default of publication and recording within the prescribed six months was absolute. The reputation of the Dorion series is so well established that the authenticity of the head-note above quoted should, I think, be accepted. We may add to this that in *Roy* v. *Pineau* (2), Chief Justice Dorion says at p. 155:—

> La majorité de la Cour Suprême a aussi tenu dans la cause de *Bulmer* v. *Dufresne* (1) qu'une substitution, quoiqu'enregistrée après les délais de l'ordonnance, était valable. Ceux des juges qui composaient cette majorité n'ont pas encore publié leur décision, mais ils n'ont pu confirmer le jugement de cette cour, qu'en maintenant que la substitution, quoique non enrégistrée dans les six mois du décès de l'auteur de la substitution, n'était pas nulle à l'égard de ceux qui n'avaient contracté qu'après l'enrégistrement du testament, puisqu'ils ont jugé que les appelants Bulmer et autres n'avaient pas pu acheter du grevé ce que, à raison de l'enrégistrement de la substitution, ils savaient ou devaient savoir que le grevé n'avait pas le droit de vendre.

On the authority therefore of the decision of this court in *Bulmer* v. *Dufresne* (1) the title created by the substitution in question here must prevail over rights which depend upon instruments executed after its registration in July, 1880.

The judgment of Chief Justice Dorion in *Bulmer* v. *Dufresne* (1), confirmed by the majority of this court, was based on Art. 941 C.C. In that case the will of the testatrix, who died in 1834, was published and

(1) 3 Dor. Q.B. 90. (2) [1882] 3 Dor. Q.B. 146.

recorded in the Court of Queen's Bench nine months after her death. Art. 941 C.C., which is not indicated as new law (Cod. Rep. vol. 5, pp. 192-3) and was intended as an embodiment of the effect of the statute, 18 Vic., c. 101, was treated as an application of the law in regard to judicial publication and recording existing prior to that statute to the registration system which it substituted for such publication and recording. Indeed the perusal of the statute (18 Vic., c. 101) makes it reasonably clear that its purpose in substituting registration for the former judicial publication was that it should be subject to similar limitations and should entail consequences identical with those attached to the superseded procedure. The concluding words of sec. 2 are as follows:—

> The delays for registration shall be the same as those established by law for the transcription and the publication in court, and no legal provision having reference to substitutions not specially repealed, shall be affected by this Act, *the sole object of which is to substitute the formality of registration in the Registry Offices for transcription and publication in the courts of Acts containing substitutions.*

Although it has been determined by authority by which we are bound, *Symes* v. *Cuvillier* (1), that the *Ordonnance des Donations* of 1731 (Art. 58 of the *Ordonnance de Moulins* deals with donations) as a new law was not in force in Canada because never registered by the Superior Council (p. 157)—(it follows that the *Ordonnance des Substitutions* of 1747 was in like plight and it is that *ordonnance* and Pothier's Commentaries upon it that the Codifiers assign as the sources of Art. 941 C.C.—Commissioners' Report, Vol. 5, p. 386,) two Royal Declarations, one of the 17th of November, 1690, and the other of 18th January, 1720 (likewise not registered in Canada) would seem to have been treated in France as merely declara-

(1) [1880] 5 App. Cas. 138.

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tory of the interpretation which had been put upon Art. 57 of the *Ordonnance de Moulins* and as such, though unregistered, may be regarded as declaratory of the effect given to that article of the *Ordonnance* in Canada. The nullity of substitutions not published and recorded within the six months prescribed by the *Ordonnance de Moulins* had before 1747 been held in France in a long series of *arrêts* to be not absolute but relative merely, i.e., to obtain, where publication and recording had taken place after the expiry of the prescribed six months, only in favour of persons who had acquired interests prior thereto. Chief Justice Dorion in *Roy.* v. *Pineau* (1), discusses this question at length and we have the authority of that great jurist for the statement that it was the law of Canada long prior to the statute of 18 Victoria that a substitution published and recorded after the period prescribed by the *Ordonnance de Moulins* was effective from the date of such publication and recording as against persons acquiring title subsequently thereto. In the comparatively recent judgment of Martineau J. in *Taillefer* v. *Langevin* (2), *Bulmer* v. *Dufresne* (3), is cited as well established authority.

Two titles are preferred in support of the claim of the intervenant—one a deed from Flavien Rochon of 1865, and the other a deed from Felix Rochon of 1889. The latter cannot prevail against the substitution registered in 1880. The former, as pointed out in the judgments delivered in the Court of King's Bench, purports merely to transfer *"tous les droits et prétentions"* of the grantor under the donation containing the substitution. Those rights were *ex facie* subject to the rights of the substitutes.

(1) 3 Dor.Q.B. 146, at pp. 150-153. (2) [1910] Q.R. 39 S.C. 274, at p.284.
(3) 3 Dor. Q.B. 90.

Registration of the substitution in 1880 being inconsistent with the intervenant having been a purchaser in good faith in 1889, when he took the conveyance from Felix Rochon, (*Meloche* v. *Simpson* (1),) the claim of prescriptive title under Art. 2206 C.C., which he was allowed to prefer by consent, cannot prevail.

MIGNAULT J.—Les intimés, appelés en vertu d'une substitution non encore ouverte créée en 1819, ont poursuivi la Compagnie Canadian Northern Montreal Land Company Limited, pour faire interrompre la prescription contre leurs droits éventuels, et l'appelant, qui avait vendu les immeubles substitués au nommé Darling, lequel les avait revendus à cette compagnie, est intervenu dans l'instance pour défendre, en sa qualité de garant, les droits qu'il avait concédés. Il a perdu sa cause dans la cour de révision et la cour d'appel et il en appelle à cette cour. Sur le mérite de ses prétentions je puis dire que les raisons données par les honorables juges de la cour d'appel sont si satisfaisantes que je puis me dispenser de motiver longuement mon opinion que l'appel est mal fondé et doit être renvoyé.

Deux questions surtout ont été discutées devant cette cour:

1. La substitution que l'appelant attaque n'ayant pas été insinuée dans les délais prescrits par l'ordonnance de Moulins, mais ayant été enregistrée, au bureau d'enregistrement d'Hochelaga et Jacques Cartier, le 6 juillet 1880, ainsi que l'appelant l'admet dans son intervention, cette substitution est-elle valide?

(1) 29 Can. S.C.R. 375.

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2. L'appelant ayant amendé son intervention devant cette cour, du consentement des intimés, aux fins de réclamer la prescription de dix ans avec titre et bonne foi, ce nouveau moyen est-il bien fondé?

Première question. Les intimés se basent sur l'article 941 C.C. et la décision de cette cour dans la cause de *Bulmer* v. *Dufresne* (1), pour soutenir que la substitution enregistrée en 1880, avant que l'appelant eût acquis les droits qu'il invoque par son intervention (d'après certaines indications au dossier, le titre de l'appelant remonterait à 1889; ce titre n'est pas produit), lui est opposable nonobstant le défaut d'insinuation dans les six mois.

En effet, l'article 941 C.C. dit que l'enregistrement des actes portant substitution remplace leur insinuation au greffe des tribunaux et leur publication en justice, formalités qui sont abolies. Et après avoir fixé un délai de six mois pour l'enregistrement, lequel, quand il se fait dans ce délai, opère avec rétroactivité au temps de la donation ou à celui du décès, cet article ajoute que si l'enregistrement a lieu postérieurement, il n'a d'effet qu'à compter de sa date.

Dans la cause de *Bulmer* v. *Dufresne* (1), il s'agissait d'une substitution créée par testament. La testatrice est décédée le 30 juillet, 1834, et l'insinuation eut lieu le 15 avril 1835, plus de six mois après son décès. On ne manqua pas d'invoquer contre cette substitution le délai fatal de l'ordonnance de Moulins, mais la cour d'appel (1) jugea, en 1878, que même avant l'ordonnance d'enregistrement (1841) et l'abolition de l'insinuation (1855), le défaut de publication et d'insinuation dans les six mois ne rendait pas la substitution non avenue.

(1) 3 Dor. Q. B. 90.

Ce jugement fut confirmé par cette cour, feu l'honorable juge H. E. Taschereau différant. La décision de cette cour n'a pas été rapportée dans les rapports de la cour suprême. Il n'y en a qu'une note dans le digeste de feu M. Cassels, 2ème édition, p. 873, et cette note ne mentionne pas le point qui nous occupe. Cependant on trouve, à la suite du rapport de la décision de la cour d'appel, l'opinion que feu l'honorable juge H. E. Taschereau avait exprimée en cette cour, et, en concluant à la nullité de la substitution pour le défaut d'insinuation dans les six mois, le savant juge ajoutait qu'il était seul de cet avis. Il n'a pas été possible de retrouver dans les archives de cette cour l'opinion des autres juges, mais il est hors de doute que le jugement de la cour d'appel a été confirmé par cette cour, et l'opinion de l'honorable juge Taschereau démontre qu'il a été confirmé sur le point précis qui nous concerne. Je crois donc que nous pouvons regarder la cause de *Bulmer* v. *Dufresne* (1) comme une autorité en faveur des intimés.

Et quand même nous n'aurions pas cet arrêt, l'article 941 C.C. fournirait un argument aux intimés. En France on avait mitigé la rigueur des dispositions de l'ordonnance de Moulins par les déclarations royales de 1690 et de 1712 et par l'ordonnance des substitutions de 1747, le système de cette dernière ordonnance (titre 2, art. 28 et 29) étant identique à celui de l'article 941 C.C. Il est vrai que les déclarations de 1690 et 1712, ainsi que l'ordonnance de 1747, n'ont pas été enregistrées au greffe du conseil supérieur de Québec, mais on ne peut se cacher que les codificateurs s'en sont inspirés en rédigeant l'article 941 C.C. En cela ils ne croyaient pas innover,

(1) 3 Dor. Q.B. 90.

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puisqu'ils n'indiquent pas cet article comme étant de droit nouveau. Et à maints endroits de ce titre des donations entre vifs et testamentaires ils se basent sur l'ordonnance des donations et sur l'ordonnance des substitutions qui n'ont pas été enregistrées. Si on ne peut aller jusqu'à croire que les codificateurs partagaient l'opinion alors assez courante que l'enregistrement des ordonnances royales par le conseil supérieur de Québec n'était pas une condition essentielle de leur entrée en vigueur en la Nouvelle France—et autrefois bien d'esprits et des meilleurs étaient de cet avis—du moins on peut dire qu'ils regardaient les ordonnances des donations et des substitutions comme étant très souvent déclaratoires du droit et de la jurisprudence existants. Je dois ajouter que cette question de la nécessité de l'enregistrement des ordonnances royales a été, je ne dis pas discutée, mais tranchée dans l'affirmative par le conseil privé, en 1880, dans la cause de *Symes* v. *Cuvillier* (1), où il était précisément question de l'ordonnance des donations, et se trouve maintenant définitivement réglée. Cependant, quant au point qui nous occupe, l'opinion assez générale dans la province de Québec paraît avoir été celle que la cour d'appel a exprimé dans la cause de *Bulmer* v. *Dufresne* (2).

Cette décision de la cour d'appel ayant été confirmée par la cour suprême, je suis d'opinion qu'il n'y a pas lieu de renouveler le débat et je me base sur cet arrêt pour décider que la substitution en question en cette cause est opposable à l'appelant.

Deuxième question. L'appelant réclame la prescription de dix ans, prétendant avoir un titre translatif de propriété et la bonne foi. Il a promis de

(1) 5 App. Cas. 138 at p. 157. (2) 3 Dor. Q.B. 90.

produire ce titre, mais ne l'a pas fait. En supposant cependant que ce titre serait translatif de propriété, il est évident que l'appelant ne peut pas invoquer la bonne foi si lors de son acquisition il connaissait ou était censé connaître la substitution. Or cette substitution ayant été enregistrée en 1880 avant son acquisition, cet enregistrement, ainsi qu'il a été décidé par cette cour dans la cause de *Meloche* v. *Simpson* (1), empêche tout acquéreur subséquent d'invoquer la prescription de dix ans, car il lui manque la condition essentielle pour cette prescription de la bonne foi.

L'appelant prétend que cette doctrine rend à peu près impossible la prescription de dix ans, car si le droit invoqué n'a pas été enregistré il n'est pas opposable aux acquéreurs qui ont priorité d'enregistrement, et s'il l'a été avant leur acquisition, ils ne peuvent prétendre avoir acquis de bonne foi. J'ai fait remarquer, dans la cause de *Samson* v. *Décarie* (2) que nous décidons en même temps que cette cause, que les lois de l'enregistrement ont profondément modifié les principes du droit civil, et la présente cause nous en fournit un nouvel exemple. D'ailleurs la décision rendue dans *Meloche* v. *Simpson* (1) nous lie, et la question se trouve ainsi résolue définitivement.

Pour ces raisons je suis d'avis de renvoyer l'appel avec dépens.

BERNIER J.—Il s'agit de l'appel d'un jugement de la Cour du Banc du Roi confirmant le jugement de la Cour de Révision; ce dernier jugement avait infirmé celui de la Cour Supérieure. Le jugement de la Cour Supérieure avait maintenu l'intervention et renvoyé l'action.

(1) 29 Can. S.C.R. 375. (2) 63 Can. S.C.R. 11.

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L'action en est une en interruption de prescription.

Trois questions sont soulevées devant cette cour:

1. La substitution créée par un acte de donation entre vifs, en date du 25 octobre 1919, en était-elle une à un degré seulement, ou bien en était-elle une à deux degrés?

2. L'acte créant la substitution, n'ayant pas été insinué ni publié au greffe du tribunal dans les six mois de sa date, ni du vivant des donateurs, est-il nul et de nul effet à l'égard des tiers acquéreurs des biens substitués?

3. Y a-t-il lieu pour les intimés à invoquer la prescription de 10 ans avec titre et bonne foi?

1. Par acte notarié, en date du 25 octobre 1919, Jacques Rochon et son épouse Marie Meilleur ont fait une donation entre vifs à leur fils Pierre Rochon de deux terres, dans la Paroisse de St. Laurent, dont les terrains en question en cette cause sont extraits; il y est dit que les donateurs substituent les biens donnés comme suit:

> 1. Au profit des enfants et descendants du dit donataire, soit d'un premier mariage, soit d'un second, ou d'autres mariages subséquents, et ce par égale portion, sans préférence des enfants du premier à ceux d'autres mariages subséquents, et au profit de leurs descendants dans tous les dégrés.
>
> Et si le dit donataire vient à mourir sans enfants ou si ces enfants qui pourraient recueillir la dite substitution *au premier dégré* venaient à mourir sans enfants, et qu'il n'y eût aucun autre descendant du dit donataire, la dite substitution aura lieu au profit de Marie Louise Rochon, fille des donateurs, soeur du dit donataire et épouse de Louis Meunier susdit, si elle est alors vivante, ou si elle était décédée, au profit de ses enfants ou descendants dans tous les dégrés; et, si le dit donataire et sa dite soeur venaient à mourir sans aucun enfant ni descendant, la dite substitution aura lieu au profit des parents les plus proches des dit donataires et habiles à leur succéder suivant la loi.

Je suis d'opinion que cette substitution est à deux dégrés.

Le donataire Pierre Rochon est un grevé de substitution en faveur de ses enfants qui sont les premiers appelés; à leur tour, ces enfants, appelés au premier dégré, sont grevés de substitution en faveur de leurs propres enfants, s'ils en ont.

Au cas où il n'y aurait pas d'enfants, ni de petits enfants du donataire, les biens substitués devront aller à Marie Louise Rochon, si elle est alors vivante, ou au profit de ses enfants si elle est morte; si le donataire lui-même, ou sa soeur susdite, mouraient sans enfants, la substitution serait allée en faveur des parents les plus proches des donateurs.

Il y a donc là clairement deux classes d'appelés dans cette substitution.

2. L'acte de donation entre vifs contenant la substitution n'a jamais été insinué ni publié au greffe du tribunal du vivant des donateurs. L'acte n'a été enregistré qu'en 1880.

Le défaut d'insinuation est-il fatal à l'égard des tiers acquéreurs?

L'ordonnance de Moulins (1566) déclarait nulles et de nul effet les substitutions non insinuées dans les délais qu'elle prescrivait; par l'article 58, il était décrété que l'insinuation des donations devait se faire dans les quatre mois à compter de leur date

pour le regard des biens et personnes de ceux qui sont demeurants dedans notre Royaume, et dans six mois pour ceux qui sont hors de notre Royaume.

Cette ordonnance fut modifiée par la déclaration du roi du 17 novembre 1690, et par celle du 18 janvier 1712; ces modifications furent à l'effet qu'il serait permis d'insinuer les substitutions en tout temps, mais qu'elles ne vaudraient contre les tiers-acquéreurs que du jour de l'insinuation si cette dernière était faite après les délais.

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La déclaration du roi du 18 janvier 1712, contient les dispositions suivantes:

(2) Que les dites publications et enregistrement soient faits dans les six mois à compter du jour des actes si les substitutions sont faites par des dispositions entre vifs; et du jour du décès du testateur, si elles sont faites par des dispositions à cause de mort.

Que les substitutions qui n'auront pas été publiées ni enregistrées dans le dit terme de six mois, ne pourront être opposées aux créanciers, ni aux tiers-acquéreurs; et que celles qui n'auront été publiées et enregistrées après les six mois, ne pourront leur être opposées que du jour des dites publication et enregistrement.

La loi 18 Victoria, chapitre 101, n'a rien changé à cet égard. Il y est dit:

Les délais de l'enregistrement de ces actes resteront les mêmes que ceux établis par la loi de la transcription et publication devant les Cours, et nulle disposition légale relative aux substitutions non spécialement abrogée ne sera affectée par cet acte, dont le seul objet est de substituer la formalité de l'enregistrement dans les bureaux d'hypothèques à la transcription et publication devant les cours des actes portant substitution.

Cette loi fut refondue et inscrite, en termes à peu près identiques, dans les Statuts Refondus du Bas Canada de 1861. Notre Code Civil, aux arts. 939, 941, et 2108, pose les règles qui les établissent.

Ces articles ne sont pas entre crochets dans le code et par conséquent ils ne doivent pas être considérés comme étant du droit nouveau. On doit donc en conclure qu'avant le code, la loi ne frappait pas de nullité les substitutions qui n'étaient pas insinuées ou enregistrées, mais qu'elle permettait leur insinuation ou leur enregistrement, sauf cependant le droit des tiers qui pourraient avoir enregistré des droits dans l'intervalle.

Le savant procureur de l'appelant objecte que les déclarations de 1690 et de 1712, de même que l'ordonnance des substitutions de 1747, n'ont pas été enregistrées au Conseil Supérieur de Québec; que, vu ce

défaut d'enregistrement, ces déclarations et ordonnances n'ont pas la force de loi dans notre province; partant, c'est l'ordonnance de Moulins qu'il faut suivre jusqu'en 1855; et il ajoute que les Lords du Conseil Privé ont exprimé l'opinion que le défaut d'enregistrement des ordonnances françaises avait empêché leur mise en force dans le Bas Canada (*Symes* v. *Cuvillier* (1).

Sans vouloir entrer dans la discussion sur la question d'enregistrement des ordonnances françaises subséquentes à l'édit de création du Conseil Souverain, je dois dire cependant que les déclarations du roi de France sus-citées ont toujours, dans mon opinion, été la loi qui a gouverné la matière; nos codificateurs l'ont ainsi compris.

L'ordonnance de Moulins (1566) devait s'appliquer aux termes de l'art. 58, non seulement au royaume de France, mais aussi dans les colonies françaises. Les déclarations subséquentes du roi, modifiant cette ordonnance, s'appliquaient dans la même étendue.

Exprimant mon opinion personnelle du reste, je dois dire que je ne crois pas que ces ordonnances, d'intérêt général, devaient être enregistrées au Conseil Souverain pour avoir force et effet dans notre pays.

Si la substitution dont il est question en cette cause n'a jamais été insinuée, elle a cependant été enregistrée le 6 juillet 1880, et cet enregistrement doit produire son effet à compter de sa date. Or quels sont les tiers dont les droits auraient été enregistrés avant cette date?

L'intervenant a vendu la propriété des terrains substitués à la défenderesse, le 16 décembre 1912; son acte de vente est produit; cependant, l'intervenant n'a

(1) 5 App. Cas. 138.

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pas produit son acte d'achat. Aucun des actes antérieurs à cette mutation de propriété n'a été produit. Il est vrai qu'il a produit des actes de déclaration et de ratification passés devant notaires, entre lui et Dame Flavie Rochon le 22 juin 1911; ces déclarations énumèrent certains contrats passés entre les appelés à la substitution en 1865, en 1880, en 1889, en 1868, en 1881 et en 1889. On ignore le contenu de ces actes; dans la liste qui en est donnée, on voit seulement que les appelés cèdent tout simplement les droits et prétentions qu'ils pouvaient avoir dans les immeubles substitués; or, la transmission de ces droits, ne pouvait comporter l'aliénation du droit de propriété aux immeubles, puisque la substitution n'était pas encore ouverte, et que les appelés étaient chargés eux-mêmes de rendre ces biens.

Du reste ces déclarations faites devant notaires n'ont aucune force probante.

3. La prescription décennale avec titre et bonne foi, invoquée par l'appelant en cette cause, ne saurait être également maintenue. L'acte entre vifs contenant la substitution a été enregistré en 1880, et partant l'appelant ne peut invoquer sa bonne foi. Quant à son titre, il ne lui a conféré, comme je viens de le dire, que les droits et les prétentions que ses vendeurs ont pu lui accorder, et les titres qu'il pourrait invoquer ne sont même pas produits au dossier.

Je suis d'opinion de renvoyer l'appel et de maintenir le jugement avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Handfield & Handfield.*

Solicitor for the respondents: *Charles Champoux.*

LA CORPORATION DU COMTÉ D'ARTHABASKA (DEFENDANT).. } APPELLANT;

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*Oct. 26, 27.
*Nov. 21.

AND

LA CORPORATION DE CHESTER-EST (PLAINTIFF)..... } RESPONDENT;

AND

LA CORPORATION DE ST-NORBERT AND OTHERS..... } MISES EN CAUSE

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

Municipal law—County corporation—County road—Procès-Verbal Local road—"Road to be made"—Acts 444, 445, 447, 449, 451, 453, 574 *M.C.*

The appellant homologated a procès-verbal for the opening and construction as a county road of a contemplated highway situated wholly within the limits of the local municipality of St. Norbert. Such highway, when constructed, would have connected with other roads already existing in the adjacent municipalities.

Held, Duff and Bernier JJ. dissenting, that such procès-verbal was *ultra vires* of the appellant corporation.

Held, also, Duff and Bernier JJ. dissenting, that the words "road to be made" in article 451 of the new municipal code should receive the same interpretation as that given by a well-established jurisprudence to the same words contained in article 762 of the precedent municipal code; and that these words mean a road already established by the local authority, although not yet constructed, and do not include "a road which previously did not exist in any way." *Bothwell* v. *Corporation of West Wickham* (6 Q.L.R. 45) followed. Judgment of the court of King's Bench (Q.R. 31 K.B. 475) affirmed, Duff and Bernier JJ. dissenting.

PRESENT:—Idington, Duff, Anglin and Mignault, JJ. and Bernier J. *ad hoc.*

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LA CORPORATION DU COMTE D'ARTHABASKA v. LA CORPORATION DE CHESTER EST. AND LA CORPORATION DE ST. NORBERT.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec (1), reserving the judgment of the Superior Court and maintaining the respondent's action.*

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgment now reported.

L. St.-Laurent K.C. and *A. Perrault K.C.* for the appellant.—According to articles 758, 759 and 762 of the precedent municipal code, the county council had power to declare the road a county road, even if it was situated within the limits of a local municipality and even if the local municipality has not already dealt with it. The substantial changes made by the new code make now that power clear; articles 447, 448, 451 M.C.

Girouard for the respondent.—The County Corporation had not the power to declare a new road to be opened within the limits of a local municipality to be a county road. *Corporation du Comté de Nicolet* v. *Corporation du village de Villers* (2); The words "road to be made" in article 451 P.M.C. have been defined as a road which although not made has already been legally established. *Bothwell* v. *Corporation of West Wickham* (3); *Brunet* v. *Corporation de Comté de Beauharnois.* (4)

Alleyn Taschereau K.C. for the mises en cause.

*NOTE:—The judgment of this court on a motion to quash for want of jurisdiction is reported in vol. 62, p. 101.

(1) Q.R. 31 K.B. 475.
(2) [1918] Q.R. 27 K.B. 289.
(3) [1880] 6 Q.L.R. 45.
(4) [1911] 18 R. de J. 141.

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IDINGTON J.—Any jurisdiction we have to interfere herein must rest upon that part of subsection (b) of section 46 of the "Supreme Court Act" falling within the words herein as follows:—

or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound.

When the notice to quash made herein was dismissed the fact that there had been expropriations made in virtue of the proceedings appellant had taken was pointed to as within said subsection.

Upon due consideration of all that has developed in argument herein I fail to find anything of that kind, or approximately so, as part of the subject matter of the appeal.

The mere surmise that ultimately some such questions may possibly arise, turning upon the question of whether or not that which has been done by the appellant is or is not *ultra vires*, cannot give us jurisdiction to overrule the decisions of the courts below acting within the jurisdiction given by the legislature in way of a supervising power over municipal assertions of authority such as appellant pretended to exercise and is in question herein by virtue of the powers given it in the Municipal Code.

I am therefore by reason of such question of possible want of jurisdiction all the more inclined to abide by the reasoning of the majority of the Court of King's Bench which presents cogent reasons against such an extreme and unusual exercise of authority as appellant has pretended to exercise and seeks herein to have maintained.

The primary idea of a county road is one running through more than one local municipality.

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If the appellant had seen fit to construct the road in question, at its own expense, and then desired to abandon such a road once constructed to the local municipality and thus cast the burden of its maintenance upon the local municipality, I could conceive of its action being somewhat more in accord with the spirit, as well as the literal language of the rather confusing legislation bearing upon the question than it seems to be.

I am loathe to accept the conclusion that the legislature, in light of the jurisprudence that preceded its latest enactment, really designed to give the appellant such a curious power as is pretended to have been given it.

If it had intended thereby to assign the counties the power of directing a local municipality to open and construct in a single municipality a road confined within same and to maintain same, it should have done so by a clear expression of such purpose and swept away all other old conflicting and embarrassing provisions inconsistent therewith.

I would dismiss this appeal with costs.

DUFF J. (dissenting)—I concur with the Chief Justice of Quebec in his opinion as to the effect of Art. 447 of the Municipal Code. I only add that the reasons given by the Chief Justice establish in a manner entirely satisfactory to my mind that the construction adopted by him is the only construction which avoids the alternative of doing violence to the object of the legislature as disclosed by an examination of the provisions as a whole That being so I find no difficulty in reading the words "under the control of a local corporation" as equivalent to belonging to a class of roads under the control of a local corporation. In this view all the difficulty arising from the verbal structure of the clause in question disappears.

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The only remaining point is the question whether the course of decision in Quebec has been such as to establish the law in the sense contended for by the respondent.

I shall first consider the effect of the decisions relied upon. They begin with the decision of the Court of Review in *Bothwell* v. *West Wickham* (1). The Court of Review in that case considered the meaning of section 758 of the old code which, with certain modifications, is now section 447 of the existing Municipal Code. The decision was given in 1880. The question arose on an appeal from the judgment of the Superior Court of Arthabaska which had ordered a peremptory writ of mandamus to issue condemning the township of West Wickham to open and complete a certain road within a specified time under a penalty of $1,000 for default. The road in question was one situated entirely within the local limits of the township and by force of Art. 755 of the existing code it fell within the category "local road". The county council in January 1877 declared the road to be a county road and ordered that it should be commenced and finished on two severally named dates. In the following September and prior to the date of commencement provided for by the order of the previous January the county council professed to declare the road to be a local work. The Court of Review reversed the order of the primary court on various grounds, among others that the order of the county council was inoperative for want of the notice and publication required by law; that in any case the Superior Court had exceeded its powers in the imposition of the penalty; that the procès verbal was too vague to enforce by mandamus

(1) 6 Q.L.R. 45.

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and finally that the county council had no authority under the powers conferred by Arts. 758 and 759 effectively to declare a non-existent local road a county road for the purpose of getting jurisdiction under these articles.

It will be observed that the real question for consideration before the Court of Review as regards the construction of Art. 758 and strictly the only question arising under that article was the question whether or not the county council had authority by force of it to order the township municipality to open and construct a local road which had not previously been established. As regards that question the language of the article was explicit; no authority was given by the article to require the local municipality to incur the expense of opening or constructing any road. Assuming the county council had power to declare a non-existent road a county road and thereby to acquire jurisdiction to establish it as a lawful highway, it is quite plain that the article gave no authority to the county council to place upon the local municipality the burden of opening and constructing the road. It is true that Art. 762 must apply to roads to be made as well as to roads already made. I entertain no doubt myself as to the effect of this provision in its relation to the power under 758 to declare a local road a county road. The authority, I think, was plainly given. It is equally clear, I think, that as regards such road the power of the county council did not include the authority to direct that the local municipality should assume the whole or any part of the cost of constructing or opening it but that the authority to impose a financial burden upon the local municipality in respect of such roads extended only to the cost of maintenance and reparation.

The judgment of the court no doubt does rest in part upon its view of the proper construction of articles 758 and 762, but the practical point decided was the one just mentioned, the point that, assuming authority to open the road vested in the county council, the cost of construction must be borne by the council and not by the local municipality.

In order of date, the next case relied upon is *Giguère* v. *Beauce* (1). The judgment of Mr. Justice Carroll which is the only judgment appearing in the reports points out that the decision of the Court of Review in *Bothwell's case* (2) had no relevancy to the question then before the Court of King's Bench. As to the judgment delivered in *Nicolet* v. *de Villers* (3), I am unable to discover there either any opinion or judgment which has any relevancy.

The civil law recognizes the effect of a series of decisions although the doctrine of precedent as known to the common law has strictly no place in it. Examining the decisions bearing upon the point before us, I am not able to discover anything like such a continuity of adjudication upon the precise point we have to pass upon, as would be necessary to establish a law independently of the meaning of the words of the statute themselves. There is no doubt the circumstance which must be taken into consideration that the statute was enacted without very serious change in its language after the first of these decisions was delivered; but the rule of statutory construction applied by the English courts that where a superior court has given a meaning to a set of words used by the legislature and the legislature has reproduced these words, *prima facie* it is taken to have adopted the

(1) [1910] Q.R. 19 K.B. 353 (2) 6 Q.L.R. 45.
(3) Q.R. 27 K.B. 289.

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meaning thus given to them is a rule which at all events in the imperative form in which it is applied in common law jurisdictions cannot be said to be binding upon courts administering the law of Quebec. One very obvious reason for this is that a decision by a superior court under the Quebec system is not an "authority" in the sense in which common lawyers use the term; it is important and weighty evidence as to what the law is, but no more. The tribunal which pronounced the decision may with perfect propriety decline to follow it. The presumption therefore that the legislature in re-enacting a statutory provision which has already been construed intends thereby to stereotype the meaning which has been ascribed by a single decision to the enactment, if there be such a presumption at all, must be one of exceedingly little force. There is another reason and it is this. In this country (I have fully developed this point in a judgment delivered in *Schmid* v *Miller* (1) which was afterwards approved by the Privy Council) it has long been recognized that such a presumption does violence to the fact and consequently as early as 1891 an enactment was passed by the Dominion Parliament applying to all Dominion statutes and this enactment has since been reproduced in most of the provinces in which such a rule could have been supposed to have sway negativing the existence of the rule and directing tribunals called upon to construe statutes to construe them according to their real meaning and without regard to any such supposed presumption. This legislation, as I say, was passed as is well known in recognition of the fact that the presumption which, no doubt, in England has a sound foundation in the practice of Parliament with regard to the drafting

(1) 46 Can. S.C.R. 45.

and preparation of statutes, was in this country a mere artificial rule resulting frequently, where it was applied, in the frustration of the legislative intention.

The appeal, in my opinion, should be allowed.

ANGLIN J.—This is an action brought under the supervisory power conferred on the Superior Court by Art. 50 C.P.C., to quash and set aside a procès-verbal and its homologation by the council of the appellant corporation and subsequent proceedings for the opening and construction as a county road of a contemplated highway situated wholly within the limits of the local municipality of St. Norbert. The facts out of which the litigation arises are detailed in the judgments delivered in the Superior Court and the Court of King's Bench (1) and in the opinions prepared by my learned brothers. A number of minor matters dealt with in the judgments below were but slightly pressed in this court and would not seem to call for further discussion.

Having regard to the nature of the jurisdiction invoked by the plaintiffs, the contest is virtually limited to the questions whether the impugned procès-verval and its homologation were *ultra vires* of the county council, and, if not, whether there is such gross and palpable injustice in the distribution made of the cost of the proposed works as would warrant interference on the ground of oppression.

Counsel for the appellant in supporting the jurisdiction of the county council contended (a) that the road in question forms part of a highway which will run through two or more local municipalities and is therefore *ex natura* a county road; (b) that under Art.

(1) Q.R. 31 K.B. 475.

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451 of the Municipal Code of 1916 a county council is empowered to establish as a county road a highway to be wholly situate within a local municipality, although no action towards creating it or determining its *situs* has yet been taken by the proper authority of such local municipality.

(a) The appellant's case on this branch is rested on an alleged declaration by it, made under the authority of the first paragraph of Art. 447 M. C., that a highway, already constructed by the local authority in the adjoining municipality of Chester North, with which the projected road in St. Norbert would connect, thus providing a through road to the provincial highway leading from Victoriaville to Arthabaska, should become a county road. Without pausing to examine in detail the proceedings of the county council relied upon as containing or implying such a declaration in regard to the road in Chester North, I shall content myself with again stating, as I did during the argument, that I fail to find in them anything of the kind. The power conferred by Art. 447 M.C. is so extraordinary that it is not too much to expect that its exercise should be explicit. Not only is there no explicit declaration by the county council that the road in Chester North "shall in future be a county road" but, if that would suffice, there is nothing to warrant an inference that the county council ever meant to assume responsibility for its control, maintenance and repair, which such a declaration would involve.

(b) If the question as to the construction of Art. 451 M. C. were *res integra*, it may be that I would have accepted the view clearly and forcibly presented by the learned Chief Justice of Quebec in his dissenting opinion. But it was determined forty-one years ago by a strong

court (Meredith C. J. Stuart J. and Caron J.) in *Bothwell* v. *West Wickham* (1) in a carefully considered judgment that the words "road to be made" (*chemin à faire*) in Art. 762 of the former municipal code meant a road already established by the local authority, although not yet constructed, and that they did not include "a road which previously did not exist in any way". That judgment was approved in *Giguère* v. *Corporation du Comté de Beauce* (2) and was followed in *Brunet* v. *Beauharnois* (3). The legislature in re-enacting the former Art. 762 M.C. in 1916 as Art. 451 of the new municipal code practically in *ipsissimis verbis* (the only change is the addition of the words "bridge or water course" twice after the word "road") may be taken to have intended that it should receive the well established construction thus put upon it. Their Lordships of the Judicial Committee said in a Quebec case, *Casgrain* v. *Atlantic and North West Ry. Co.* (4):

> Their Lordships cannot assume that the Dominion legislature, when they adopted the clause *verbatim* in the year 1888, were in ignorance of the judicial interpretation which it had received. It must on the contrary be assumed that they understood that s. 12 of the Canadian Act must have been acted upon in the light of that interpretation. In these circumstances their Lordships, even if they had entertained doubts as to the meaning of s. 12 of the Act of 1888 would have declined to disturb the construction of its language which had been judicially affirmed.

The section there in question dealt with the power of a municipality to sanction the closing of a public street. It had been construed in two decisions rendered in Upper Canada in 1857. The principle underlying this judgment is recognized in the French

(1) 6 Q.L.R. 45.
(2) Q.R. 19 K.B. 353, at p. 356.
(3) 18 R. de J. 141 at p. 151.
(4) [1895] A.C. 282 at p. 300.

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authorities. Thus we find Baudry-Lacantinirie in the first volume of his Traité de Droit Civil, Par. No. 261, saying

> lorsque le législateur reproduit une règle déjà formulée par la loi, il est probable qu'il lui conserve le sens qu'elle avait.

See too Fuzier Herman, Rep. vbo. Lois et Décrets, No. 375. I refrain from citing other well known English authorities to the same effect. They may be found conveniently collected in Maxwell on Statutes, 6 ed. at p. 542, and 27 Hals. L. of E. par. 263. I had occasion to apply this principle of construction the recent case of *Arnold* v. *Dominion Trust Co.* (1)

There is no provision in the Quebec statutes such as has been introduced in other legislative jurisdictions (v.g. R.S.C. c. 1, sec. 21 (4); R.S.O. c. 1, s. 20), to exclude this well-known rule of statutory construction, based on the presumption that Parliament knows the law, that its re-enactment, especially in a consolidating Act, implies the adoption by the legislature of judicial construction placed upon the language of a statute.

Since the new municipal code was enacted the Court of King's Bench (Archambault C. J., Lavergne, Cross, Carroll & Pelletier JJ.) in *Corporation du comté de Nicolet* v. *Corporation du village de Villers* (2) has put the same construction on Art. 451 of the new code as was formerly given to Art. 762 of the old code.

Much reliance was placed by counsel for the appellant on the introduction of the words "construction and opening" into par. 3 of Art. 447 of the new code, which replaced former Art. 758, as warranting, if not requiring, the wider construction put upon the new Art. 451 by the learned Chief Justice of Quebec in the present

(1) [1918] 56 Can. S.C.R. 433. (2) Q.R. 27 K.B. 289.

case. But an examination of Art. 447 itself seems to answer that argument. In the first place the word "opening" follows the word "construction" indicating that the physical opening or the declaring of the constructed road open for traffic is meant rather than the formal determination to create a road, which of course precedes its construction. Moreover, in the phrase in paragraph 3, "for the construction, opening, maintenance and repair of such road", the words "such road" clearly refer to the road mentioned in paragraph 1, and that should (but for its extension by Art. 451) be understood to mean a road having actual physical existence as distinguished from the "road to be made" dealt with by art. 451. Otherwise Art. 451 would have no office—a consequence always avoided, if possible, in construing a statute. *The Queen* v. *Bishop of Oxford* (1).

The words "construction and opening" were required in Art. 447 (3) to provide for the case of a road not yet made but determined on by the local authority, which the county council was held to have had authority under s. 762 of the old code to declare a county road. The county council could formerly determine how the cost of maintaining and repairing such a road should be borne. It can now make a like provision for the cost of its "construction and opening"—which was formerly *casus omissus*. The purpose of this change is therefore sufficiently met and reasonable effect is given to it without imputing to the legislature the very improbable intent of thus indirectly interfering with the construction of former Art. 762 when re-enacting it without material change as Art. 451.

Mr. Justice Greenshields has in his judgment made a useful comparative analysis of the relevant provisions of the new and the old codes.

(1) [1879] 4 Q.B.D. 245 at p. 261.

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On the ground therefore that the construction of the words "road to be made" (*chemin à faire*) in Art. 451 M.C. has been long established in the jurisprudence of the Province of Quebec and that the legislature far from suggesting any intention that that construction should be departed from in the future has rather indicated its purpose to adopt and confirm it I am of the opinion that the judgment of the majority of the learned judges of the Court of King's Bench should be upheld.

MIGNAULT J.—La principale question que soulève ce procès est de savoir si, en vertu de l'article 447 du nouveau code municipal, la corporation de comté peut déclarer chemin de comté et en ordonner l'ouverture, un chemin qui n'existe pas encore, mais qui, quand il sera ouvert et construit, se trouvera situé entièrement dans le territoire d'une municipalité locale, c'est-à-dire, dans l'espèce, à St-Norbert. Tel que projeté, le chemin en question se relierait à d'autres chemins ouverts ou à être ouverts dans les municipalités voisines, formant ainsi une artère d'une grande importance pour le comté d'Arthabaska. Et c'est la corporation de ce comté qui a ordonné l'ouverture et la construction de ce chemin.

La cour d'appel a dénié ce pouvoir à la corporation de comté et celle-ci en appelle à cette cour. La majorité des honorables juges de la cour d'appel (l'honorable juge en chef différant) se basent sur la jurisprudence de la province de Québec qui a pour point de départ la décision unanime de la cour de revision à Québec, en 1880, dans la cause de *Bothwell* v. *Corporation of West Wickham* (1) où siégeaient les juges Meredith, juge en chef, Stuart et Caron.

(1) 6 Q.L.R. 45.

Dans cette cause, il s'agissait de l'interprétation des articles 758 et 762 de l'ancien code municipal, qui correspondent aux articles 447 et 451 du nouveau code, et le juge en chef Meredith, parlant pour le tribunal, a interprété l'expression "chemin à faire" "road to be made" dans l'article 762 comme signifiant un chemin qui, bien qu'il n'eût pas été fait, avait été établi par l'autorité compétente, et le savant juge en chef ajouta:—

> We do not think that a county council could establish a local road, which previously did not exist in any way, in order immediately afterwards to convert the local road, so established, into a county road.

Cette décision a fait jurisprudence. Elle a été déclarée bien fondée par la cour d'appel dans la cause de *Giguère* v. *La corporation du comté de Beauce* (1) et dans la cause de la *Corporation du comté de Nicolet* v. *La corporation du village de Villers* (2), la même cour, sans la mentionner, a jugé dans le même sens. Enfin il y a une décision du juge Mercier dans la cause de *Brunet* v. *Corporation du comté de Beauharnois* (3), où l'honorable juge accepte formellement l'autorité de la décision de la cour de revision dans *Bothwell* v. *Corporation of West Wickham* (4).

Convient-il maintenant de renverser cette jurisprudence?

L'appelante prétend que la rédaction des nouveaux articles 447 et 451 diffère de celle des anciens articles 758 et 762 de l'ancien code. Les nouveaux articles s'appliquent non seulement aux chemins, mais aux ponts et cours d'eau, mais ce changement est sans importance, et l'appelante ne se prévaut que du fait que, dans le dernier paragraphe de l'article 447 on

(1) Q.R. 19 K.B. 356.
(2) Q.R. 27 K.B. 289.
(3) 18 R. de J. 141.
(4) 6 Q.T.R. 45.

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a ajouté les mots "construction et ouverture" avant les mots "entretien et réparation" qui seuls se trouvaient dans l'ancien article 758. Je reproduis ce paragraphe tel qu'il se lit dans l'ancien et le nouveau code:

Ancien code, art. 758: Le conseil de comté, après avoir déclaré qu'un chemin local est un chemin de comté, peut, si les circonstances l'exigent, déterminer par procès-verbal quelles corporations seront responsables de l'entretien et des réparations du chemin et de la construction et des réparations des ponts, et déclarer dans ce procès-verbal quelle sera la part contributoire de chaque corporation.

Nouveau code, art. 447: La corporation de comté, après avoir déclaré qu'un chemin, un pont ou un cours d'eau local est un chemin, un pont ou un cours d'eau de comté, peut, si les circonstances l'exigent, déterminer par règlement ou par procès-verbal quelles corporations sont responsables de la construction, de l'ouverture, de l'entretien et des réparations de tel chemin, pont ou cours d'eau, et déclarer dans ce règlement ou procès-verbal quelle est la part contributoire de chaque corporation.

Si on lit attentivement le premier paragraphe de l'article 447, ou de l'article 758, ancien code, on voit qu'il n'est question que de chemins existants, puisqu'on parle de chemins sous la direction d'une corporation locale. Le troisième paragraphe de l'article 447 envisage ce qui suit la déclaration faite en vertu du premier paragraphe, et à la différence de l'ancien article 758, mentionne, outre l'entretien et la réparation du chemin, sa construction et son ouverture. A première vue, cela paraît dépasser la portée du premier paragraphe, mais comme il s'agit de la responsabilité du coût des travaux de chemin, il n'est pas impossible de concilier les deux paragraphes en disant que si une corporation locale s'est bornée à ordonner l'ouverture d'un chemin chez elle, et qui partant se trouve sous sa direction, la corporation de comté, après avoir déclaré ce chemin local un chemin de comté, peut déterminer par règlement ou par procès-verbal quelle corporation sera responsable du coût de la construction et de l'ouverture, de même

que de l'entretien et de la réparation, de ce chemin. Ainsi entendus, il paraît facile de concilier les paragraphes un et trois de l'article 447.

Envisageons maintenant l'article 451 dont le texte ne diffère guère de celui de l'ancien article 762, le nouvel article s'appliquant aux ponts et cours d'eau comme aux chemins. Cet article dit en substance que les attributions conférées par l'article 447 à la corporation de comté peuvent être exercées par elle relativement à un chemin, pont ou cours d'eau à faire, de la même manière que pour les chemins, ponts ou cours d'eau déjà faits.

Ces expressions "chemin à faire" "road to be made", "chemins déjà faits" "roads already made", méritent de retenir l'attention. Un chemin *à faire* n'est pas nécessairement un chemin dont l'ouverture n'a pas été ordonnée. Un procès-verbal, supposons-le, décrète l'ouverture d'un nouveau chemin local là où il n'y en avait aucun. Désormais on peut dire que ce chemin existe légalement et est sous la direction de la corporation locale, mais il est encore *à faire*, les opérations qui donneront effet à l'ordonnance d'ouverture étant l'acquisition de l'assiette et la construction matérielle de ce chemin. On peut et on doit donc distinguer entre ordonner l'ouverture d'un chemin et faire le chemin dont l'ouverture a été décrétée.

Maintenant puisque le chemin local que la corporation de comté déclare un chemin de comté est "un chemin sous la direction d'une corporation locale" (parag. 1er de l'art. 447), ce chemin peut très bien être un chemin *à faire*, c'est-à-dire un chemin dont l'ouverture seulement a été ordonnée. Il y a donc harmonie parfaite entre l'article 447, paragraphe 1er,

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et l'article 451, et aucune règle d'interprétation n'exige de donner à ce dernier article un sens qui le mettrait en contradiction avec le premier, par exemple en entendant par "chemin à faire" un chemin dont l'ouverture n'a même pas été décrétée, et partant un chemin qui n'est sous la direction d'aucune corporation. Au contraire, toutes les règles de l'interprétation légale commandent d'harmoniser, si cela se peut, toutes les dispositions d'une même loi, et c'est ce qu'on doit s'efforcer de faire pour le code municipal.

Je prévois bien qu'on pourra dire que voulant harmoniser les articles 447 et 451, je rends ce dernier article à peu près inutile, car je comprends virtuellement sa disposition dans le premier paragraphe de l'article 447 en tant qu'il parle de chemins à faire. Je puis répondre que le but de l'article 451 est d'écarter un doute quant à l'interprétation des articles 447 et 448, et qu'en acceptant cette interprétation extensive on ne rend pas inutile l'article 451 qui l'a consacrée, mais on ne fait que répondre à la volonté du législateur qui a formellement exigé que l'article 447 reçoive cette intreprétation.

Je ne suis donc pas prêt à dire que la cause de *Bothwell* v. *Corporation of West Wickham* (1) a été mal jugée. Mais alors que j'aurais des doutes sur ce point, il me semble qu'il est mieux que cette cour accepte, quand elle peut le faire raisonnablement, la jurisprudence des différentes provinces lorsqu'il s'agit de droit municipal. Les tribunaux de chaque province, par leur situation dans les divers centres de la population, sont plus à même de se rendre compte de la portée des lois adoptées pour la gouverne des municipalités, surtout des municipalités rurales. Et, pour ma part, je crois qu'il est préférable de respecter

(1) 6 Q.L.R. 45.

une jurisprudence comme celle sur laquelle la cour d'appel s'est basée, que de jeter la perturbation dans les affaires municipales en renversant cette jurisprudence et en donnant ainsi une nouvelle orientation au gouvernement des villages et des comtés. Il faudrait, pour en agir autrement, un texte bien formel, et je ne trouve pas ce texte dans le nouveau code municipal.

Il est possible que l'opposition d'une petite municipalité paralyse dans l'espèce les efforts de la corporation du comté d'Arthabaska pour assurer le bien-être de ses contribuables et pourvoir à la création de voies de communication commodes entre eux. Et il peut être d'autant plus nécessaire d'augmenter les pouvoirs des grandes unités comme les corporations de comté que celles-ci, depuis le nouveau code municipal, n'ont plus une jurisdiction d'appel contre les décisions des corporations locales. S'il en est ainsi, c'est au législateur d'y voir, car les tribunaux ne peuvent que se conformer à la loi.

Je suis donc d'avis de renvoyer l'appel avec dépens. Je ne donnerais pas de frais à la corporation de St-Norbert, qui, bien que le chemin en question se trouve sur son territoire, n'a pas contesté l'action de l'intimée, mais s'est contentée de surveiller le procès.

BERNIER J. (dissenting).—Il s'agit d'une action prise par la corporation locale de Chester-Est contre le corporation du comté d'Arthabaska, pour faire déclarer nul, illégal et *ultra vires*, un procès-verbal fait par le surintendant spécial de cette dernière corporation, en vertu d'une résolution du Conseil de comté d'Arthabaska, décrétant chemin de comté un chemin situé entièrement dans la municipalité de St-Norbert, dans le comté d'Arthabaska.

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La Cour Supérieure a renvoyé l'action; la Cour du Banc du Roi, siégeant en appel, a renversé le jugement de la Cour Supérieure, le juge en chef, l'Honorable M. G. Lamothe, étant dissident. C'est de ce dernier jugement que la corporation du comté d'Arthabaska en appelle.

Il importe de raconter les circonstances de cette cause pour expliquer l'action du conseil du comté d'Arthabaska.

Le 13 décembre 1916, la requête suivante, signée par des contribuables de la corporation de Ste-Hélène de Chester-Est, de Chester-Nord, et de St-Norbert (trois municipalités situées dans le comté d'Arthabaska), fut présentée au conseil du comté d'Arthabaska:

REQUETE DEMANDANT LE CHEMIN

A Monsieur le préfet et autres membres du Conseil de Comté d'Arthabaska.

Messieurs,

La requête des soussignés expose respectueusement ce qui suit:

1.—Qu'un chemin public court actuellement de Ste-Hélène de Chester jusqu'à la ligne de division entre Chester-Nord et St-Norbert;

2.—Que par procès-verbal de Mtre B. Feeney, une partie du chemin ci-dessus a été récemment ouverte et verbalisée dans le cinquième rang de Chester-Nord, tel qu'appert par le procès-verbal annexé aux présentes;

3.—Qu'il y a lieu de relier à un endroit situé à 300 pieds au nord-ouest du Pont Gosselin le grand chemin provincial courant entre St-Norbert et Arthabaska au chemin verbalisé par le dit B. Feeney; que demande a été faite à ce sujet à la Corporation de St-Norbert et qu'un procès-verbal préparé par J. N. Poirier annexé à la présente requête a conclu favorablement à l'ouverture du dit chemin, mais que la dite corporation de St-Norbert a refusé d'homologuer tel procès-verbal;

4.—Que le chemin en question, tel que plus amplement décrit au procès-verbal du dit J. N. Poirier est un chemin d'utilité publique pour trois municipalités du Comté d'Arthabaska, à savoir Ste-Hélène, Chester-Nord et St-Norbert, et que tel chemin aura pour effet de

raccourcir les distances pour aller à Arthabaska et Victoriaville d'environ un mille et qu'en outre cela aura pour effet d'exempter les voyageurs des côtes escarpées et longues situées entre les 7ème et 8ème rangs du Canton d'Arthabaska et que l'ouverture du dit chemin est réellement d'un intérêt considérable pour le public du comté généralement;

5.—Qu'en conséquence il y a lieu de décréter que le chemin projeté et à être construit à partir de la ligne de division entre Chester-Nord et St-Norbert jusqu'au chemin Provincial à 300 pieds au nord-ouest du pont Gosselin et plus amplement décrit au procès-verbal ci-dessus relaté de J. N. Poirier soit déclaré chemin de comté sous l'autorité de l'article 451 du nouveau code municipal, et de procéder subséquemment à verbaliser le dit chemin sous la direction du conseil de comté;

Pourquoi vos requérants vous prient de bien vouloir faire donner tous avis que de droit, qu'à la première séance régulière de ce conseil, il sera procédé par ce conseil à déclarer le dit chemin projeté chemin de comté, à réglementer l'ouverture du dit chemin soit par règlement ou par procès-verbal, à nommer un surintendant spécial pour visiter les lieux, dresser un procès-verbal, s'il y a lieu, et faire rapport au conseil pour homologation.

Daté ce 13 décembre 1916.

Le 14 mars 1917, cette requête fut prise en considération par le conseil de comté, et il y fut décidé que des avis publics seraient donnés à l'effet qu'à sa prochaine séance, le conseil passerait un règlement décrétant que le chemin, décrit dans la requête susdite, serait à l'avenir un chemin de comté, y compris les ponts. Tels avis furent donnés.

Le 13 juin 1917, le conseil de comté passa effectivement une résolution à l'effet qu'il déclarait que le chemin projeté, ainsi que les ponts et ponceaux qui y seraient construits, à partir de la ligne de division entre la municipalité de Chester-Nord et la municipalité de St-Norbert, en gagnant vers le Nord-Ouest jusqu'au grand chemin provincial, traversant des terrains connus et désignés au cadastre officiel de la paroisse de St-Norbert sous les numéros 250, 251, 253, 255, 256, 258, 259, 260 et 262, seraient à l'avenir un chemin et des ponts de comté, sous la jurisdiction de la corporation d'Arthabaska.

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Le 30 juin 1917 avis public fut donné de la passation de cette résolution.

Le 15 août 1917, J. N. Poirier, Notaire Public, nommé surintendant spécial par le conseil de comté aux fins de faire rapport au sujet de la résolution susdite, dressa un procès-verbal au sujet du chemin en question; entr'autres dispositions, il contient les suivantes:

1°. Un chemin sera ouvert, fait et entretenu, depuis un point situé dans la ligne de division, entre les municipalités de St-Norbert et de Chester-Nord à environ 200 pieds du côté est de la Rivière Gosselin, vis-à-vis le chemin déjà ouvert dans le cinquième rang de Chester-Nord; jusqu'au chemin provincial à un point situé à environ 300 pieds du côté ouest du Pont Rouge, sur la rivière Gosselin, après avoir traversé les lots numéros 1, 2, 3 et partie du lot numéro 4, du septième rang du canton d'Arthabaska, dans la paroisse de St-Norbert, c'est-à-dire à l'endroit où ce chemin a déjà été marqué sur les lieux, par Bennett Feeney, ès-qualité, il y a environ 2 ans, et moi-même l'automne dernier, (1916)."

2°. Ce chemin, depuis un point de départ, vis-à-vis le chemin ouvert dans le cinquième rang de Chester-Nord, dont il doit être la continuation jusqu'au chemin provincial, traversera en ligne droite, vers le Nord, (suit la description des lots que le chemin doit traverser).

12°. Tous les travaux du chemin ordonnés par le présent procès-verbal seront faits et exécutés par la corporation du comté d'Arthabaska, à l'entreprise, par soumission et contrat adjugé et passé d'après les règles édictées au titre 20, art. 624 et suivants du Code Municipal, mais aux frais, dépens et charges des corporations de la paroisse de St-Norbert et de Chester-Est; chacune de ces deux corporations devant contribuer au coût d'ouverture, de confection et d'entretien du chemin, fossés, clôtures, barrières, ponts, culées et abords, proportionnellement à son évaluation, tel que porté au rôle d'évaluation en force dans les municipalités, quand les paiements en seront dus et exigibles.

La corporation du comté d'Arthabaska devra faire elle-même la répartition, perception et paiement du coût de ces travaux.

13°. La municipalité de Chester-Nord est exempte de contribuer au coût des travaux du chemin ordonné par le présent procès-verbal, parce qu'elle a déjà ouvert et est tenu de faire et entretenir, par et en vertu d'un procès-verbal, sur son territoire, un chemin avec lequel le chemin présentement verbalisé doit former qu'une seule et même voie, dont partie dans Chester-Nord et partie dans St-Norbert.

Le 23 août 1917, avis public fut donné que ce procès-verbal serait pris en considération et homologué avec ou sans amendements, ou rejeté par le conseil du comté d'Arthabaska, le 12 septembre 1917.

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Le 10 septembre 1917, un certain nombre de contribuables de Chester-Est présentèrent au conseil de Chester-Est une requête au sujet du procès-verbal susdit, pour demander à ce conseil de faire amender le procès-verbal en question, de manière que le chemin projeté soit un chemin de comté à la charge du comté pour l'ouverture et entretien à toujours, ou à la charge des requérants à la requête du 13 décembre 1916, ou bien que le chemin soit déclaré chemin local à la charge de St-Norbert. Le conseil de Chester-Est passa une résolution appuyant cette requête.

A sa séance du 12 septembre 1917, le conseil de comté d'Arthabaska homologua le procès-verbal Poirier; les maires de Chester-Est, de Chester-Nord et de St-Norbert assistaient à cette séance, et ils votèrent pour l'homologation du rapport; ils avaient du reste également voté en faveur de la résolution du conseil de comté passée le 13 juin 1917, déclarant le chemin un chemin de comté.

Après cette homologation du procès-verbal, le conseil de comté procéda à faire les expropriations nécessaires pour la construction du chemin, et elle paya à cet effet diverses sommes se montant à tout près de $3,000.

Ce n'est que le 19 février 1919, que la corporation de Chester-Est prit une action contre la corporation du comté d'Arthabaska pour faire annuler le procès-verbal en question; dans les conclusions de l'action, on ne demande pas l'annulation de la résolution du conseil de comté décrétant que le chemin serait un chemin de comté; on se contente de demander l'annulation du procès-verbal.

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Les deux corporations locales de Chester-Nord et de St-Norbert ont été mises en cause; mais la corporation de St-Norbert n'a pas comparu, et celle de Chester-Nord a comparu par son procureur, mais elle n'a pas plaidé à l'action.

Les deux principaux points qu'il y a à décider dans cette cause, sont ceux de savoir 1° si le procès-verbal Poirier et son homologation par le conseil de comté, étaient *ultra vires* des pouvoirs du conseil de comté; et 2° si le chemin en question était d'utilité générale à plusieurs municipalités dans le comté d'Arthabaska, de manière à justifier le conseil de comté de déclarer chemin de comté le chemin projeté en question.

Il s'agit de l'interprétation de certains articles du nouveau Code Municipal et entr'autres des articles 444, 445, 447, 449, 451, 453 et 574.

En vertu de l'article 445 C. M. le chemin *local* est celui qui est situé tout entier dans une municipalité locale; en vertu de l'art. 446, ce chemin est sous la direction, et en vertu de l'article 453, il est sous la responsabilité, de ce conseil.

Cependant, en vertu de l'article 447, le conseil de comté a le droit de s'emparer pour ainsi dire de ce chemin local; il a le droit de le déclarer *chemin de comté;* il a le droit de le placer sous sa propre direction et sa propre responsabilité, ou sous la direction et la responsabilité de plusieurs autres municipalités locales dans le comté.

Jusqu'ici, le code municipal a entendu parler et légiférer au sujet d'un chemin local *ouvert et construit,* c'est-à-dire *existant.*

Mais les pouvoirs du conseil de comté sont bien plus étendus.

En vertu de l'article 451, il est dit que le conseil de comté a tous ces mêmes pouvoirs à l'égard d'un chemin local *à faire;* par conséquent, à l'égard d'un chemin qui n'est pas encore ouvert, pas encore existant, pas encore construit, c'est-à-dire qui est *inexistant.*

L'article 451 se lit en effet comme suit:

451. Les attributions conférées par les arts. 447 et 448 à la corporation de comté et au bureau des délégués, peuvent être également exercés par eux relativement à un chemin, pont ou cours d'eau à *faire de la même manière* que pour les chemins, ponts ou cours d'eau *déjà faits.*

Il semblerait que la simple lecture de ce dernier article ne doive pas laisser le moindre doute dans l'esprit; il n'est pas ambigu; il est clair et précis.

Cependant, en vertu de certaines décisions, particulièrement dans la cause de *Bothwell* et *La corporation de West Wickham* (1) et dans la cause de *La corporation de Nicolet* v. *La corporation du village de Villers* (2) il a été énoncé, sinon décidé, que lorsqu'il s'agit de l'application de cet article 451, il faut faire les distinctions suivantes: 1° ou bien le chemin local *à faire* a déjà été décrété, ou créé, par l'autorité du conseil local, ou bien 2° il n'a pas été ainsi déjà décrété et créé; dans le premier cas, le conseil de comté peut déclarer le chemin projeté, chemin de comté; dans le second cas, il ne le peut pas.

Pourquoi cette distinction arbitraire, alors que l'article 451 lui-même n'en fait pas?

On répond en citant l'art. 454 et l'art 446, en vertu desquels le conseil local a seul juridiction sur les chemins situés en entier dans le territoire de sa municipalité locale; que jusqu'à ce que tels chemins soient

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déclaré chemins de comté en vertu des arts. 447 ou 448, ils sont des chemins locaux. On ajoute qu'en conséquence de ces articles la disposition de l'art. 451 au sujet des chemins *à faire* doit s'entendre d'un chemin *qui est au moins décrété* et tracé, ouvert en un mot, par le conseil local.

En d'autres termes, le chemin local doit avoir été décrété, ouvert et tracé, pour qu'un conseil de comté puisse ensuite avoir le pouvoir de le déclarer chemin de comté, et d'en ordonner la construction.

La raison apportée pour faire la distinction que l'article 451 ne fait pas, est qu'il répugnerait aux principes de l'autonomie municipale de permettre à un conseil de comté de se substituer à un conseil local dans l'exercice des pouvoirs de ce dernier, et de construire des chemins sur son territoire en dehors ou contre la volonté du conseil local.

A cet argument de violation de l'autonomie du conseil local, on peut répondre qu'il y a autant, sinon plus, de violation de cette autonomie, dans le pouvoir d'un conseil de comté de s'emparer d'un chemin local tout fait, que de s'emparer du droit d'y ouvrir un nouveau chemin; dans les deux cas, le législateur a voulu apporter une exception à la juridiction d'un conseil local; la même raison d'utilité générale existe dans les deux cas.

Il faut bien se rappeler qu'un conseil de comté est composé des maires de tous les conseils locaux du comté; qu'il est quelquefois revêtu d'une sorte de contrôle général sur les municipalités locales, dans l'intérêt général du comté; que ceci était surtout bien évident à venir jusqu'au nouveau code en force depuis 1916, alors qu'il existait un appel au conseil de comté de toutes les résolutions ou décisions des conseils locaux.

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Si un conseil de comté estime qu'une voie traversant différentes municipalités devrait être construite dans l'intérêt général du comté, que telle voie serait à l'avantage de plusieurs municipalités, diminuerait les difficultes des routes existantes, ne devrait-il pas avoir le pouvoir de décréter l'ouverture et la construction de la voie nouvelle? N'est-ce pas là la raison d'être de l'article 451?

Et alors malgré l'utilité générale reconnue par le conseil de comté de la voie nouvelle ou projetée, pourrait-il être permis à un conseil local de faire obstacle à tout le projet, en refusant de faire sa part du chemin dans son territoire, empêchant ainsi l'ouverture même du chemin?

Répondre dans l'affirmative serait, il me semble, aller à l'encontre de l'esprit du code municipal.

L'article 451 était, d'après moi, suffisament clair pour justifier l'opinion qu'il n'y a pas lieu de faire de distinction entre les chemins *à faire,* déjà décrétés par l'autorité locale, et les chemins *à faire,* non encore décrétés par cette même autorité.

Mais il y a plus: le nouveau code municipal a amendé l'art. 447, alinéa 3, auquel réfère l'art. 451. Il semble que pour enlever tout doute sur l'interprétation de l'art. 451, il a introduit, dans l'art. 447 alinéa 3, deux mots qui complètent le sens et l'interprétation déjà clairs et précis de l'art. 441. En effet l'alinéa 3 de l'art. 447 se lit aujourd'hui comme suit:

> La corporation de comté, après avoir déclaré qu'un chemin, un pont ou un cours d'eau local, est un chemin, un pont ou un cours d'eau de comté, peut, si les circonstances l'exigent, déterminer par *règlement* ou par procès-verbal quelles corporations sont responsables de la *construction, de l'ouverture,* de l'entretien et réparations de tels chemins, ponts ou cours d'eau, et déclarer dans ce règlement ou procès-verbal quelle est la part contributive de chaque corporation. (arts. 758, 885, 885a et 878 combinés et amendés).

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De son côté l'article 451 dit que le conseil de comté peut exercer tous les pouvoirs mentionnés dans cet alinéa, et qui se rapportent à un chemin déjà fait, alors qu'il s'agit d'un chemin *à faire*.

Avant le nouveau code, le conseil de comté n'avait donc, du moins apparemment, de contrôle que sur les frais *d'entretien et de réparation* d'un chemin à faire; aujourd'hui il a, en plus, le contrôle sur l'*ouverture et la construction* du chemin.

Il semble qu'il répugne de croire que ces mots ont été ajoutés sans un but spécial.

Examinons ce que veut dire le mot *ouverture* d'un chemin.

L'ouverture d'un chemin comprend deux parties bien distinctes: la partie que j'appellerais décrétive ou créatrice du chemin,—et la second partie, la partie matérielle. La première appartient à l'autorité municipale; alinéa seconde n'est qu'exécutive.

Dès qu'un conseil municipal a passé un règlement ou a homologué un procès-verbal décrétant l'ouverture d'un chemin, ce chemin est légalement ouvert; il y a plus: par la description qui en est faite dans le règlement ou le procès-verbal, par la désignation des lots cadastraux qu'il doit traverser, il est tout tracé. L'assiette du chemin existe légalement. Le conseil est dès lors bien renseigné sur le coût du chemin projeté, et il peut immédiatement en répartir les frais sur les municipalités qui vont bénéficier du chemin. C'est ce qu'édicte le nouvel article 447, alinéa 3.

Cette première partie de l'ouverture d'un chemin est donc la plus importante puisque la seconde, la partie matérielle, n'est que la partie exécutive de l'ordonnance municipale.

La confection d'un procès-verbal entraîne des frais. Le surintendant appointé pour l'ouverture du chemin fait la visite des lieux, il convoque les intéressés, il donne des avis, il dresse son rapport, etc.

Or, le conseil peut répartir ces frais, tout comme il peut répartir les frais *d'exécution* de l'ordonnance municipale, c'est-à-dire les frais de *construction*. C'est encore ce que dit le nouvel article 451.

Ainsi donc, en vertu du nouveau code, le conseil de comté a un contrôle sur *l'ouverture* et la *construction* d'un chemin *à faire*, comme il avait, avant le nouveau code, le contrôle et la juridiction *seulement sur l'entretien* et la *réparation* d'un chemin fait ou d'un chemin à faire.

Autrement, que voudraient dire les mots ouverture et construction, et les frais de cette ouverture et construction, que le nouveau code a insérés, dans l'art. 447? D'après les règles d'interprétation bien connues, on ne peut supposer que ces mots ont été mis pour ne rien dire, ou pour ne rien ajouter à la disposition.

Je suis donc d'opinion que le procès-verbal Poirier, et la résolution du conseil de comté décrétant le chemin projeté comme chemin de comté, n'étaient pas *ultra vires* des pouvoirs du conseil de comté d'Arthabaska.

Sur la question de l'intérêt général du chemin projeté pour les municipalités de Chester-Est, de Chester-Nord et de St-Norbert, je crois qu'il ne peut y avoir de doute.

La voie nouvelle doit traverser, ou traverse, ces trois municipalités; elle aboutit au chemin provincial qui conduit à des centres très importants; d'après le témoignage de M. Dumont, directeur de la voirie pour le gouvernement provincial, corroboré dans les parties essentielles par d'autres témoignages,

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le chemin sera une grande amélioration sur le chemin existant dans St-Norbert; dans ce dernier chemin, il y a des élévations de terrains qui rendent le voyage en voiture extrêmement difficile, diverses côtes très longues, etc.

Je ne trouve aucune injustice équivalant à oppression et pouvant autoriser une cour de justice à mettre de côté les ordonnances municipales du conseil de comté sur ce point. Du reste, comme on l'a vu, un grand nombre de citoyens de ces trois municipalités ont demandé l'établissement de cette voie nouvelle; et, s'il y a eu opposition, il appartenait au conseil de comté, où siégeaient les représentants officiels de ces municipalités, de juger du bien-fondé des raisons de part et d'autre. Il n'y a pas lieu d'intervenir sur ce point.

Je suis donc d'opinion de maintenir l'appel devant cette cour, de casser le jugement de la Cour du Banc du Roi siégeant en Appel, et de rétablir le jugement de la Cour Supérieure avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Perrault & Raymond.*

Solicitors for the respondent: *Girouard, Lavergne & Girouard.*

Solicitors for the mises-en-cause: *Alleyn Taschereau.*

RAILWAY PASSENGERS' ASSURANCE CO. (DEFENDANT) APPELLANT;

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*Oct. 27, 28.
*Nov. 21.

AND

STANDARD LIFE ASSURANCE CO. (PLAINTIFF)..... RESPONDENT.

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

Insurance—Fidelity bond—Untrue representations—Evasive and misleading—materiality—Affirmative or promissory warranties—Arts. 2485, 2486, 2487, 2490 CC.

The company appellant issued a policy guaranteeing the company respondent against loss, up to $3,000 through the dishonesty of Mr. Shortt, respondent's agent at Halifax, whose duties were, *inter alia*, to collect premiums due in that city and vicinity to deposit them in a bank and to remit same monthly to the respondent. The policy contained the usual agreement by the insured whereby the truth of its answers to questions by the insurer was made the basis of the contract. As to the respondent's supervision over the handling of the moneys collected by Shortt a certain number of questions were put to and answered by the respondent at the time of the application for the bond. To a question as to the inspection and checking of the bank book, the answer was : "We do not inspect the bank account." To a question as to how often Shortt's cash accounts were balanced and checked, the answer was : "monthly accounts." To a question as to any cash balance due then, the answer was: "only for receipts that are in his hands for collection". To the question: "How often does an audit take place", the answer was: "He remits monthly". To another question as to time of the last audit, the answer was : "His last remittance was received a few days ago". And to a last question: "Were all things found in order?"; the answer was: "Yes." At the time the insurance was effected, a sum of over $2,000 was owed by Short to respondent, which the latter alleged was not to its knowledge. There had never been any audit of Shortt's accounts on behalf of the respondent during his employment.

*PRESENT: Idington, Duff, Anglin and Mignault, JJ. and Bernier J. *ad hoc*.

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Held, Duff and Bernier JJ. dissenting, that the respondent's answers, even if literally true, were evasive, misleading and framed in a way to give the impression that Shortt's accounts were audited monthly; and thus they did not "represent to the insurer fully and fairly every fact which shows the nature and extent of the risk" within the terms of art. 2485 C.C.

Per Duff and Bernier JJ. (dissenting):—The representations were not shown to be substantially untrue and it has not been established that there had been any material concealment or that the affirmative warranties had not been fulfilled.

Per Duff, J.—The respondent's declaration, as to the truth of his answers being the parts of the contract, is restricted in its application to representations and to warranties which are not promissory.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court and maintaining the respondent's action:—

The material facts of the case and the questions in issue are very fully stated in the above head-note and in the judgments now reported.

H. N. Chauvin K.C. and *Vipond K.C.* for the appellant. The respondent's answers were untrue representations. They were also misleading and the statements made by the respondent would rightly induce the appellant to think that Shortt's accounts were checked and audited monthly, when they were not.

Lafleur K.C. and *Phelan K.C.* for the respondent. The appellant is liable under the guarantee policy, as the statements made by the respondent were substantially true so far as they were within the knowledge of the respondent.

IDINGTON J.—This appeal arises out of an action brought by respondent upon a fidelity guarantee, dated the 2nd April 1914, given it by the appellant, which recited the employment by the respondent,

as agent at Halifax, N.S., of one Alfred Shortt, and its having delivered to appellant a proposal and declaration in writing stating (*inter alia*) the rules and conditions of the employment and the precautions observed by the employer in the management of, and the checks imposed upon, the employed, and which proposal the said employer has agreed shall be the basis of the contract (in question) and be considered as incorporated therein, and for the payment of $15.00 as the premium for such guarantee for twelve calendar months from the first day of April, 1914, and then proceeds as follows:—

> Now it is hereby agreed, that if at any time during the continuance of this agreement the employer shall sustain any loss, caused by the forgery, the embezzlement or fraud of the employed in connection with the employment hereinbefore mentioned which shall be committed after the above date, during his uninterrupted continuance in the said employment within the meaning of this agreement and the conditions hereto, which shall be discovered during the continuance of this agreement, and within three months after the death, dismissal or retirement of the employed or within three months after this agreement ceasing to exist, whichever of these events shall first happen then the company shall, subject to the conditions indorsed, make good and reimburse such loss to the employer to the extent of three thousand dollars but not further, after such loss, and the cause, nature and extent thereof shall have been proved to the satisfaction of the directors, and such reasonable verification of the statements in the above mentioned proposal as they shall require, and such information as is required hereby or by the conditions hereto shall have been furnished.
>
> Provided always, that this agreement and the guarantee hereby effected shall be subject to the several conditions hereupon indorsed which are to be deemed to be conditions precedent to any liability on the part of the company under this agreement.

The said Shortt had been for forty years in the said service when he died on the 26th October, 1916.

In the year 1910 it had been arranged between the respondent and him that an account should be opened in the Bank of Montreal at Halifax, in the name of respondent, and that moneys coming to the

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hands of Shortt in the course of his business as such agent and which it was entitled to after deducting his commission, medical fees, and some rent; and that he should have no power over moneys so deposited save by issuing from time to time cheques to respondent for such moneys.

It had also been arranged long before the said guarantee was given that on the first of each month the respondent whose head office was in Montreal, should send Shortt a list of premiums due by those insured by it through his agency along with notices to be given each of the parties so owing and receipts for him to deliver to the respective parties so concerned upon payment of the premium due.

It was understood, however, that each party so insured had thirty days grace in which to pay his or her premium.

That might extend the time for remittance that much beyond the due date and hence extend the time for the agent Shortt reporting to the head office, and sending therewith the cheque on the local agency of the Bank of Montreal.

It was stated by counsel for the respondent on the argument before us that the list of accounts so transmitted by it to Shortt should be returned to the head office as soon as possible after the expiration of that month and thirty days' grace and shew thereon what were paid and return the receipts sent him for premiums but which had not been paid.

It is necessary to observe the foregoing facts as to the course of business in order to appreciate the full significance of the answers made by the respondent and the exact measure of the risk the appellant had to run and how it came about that it could undertake same for so small a premium.

The proposal and declaration referred to in the above stated recital seems to have consisted of an application made to appellant by Shortt and brought to the respondent's notice by the following letter:—

Toronto, Ont., Mar. 31, 1914.

Sir:—

Mr. Alfred Shortt of Halifax, N.S., having applied to this Company for a guarantee in your favour of $3,000.00, I have to request that you will be good enough to reply as fully as possible to the annexed questions, as your answers and the declaration appended will form the basis of the contract between you and the Company.

I am, Sir,
Your obedient servant,
F. H. Russell,
Manager and Attorney

To the Standard Life Assurance Co.,
Montreal, Que.

The response thereto consists of answers to nearly thirty questions, one or two not having been directly answered.

Of these I think the following may be considered herein:—

10. With respect to the duties of the applicant, please reply as fully as possible to the following questions:—

A. In what capacity or office will the applicant be engaged and where? Agent for Halifax.

B. In what way will moneys pass through his hands? Collections and new business.

C. What is the largest sum which he will have in his hands at any one time, and for how long? Say $5,000. He remits monthly.

D. Is he allowed to pay out of the cash in his hands any amounts on your accounts? If so ,state nature and extent. A. Yes, commission, doctors' fees, etc.

E. How often will you require him to render an account of cash received and pay the same to you? Monthly.

F. Are moneys to be paid into the bank by applicant? If so, how often will the bank book be inspected and checked? We do not inspect the bank account.

G. How often will you balance his cash accounts, and how will you check their accuracy? Please explain fully. A. Monthly accounts.

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H. Will the balance on his hands, if any, be counted and paid over or how dealt with? Monthly accounts.

11. Is there any cash balance at present due to you from him? If so, give particulars. A. Only for receipts that are in his hands for collection.

13. Have you a separate banking account into which all moneys are paid by the applicant on your behalf when received? Yes, in Bank of Montreal.

14. Are cheques countersigned? If so, by whom? No.

15. How often does an audit take place? He remits monthly.

16. When were applicant's accounts last audited, and by whom? His last remittance was received a few days ago.

17. Were all things found in order? Yes.

21. Has any person holding the same or similar situation as that to be held by the applicant been detected in any defalcations? If so, please state particulars? No.

Of these for our present purpose I think question 11 and the answer thereto is all that need be considered.

The others are instructive and illuminative of what is really meant thereby.

And in light thereof and the evidence the answer is untrue.

It is apparently found by several of the learned judges in the Court of King's Bench that over two thousand dollars of old debt was then due and that for moneys which could not fall within the words

(11) only for receipts that are in his hands for collection.

The said learned judges, however, take a different view from what I do as to the legal result thereof.

I have read the evidence of all the witnesses in an effort to see if this statement of fact in the answers so made could be verified.

I fail to find any such statement can be supported and I am led to suspect, though I do not herein rest thereupon, that the facts were even worse against the respondent. And what I do find is quite inconsistent with the answers to questions E. G. and H. of question 10.

With great respect I cannot agree with the reasoning of the learned judges below who seem to think these assurances of monthly rendering of accounts and requiring payment thereof ineffective and hence of no consequence herein.

I think when the answer to question 11 is considered in light thereof and of the proven facts as existent at the time when the answer was made that such an answer is fatal to the claim of the respondent.

Again the answers to questions 16 and 17 should never have been made.

No use applying needlessly harsh adjectives but when, if ever, the slightest attention is paid to the facts disclosed by the system which I have outlined above, relative to the sending out of accounts and receiving them in return such an answer, as implying that all things were found in order, is quite unjustifiable.

And so far as I hold it so its erroneous statement falls within the latter part of the third condition indorsed on the guarantee, which is as follows

> 3. every renewal premium which shall be paid and accepted in respect of this agreement shall be so paid and accepted with the distinct understanding that on the faith that no alteration has taken place in the facts contained in the proposal or statement hereinbefore mentioned, and that nothing is known to the employer calculated to affect the risk of the company under the Guarantee hereby given. If the proposal referred to in the within agreement or any statements therein contained or referred to is or are untrue in any respect, or if there be any material fact affecting the nature of the risk whether in relation to the occupation of the employed or otherwise, omitted therefrom, or if there be any misrepresentation, suppression or untrue averment at the time of payment of the first or any renewal premium or in connection with or in support of any claim, then the within agreement shall be absolutely void, and all premiums paid in respect thereof shall be forfeited to the company,

and renders the agreement sued on void.

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How could any one compare the lists of moneys to be collected monthly with the actual facts disclosed in many monthly returns, much less the then last, and find all things in order?

There is much confusion in the evidence in the case and otherwise which prevents me from dealing as effectively as I had wished with the point made by appellant's counsel as to the amount paid into the bank in the months of August, September and October of 1916, being the months for which recovery herein is sought.

It is attempted to be answered by an argument of counsel for the respondent that though there was money enough deposited by Shortt during that period to cover all the defaults for the months claimed, yet that had been rightfully applied to cover old deficiencies.

I cannot satisfactorily trace the evidence relied thereon in support of the argument. Nor can I accept the argument as satisfactory for it lands respondent, if correct, hopelessly, I fear, on another horn of the dilemma presented to it here as it often is at every angle of this case.

That deficiency, so far as I can see, was part of an extended chain of fact loaded with more monthly defaults than the respondent can explain away and yet maintain its assurance to the appellant in anwering question 11.

It seems clear that the unfortunate deceased was by circumstances driven to resort to the expediency of extending the time for making his final returns and thus get more room for hiding his shortages when due attention to the facts thus disclosed and a stern hand guiding respondent might have saved both him and it.

It is not herein at all a question of what any particular officer acting on respondent's behalf thought or believed.

As I understand the law it is what the actual facts were and which the respondent was bound to know before representing otherwise any view of the facts.

The contract is expressly based by mutual consent upon the facts as ultimately found and represented and I take it abolutely binding respondent to abide thereby no matter how honestly mistaken its officers may have been.

By no means do I mean to suggest that he was wilfully false, or, on the other hand, that he was quite excusable.

There is another ground taken and that is the basis of the conclusion reached by Mr. Justice Dorion in the court below resting upon the answers given by the respondent in the following terms when asked the question put shortly after the renewal for 1915, as follows:—

The letter dated 25th May, 1915, of the request is as follows:—

Dear Sir,—

We beg to enclose herewith the customary annual audit statement in connection with the accounts of Mr. A. Shortt, your agent at Halifax, N.S., and in connection with his bond for $3,000. We shall be glad if your will kindly sign same and return to this office.

Yours faithfully,

and signed by appellant's manager, is answered by the following:—

This is to certify that the books and accounts of Mr. Alfred Shortt, were examined by us from time to time in the regular course of business and we found them correct in every respect, all monies or property in his control or custody being accounted for, with proper securities and funds on hand to balance his accounts, and he is not now in default.

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He has performed his duties in an acceptable and satisfactory manner and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Dated at Montreal, this 27th day of May, 1915.

D. M. McGOUN,
Manager for Canada.

accompanied by a letter of same date, as follows:—

We have your letter of the 25th instant, enclosing audit statement in connection with accounts of Mr. A. Shortt, our Agent at Halifax. We return herewith form duly completed.

And the following year a like certificate was given on the like request though not so complete yet objectionable.

Each was untrue in fact tending to deceive the appellant's auditor and hence quite unjustifiable.

It is said these were not asked before renewals, for the respective years in question.

I may point out that the original declaration on the application for the guarantee contained the following at its close:—

I declare that the above statements are true, and I agree that these statements and any further statements referring to this guarantee signed by me shall be taken as the basis of the contract between me and the above named company.

I think these certificates were further statements such as contemplated and it mattered not whether made in relation to renewals or not though quite likely they were.

The respondent had, by the express terms of the guarantee, the right to cancel it at any time and had a perfect right to ask such a question and be guided by the answer, or refusal to answer.

And that answer should have been honest as neither of these were or are excusable in law however otherwise possibly so in a degree.

The answers brought into operation and effect the terms of the conditions already quoted and rendered the policy void.

Moreover alternatively these are cogent evidence in the way of debarring the respondent from applying moneys paid in by the deceased in the months for which claim is made from applying same to cover up early defalcations.

The insurance is only against forgery, fraud or embezzlement.

In my opinion this appeal should be allowed with costs throughout and the respondent's action dismissed with costs.

DUFF J. (dissenting).—The questions raised by this appeal mainly concern the interpretation and effect of the answers given by the insured in a proposal for insurance. They have given rise to differences of opinion. I concur with the view of the majority of the Court of Appeal that the representations were not shewn to be substantially untrue and that there was any material concealment or that the affirmative warranties were not fulfilled is not established. It is convenient perhaps to first deal with the point argued by the appellant to the effect that the proposal contained promises as to the course of dealing which constituted essential conditions of the policy. This is a view of the policy which I think cannot be supported. The declaration with which the proposal concludes is in the following words:—

> I declare that the above statements are true, and I agree that these statements and any further statements referring to this guarantee signed by me shall be taken as the basis of the contract between me and the above named company.

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This declaration is obviously restricted in its application to representations and to warranties which are not promissory. The policy recites that the insured

> has delivered to the company a proposal and declaration in writing signed by or on behalf of the employer, stating (*inter alia*) the rules and conditions of the employment, and the precautions observed by the employer in the management of, and the check imposed upon the employed, and which proposal the said employer has agreed shall be the bais of this contract, and be considered as incorporated herein.

The fair meaning of this recital is that the proposal is to be incorporated with the policy according to the terms of the proposal itself. In other words, it is only those answers which profess to state matters of fact, (representations and affirmative warranties) which are incorporated in the policy. As against the insured it would be a departure from the long settled rule requiring the provisions of insurance contracts framed by the insurer and expressed in terms capable of more than one construction to be read according to that construction which is the most favourable to the insured. We are therefore concerned on this appeal only with representations of fact and warranties as to fact as distinguished from promissory warranties expressed in the respondent's proposal.

Is there in fact misrepresentation or concealment in respect of the matters complained of? The argument principally turned upon three alleged cases of misrepresentation or concealment. 1st. The representation "he remits monthly" is alleged to be misleading. 2nd. The answers to two questions are said to imply an affirmation that Shortt's accounts had been audited, and 3rd. there is said to be an implied representation that on the occasion of the last remittance his accounts had been investigated and found to be in order.

I observe, first, that in construing such a document the answers are not to be read with pedantic strictness; they should be given the meaning which a business man of ordinary intelligence would ascribe to them. So reading these answers I not only find in them no affirmation, express or implied, that the practice was to audit Shortt's accounts but on the contrary answers which most certainly would convey the idea that such was not the practice. So as to the answer concerning the last remittance; that, when read in connection with the preceding answer does not imply that any extraordinary investigation had taken place but only that everything had been found to be in accordance with the usual course of business.

I am moreover unable to see that any substantial departure from the truth occurs from the statement "he remits monthly." I think that would not be an untruthful or misleading description of the practice by which the monies received for premiums due in any month were sent forward in a single remittance within such delay as might be considered reasonable by the parties having regard to the statutory allowance of days of grace and the contingencies of settlements with dilatory insurers.

I am unable to agree that the so called renewal certificates affect the rights of the respondent; they were sent forward in each case after the renewals had been effected. There is no allegation in the pleadings and there is no evidence to shew that the appellant company was influenced by these certificates in refraining from exercising its powers of cancellation. And in the absence of either allegation or proof it would be inconsistent with sound principle to proceed upon the assumption that they were so influenced.

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ANGLIN J.—Article 2487 of the Civil Code of Quebec reads as follows:—

Misrepresentation or concealment, either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.

Article 2485 provides that:—

The insured is obliged to represent to the insurer fully and fairly every fact which shews the nature and extent of the risk and which may prevent the undertaking of it or affect the rate of premium.

By article 2486 it is declared that:—

The insured is not * * * obliged to declare facts covered by warranties, express or implied, except in answer to inquiries made by the insurer.

The following recital and indorsed "condition precedent" are taken from the policy sued upon:

Whereas The Standard Life Assurance Company, Montreal, Quebec (hereinafter referred to as "the employer") employs or intends to employ as agent at Halifax, N.S., Alfred Shortt, (hereinafter referred to as "the employed") and desires to effect a guarantee with The Railway Passengers Assurance Company (hereinafter referred to as "the company") and has delivered to the company a proposal and declaration in writing, signed by or on behalf of the employer, stating (*inter alia*) the rules and conditions of the employment, and the precautions observed by the employer in the management of, and the check imposed upon the employed, and which proposal the said employer has agreed shall be the basis of this contract, and be considered as incorporated herein.

* * *

3. Every renewal premium which shall be paid and accepted in respect of this agreement shall be so paid and accepted with the distinct understanding and on the faith that no alteration has taken place in the facts contained in the proposal or statement hereinbefore mentioned, and that nothing is known to the employer calculated to affect the risk of the company under the guarantee hereby given. If the proposal referred to in the within agreement or any statements therein contained or referred to is or are untrue in any respect, or if there be any material fact affecting the nature of the risk, whether in relation to the occupation of the employed or otherwise, omitted therefrom, or if there be any

misrepresentation, suppression or untrue averment at the time of the payment of the first or any renewal premium or in connection with or in support of any claim, then the within agreement shall be absolutely void, and all premiums paid in respect thereof shall be forfeited to the company.

The proposal or application by the plaintiff for the insurance contains the following questions and answers:

10. With respect to the duties of the applicant, please reply as fully as possible to the following questions:

C. What is the largest sum which he will have in his hands at any one time, and for how long? Say $5,000. He remits monthly.

E. How often will you require him to render an account of cash received and pay the same to you? Monthly.

G. How often will you balance his cash accounts, and how will you check their accuracy? Please explain fully? Monthly accounts.

H. Will the balance on his hands if any, be counted and paid over or how dealt with? Monthly accounts.

11. Is there any cash balance at present due to you from him? If so, give particulars. Only for receipts that are in his hands for collection.

15. How often does an audit take place? He remits monthly.

16. When were applicant's accounts last audited, and by whom? His last remittance was received a few days ago.

17. Were all things found in order? Yes.

It concludes as follows:—

I declare that the above statements are true and I agree that these statements and any further statements referring to this guarantee signed by me shall be taken as the basis of the contract between me and the above named company.

The facts were that the agent Shortt, although his accounts as rendered did not disclose it, had stolen upwards of $2,000 collected in premiums at the time the insurance was effected and that this defalcation continued and increased throughout the duration of the policy so that it amounted to more than $5,000 when he died; that there never was any audit of his accounts, or any examination, counting or balancing of his cash on behalf of the plaintiffs; that any thorough audit, any effective balancing of the cash accounts, any real checking of the "monies in his control or custody" or of "the funds on hand to balance

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his accounts" would have revealed the embezzlement; and that, although it was twice stated that he remitted monthly, he was habitually permitted to hold moneys collected by him for premiums for periods of 80 and even of 90 days as this extract from the evidence of the plaintiff's accountant, Bowles, shews:—

Q. Did you ascertain when May, 1916, premiums were remitted? A. They were remitted for the week ending 5th of August.
By the Court:
Q. The June, 2nd of September, and July, the 30th of Sept. A. Yes.
By defendant's counsel:
Q. And April, the 30th June I think you said? A. Yes, the 30th of June.
Q. And March? A. 29th of May.
Q. February? A. The week ending 6th of May; they were received in Montreal really on the 1st of May as per our stamp; that is February, 1916, received on the 1st of May, 1916.
Q. January? A. On the 28th of March.
Q. December, 1915. A. On the 28th of February.
Q. November, 1915? A. On the 29th of January.

In fact the account rendered immediately prior to the application made for the policy on the first of April, 1914, which was sent in on the 20th of March, covered the premiums received in January leaving the whole of the February premiums and those received during the first 20 days of March unaccounted for. Whatever excuse the statutory provision for 30 days' grace on payment of premiums may have afforded for allowing the agent to retain the premiums collected during January until the 1st of March or even a day or two later, it cannot avail to cover withholding them until the 20th of March. It was also the fact that Shortt was never required when rendering his statements to account for or pay over all monies received by him up to the date of the accounting. Moneys received during the preceding 40 to 60 days were not included. Nevertheless the misleading statement is twice made that "he remits monthly".

"All things" would not have been "found in order", a few days before the policy was applied for if any proper audit or investigation, such as the answer to question 17 implied, had in fact taken place. In my opinion the answers to questions 16 and 17 fairly read together, as they must be, were false and misleading; the answers to questions 10 (C) and 10 (E) were calculated to "diminish the appreciation of the risk" to be undertaken; on the answers as a whole the facts were not substantially as represented (Art. 2489 C.C.) and the risk which the defendants were induced to undertake was materially different from and greater than the statements in the application would indicate. I cannot find anything in that document which limits the responsibility of the applicants for the truth of the answers made to matters within their own knowledge. On the contrary, there is an express declaration of the truth of the representations and they are made the basis of the contract. *Thomson* v. *Weems* (1). Viewed as warranties (Art. 2491 C.C.) the untruth of the answers in the application, whether taken singly or as a whole, avoids the policy whether known or unknown to the warrantor (Art. 2490 C.C. *Joel* v. *Law Union and Crown Ins. Co.* (2); viewed as misrepresentations or concealments of existing facts it is immaterial whether there was merely error or design to deceive on the part of the applicant (Art. 2487 C.C.); viewed as undertakings in regard to the course of dealing to be pursued by the assured with its agent during the currency of the policy, having been incorporated with it as the basis of the contract their non-fulfilment is equally fatal. Art. 2490 C.C. The case falls within the principle of the decision of this court in *Anrprior* v. *United States Fidelity and Guarantee Ins. Co.* (3).

(1) 9 App. Cas. 671. (2) [1908] 2 K.B. 863 at pp. 885-6.
(3) 51 Can. S.C.R. 94.

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Moreover, in connection with each of the two renewals of the policy a certificate was required from the assured. The two certificates, obtained respectively in 1915 and 1916, read as follows:—

This is to certify that the books and accounts of Mr. Alfred Shortt, were examined by us from time to time in the regular course of business and we found them correct in every respect, all monies or property in his control or custody being accounted for, with proper securities and funds on hand to balance his accounts, and he is not now in default.

He has performed his duties in an acceptable and satisfactory manner and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Dated at Montreal, this 27th day of May, 1916.

D. M. McGOUN,
Manager for Canada.

This is to certify that the books and accounts of Mr. Alfred Shortt, as rendered by him, were examined by us from time to time in the regular course of business and we found it correct in every respect, all monies or property in his control or custody being accounted for, and he is not now in default.

He has performed all his duties in an acceptable and satisfactory manner and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Dated at Montreal, this 9th day of May, 1916.

Standard Life Ass. Co.,

J. R. EAKIN,
Secretary for Canada.

The words "as rendered by him" in the 1916 certificate were inserted in ink. They obviously refer only to the "accounts" of the agent. Books are not "rendered". In these certificates we find these three positive statements, (a) that Shortt's books had been examined from time to time by his employers; (b) that all moneys in his control or custody had been accounted for; and in 1915 (c) that he had "proper securities and funds on hand to balance his accounts". All three statements were absolutely untrue and one, if not two of them, must have been untrue to the knowledge of the officials of the assured. But I find nothing

to restrict the statements made in these certificates to matters within their knowledge, or otherwise to qualify them. Nor, in view of the provision entitling the company to cancel the policy at any time, is it of vital moment that the sending in of those certificates was delayed until after the renewal premiums had actually been paid. The power to cancel was not exercised and the policy was kept on foot on the faith of them—at least that must be assumed as against the insured. On this ground, as well as for substantial misrepresentations and concealments of fact in the original proposal of a nature to diminish the insurer's appreciation of the risk, the policy sued upon was in my opinion avoided. Indeed if some of the answers to the questions which are expressly incorporated in and made the basis of the policy should be regarded as merely evasions there is good authority for holding that the insurance was thereby avoided. *Fitzrandolph* v. *The Mutual Relief Society of N.S.* (1). *Moens* v. *Heyworth* (2).

Insurance companies should undoubtedly be held to strict compliance with their obligations and defences on their part lacking in merit and substance should be discouraged. On the other hand the fact that the contract of insurance is *uberrimæ fidei* (*Brownlie* v. *Campbell* (3), must never be lost sight of and an insured cannot be permitted to recover on a policy which he has obtained by making particular statements in regard to material matters which are only half truths—often more misleading than actual falsehoods—*London Assurance Co.* v. *Mansel* (4)—or by putting

(1) 17 Can. S.C.R. 333, at p. 338;
(2) 10 M. & W. 147 at pp. 157-6.
(3) 5 App. Cas. 925 at p. 954.
(4) 11 Ch. D. 363, at p. 371;

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in an application which, taken as a whole, is palpably calculated to create a false impression as to the nature and extent of the risk to be undertaken by the insurer.

I would for these reasons, with respect, allow this appeal and direct judgment dismissing this action with costs throughout.

MIGNAULT J.—The question here is whether the appellant is liable, under a guarantee policy issued by it in favour of the respondent, to make good a defalcation committed by one Alfred Shortt who was the agent of the respondent at Halifax. On the latter's death it was discovered, the respondent alleges, that he was short in his accounts to the extent of $5,197.90, and the respondent sued to recover the full amount of the policy, $3,000.00. It succeeded in the Superior Court for the entire amount of its demand, but, in the Court of King's Bench, the judgment was reduced by the sum of $584.36 which the respondent owed to Shortt's estate on a life insurance policy which was payable to his executors. The respondent acquiesced in this reduction, and the appellant claims that the conditions of the policy were violated and that the action should have been dismissed.

The policy was issued in Montreal in 1914, and was twice renewed.

As it is usual in such cases, the truth of the answers of the insured to questions made on behalf of the insurer in the application for insurance, and of any further statements of the insured referring to the guarantee, is made the basis of the contract.

The questions and answers contained in the application for insurance and which are material to this inquiry are the following:—

10. C. What is the largest sum which he will have in his hands at any one time, and for how long? Say $5,000. He remits monthy.

10 E. How often will you require him to render an account of cash received and pay the same to you? Monthly.

10 F. Are moneys to be paid into the bank by the applicant? If so, how often will the bank book be inspected and checked? We do not inspect the bank account.

10 G. How often will you balance his cash accounts, and how will you check their accuracy? Please explain fully? Monthly accounts.

10. H. Will the balance in his hands, if any, be counted and paid over or how dealt with? Monthly accounts.

11. Is there any cash balance at present due to you from him? If so give particulars.—Only for receipts that are in his hands for collection.

13. Have you a separate banking account into which all moneys are paid by the applicant on your behalf when received? Yes, in Bank of Montreal.

15. How often does an audit take place? He remits monthly.

16. When were applicant's accounts last audited, and by whom? His last remittance was received a few days ago.

17. Were all things found in order? Yes.

The evidence clearly shews that some years before the policy Shortt had been guilty of a defalcation for a considerable amount, but, by reason of an inefficient system of control by the respondent, he succeeded in concealing it, and his defalcation, at the date of the policy, amounted to approximately $2,000.00. At his death the shortage had reached the figure of $5,197.90.

I have quoted the principal questions and answers contained in the application for insurance. As to these answers Mr. Justice Martin, in the Court of King's Bench, remarks:—

> It will be observed from these answers that respondent persistently avoided making any direct answers as to any audit or checking the accuracy of Shortt's accounts. What they said amounts to this: we do not inspect the bank account: we do not make any audit: we do not balance his cash account or check their accuracy: we require him to render monthly accounts and pay over cash received monthly.
>
> While the wisdom of accepting such incomplete answers and issuing a policy thereon may be doubted I think there was a full and fair disclosure of all facts showing the nature and extent of the risk and showing entire absence of any audit, inspection of the bank account or checking the accuracy of Shortt's monthly statements.

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With deference, I am of opinion that it is not enough to say that the appellant issued the policy on incomplete answers. If I am right in thinking that these answers were evasive and misleading, they certainly do not amount to a full disclosure of all facts showing the nature and extent of the risk.

And indeed, while it is true that the respondent stated that it did not inspect the bank account, some of these answers were framed in a way to give the impression that Shortt's cash accounts would be monthly balanced and their accuracy checked. To reply "monthly accounts" in answer to questions inquiring how the cash accounts would be balanced and checked, and the balance in Shortt's hands would be dealt with; to say "he remits monthly" when the point was "how often does an audit take place" and "his last remittance was received a few days ago" in reply to an inquiry "when were applicant's accounts last audited and by whom"; and to answer "yes" to the question whether all things were found in order; is in effect to assure the appellant that a monthly balancing, checking and auditing of Shortt's accounts would take place and that, at the last audit made, everything was found in order. The respondent says that the evasive and misleading answers it made were literally true. If so their truth was a species of half truth really quite as deceptive as a false answer. The whole truth was that Shortt's accounts were not balanced, checked and audited monthly for otherwise the defalcation could not have escaped detection.

This is shewn by the cross-examination of Mr. Bowles, the accountant whose duty it was to check Shortt's returns. The system was to send to Shortt the renewal receipts for the coming month, which the

insured could pay within thirty days from maturity, and for which Shortt had to account. Mr. Bowles states that, in 1896, the January premiums received by Shortt were remitted on the 28th of March, the February premiums on the 1st of May, the March premiums on the 29th of May, the April premiums on the 30th of June. This was, as admitted by Mr. Bowles, one month late, and the lax system prevailed during the preceding year, the length of the delay in remitting being somewhat less.

In my opinion the answers made by the respondent inplied a promise that Shortt's accounts would be balanced, checked and audited monthly, and this promise was not fulfilled when he was allowed to remain in arrears from month to month, thus permitting him to conceal or cover up up his defalcation.

In *Arnprior* v. *United States Fidelity and Guarantee Cl.* (1) the insured in answer to the question: "What means will you use to ascertain whether his accounts are correct? "replied: "auditors examine rolls and his vouchers from treasurer yearly". The rolls were never examined during the continuance of the policy and it was held that this was an untrue representation that avoided the contract. This case seems to me clearly applicable here.

The contract of insurance is one where the utmost good faith and sincerity must be observed by the insured. This is well stated by Fuzier-Herman, vo. Assurance, nos. 588 and 589:—

588. L'assurance étant un contrat de bonne foi et la sincérité en étant une condition nécessaire, l'assuré doit faire à l'assureur, au moment de la formation du contrat, des déclarations exactes et complètes sur ce que ce dernier a intérêt à savoir, l'éclairer sur l'objet de l'assurance et sur les risques.

(1) 51 Can. S.C.R. 94.

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589. Toutes les polices subordonnent l'existence du contrat à la sincérité et à l'exactitude des déclarations. C'est à juste titre: l'assureur doit nécessairement être éclairé sur la portée véritable de son engagement, sur l'étendue du risque qui lui est proposé; sinon, il n'y a plus accord de volontés sur la chose promise, le consentement n'existe pas et, par suite, le contrat est vicié dans son principe.

The civil Code of the Province of Quebec has adopted these principles in their utmost strictness:

2485. The insured is obliged to represent to the insurer fully and fairly every fact which shews the nature and extent of the risk, and which may prevent the undertaking of it or affect the rate of premium.

2487. Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.

2490. Warranties and conditions are a part of the contract and must be true if affirmative, and if promissory most be complied with; otherwise the contract may be annulled notwithstanding the good faith of the insured.

Measured by this test, the respondent cannot cercertainly contend that its replies represented to the assurer

fully and fairly every fact which shews the nature and extent of the risk.

Its answers were calculated to mislead, perhaps not deliberately, but none the less effectively. And it should not now be heard to defend these answers by saying that they were true as far as they went, or that they were incomplete and the appellant having chosen to issue the policy cannot complain of their incompleteness. It would seem to me contrary to the principles I have stated to allow the respondent, notwithstanding its misrepresentation, or failure to fully and fairly represent such material facts as the checking and auditing of Shortt's accounts, to recover on the policy a loss brought about by its own loose method of dealing with its agent.

The policy in question was twice renewed and after each renewal the respondent furnished the appellant with a certificate that Shortt's books and accounts had been examined by it from time to time in the regular course of business and were found correct in every respect. The evidence shows that this statement was not true, no such examination having been made, otherwise it is inconceivable that the defalcation would not have been discovered. The respondent claims that the appellant did not rely on these statements in renewing the policy, for they were subsequent to each renewal, but, being false, they deceived the appellant as to a material fact and induced it to maintain a policy which it could have cancelled. Moreover, if the answers to the questions in the original application amount to a representation that Shortt's books and accounts would be balanced, checked and audited monthly, and I think they do, this representation and the promise it implies has not been fulfilled. I am therefore of opinion that the respondent cannot recover on the policy.

The appeal should be allowed and the respondent's action dismissed with costs throughout.

BERNIER J. (dissenting).—Les parties en cause sont toutes deux des compagnies d'assurance.

L'intimée a obtenu de l'appelante le 1er avril 1914, une police de garantie sur la fidélité de son employé Alfred Shortt, au montant de $3,000; l'appelante s'est engagée dans la police à garantir l'intimée contre toute fraude, ou malversation criminelle, de son employé.

A la mort de ce dernier, vers le 25 octobre, 1916, il fut constaté qu'il était en déficit d'une somme d'au-delà de $5,000.00 envers l'intimée.

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Sur refus de l'appelante de rembourser l'intimée, celle-ci poursuivit l'appelante pour le montant de sa police, savoir $3,000.00. La Cour Supérieure a maintenu l'action; la Cour du Banc du Roi a confirmé le jugement, tout en le réduisant cependant à la somme de $2,415.64, sans frais de part ni d'autre en Cour du Banc du Roi mais avec les frais de la Cour Supérieure contre l'appelante.

Parmi ses moyens de défense à l'action, l'appelante allègue fausse représentation et reticence coupable, de la part de l'intimée; elle allègue également la fausseté des garanties affirmatives et la non-exécution des garanties promissoires, contenues dans les réponses de l'intimée, réponses incorporées dans la police ou en faisant partie par une énonciation à cet effet.

Ce premier moyen a-t-il été prouvé? Je suis d'opinion qu'il ne l'a pas été.

Les réponses à l'interrogatoire écrit de l'appelante et qui ont précédé naturellement l'émission de la police, ne sont pas toutes complètes; cependant elles ne sont pas vagues, et on ne peut y découvrir de traces de reticences, pas plus, du reste, que de fausses représentations.

Ainsi à la question 10 F, voici la réponse:

> Q. Are moneys to be paid into the bank by the applicant? If so, how often will the bank book be inspected and checked? R. We do not inspect the bank account.

Cette réponse n'est pas complète. Elle laisse entendre cependant que son employé dépose les argents à la banque, et en effet, il le dit en réponse à la 13ème question.

Mais la réponse devient importante, quand il s'agit de faire une revue générale de l'enquête, pour déterminer s'il y a eu inexécution des garanties promissoires de la police.

La réponse à la question 10 G n'est pas plus complète, car la question découlant de la précédente 10 F devait recevoir la même réponse, si l'appelante voulait bien se contenter de la première.

Même chose pour la réponse à la question H.

Question 11:

Is there any cash balance at present due to you from him? If so, give particulars. Only for receipts that are in his hands for collection.

Cette réponse a également son importance au point de vue de la garantie affirmative.

Mais que veut-elle dire de plus que ceci: il n'est pas à ma connaissance personnelle que mon employé me doive autre chose que les argents représentés par les reçus de prime que je lui ai transmis, reçus qu'il devra remettre aux assurés lorsqu'il sera, par ces derniers, payé de leurs primes de renouvellement?

L'appelante prétend qu'au moment où cette réponse était donnée, Shortt était déja défalcataire vis-à-vis de l'intimée. La chose est possible. S'il l'était, ce n'était certainement pas à la connaissance de l'intimée qui avait cet homme à son service depuis quarante ans, et dont la réputation était excellente.

Il n'y a pas lieu à appliquer ici aucune règle de garantie implicite, à l'effet que, si Shortt était à ce moment défalcataire hors la connaissance de l'intimée, la réponse de cette dernière serait une garantie fausse, et partant pourrait faire annuler la police.

Question 15:

How often does an audit take place? He remits monthly.

La réponse, d'après la preuve qui a été faite, est vraie, mais elle n'est pas "ad rem".

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Cependant, l'intimée avait déjà répondu à la question 10 F; "We do not inspect the bank account". Si l'intimée déclare qu'elle n'examine pas le compte de banque de son employé, on comprend qu'elle n'audite pas ses comptes.

Question 16:

When were applicant's accounts last audited and by whom? His last remittance was received a few days ago.

Cette dernière question, découlant de la précédente, devait recevoir une réponse dans le même ordre d'idées que la précédente réponse.

Elle n'est pas complète; mais on voit bien que l'intimée ne faisait aucune audition des comptes qu'elle avait avec son employé, et qu'elle n'entendait pas non plus en faire.

L'appelante a décidé de se contenter de ces réponses; elle a émis sa police.

Peut-elle aujourd'hui s'en plaindre? Je ne le crois pas.

L'enquête n'a pas revélé que l'intimée eût caché quoi que ce soit des agissements de son employé, rien dont la connaissance par l'appelante l'aurait empêchée d'assumer le risque, ou qui aurait pu influer sur le taux de la prime.

Pourquoi ne pas avoir requis l'intimée de faire à l'avenir des auditions des livres ou des comptes de son employé? Pourquoi ne pas l'avoir obligée à remplir à l'avenir certaines précautions que visiblement, par la formule de l'interrogatoire écrit et imprimé, elle avait l'habitude d'exiger de ses assurés?

Elle eût alors posé des garanties promissoires, dont le défaut d'accomplissement eût été une cause d'annulation de la police.

Les réponses données par l'intimée ont formé la base du contrat d'assurance entre les parties. La clause suivante accompagnait les réponses, à l'effet que telles réponses étaient vraies et qu'elles serviraient de base au contrat:

I declare that the above statements are true and I agree that these statements and any further statements referring to this guaranty signed by me shall be taken as the basis of the contract between me and the above named company. . .

Après l'émission de la police, savoir le 21 mai 1915, l'appelante transmit à l'intimée pour que celle-ci le signât un blanc de certificat au sujet de son employé; le même envoi fut fait l'année suivante, mais après le renouvellement de la police d'assurance, savoir, le 9 mai 1916.

Ces blancs sont des formules imprimées.

Ces certificats sur la conduite ou les agissements de Shortt ne sont pas autres choses que des déclarations au sens de l'article 2485 du code. Elles ne viennent rien ajouter aux clauses et conditions de la police, ni aux réponses de l'intimée qui ont fait la base du contrat.

Il semble que c'est l'habitude chez l'appelante de faire signer ces documents à ses assurés; mais, venant après que le contrat d'assurance a été rendu parfait, ils ne peuvent guère avoir d'influence sur ce contrat; je leur appliquerais ce principe des assurances sur le feu (Art. 2570 C.C.) et des assurances sur la vie (Art. 2585 C.C.)

Les déclarations qui ne sont pas insérées dans la police ou qui n'en font pas partie ne sont pas reçues pour en affecter le sens ou les effets.

Partant, ces certificats ne peuvent être reçus pour affecter le sens de ce qui a fait la base du contrat, savoir, les réponses de l'intimée à l'interrogatoire de l'appelante.

Sur les autres points de défense de l'appelante, je ne puis non plus concourir en sa faveur.

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Ainsi, elle a prétendu que lors de l'émission de la police d'assurance, son employé était en déficit; que ce fait non seulement n'a pas été déclaré par l'intimée, mais elle aurait affirmé le contraire.

D'abord est-il bien prouvé que Shortt était en déficit dans ses comptes avec l'intimée, en 1914? La chose est probable; cependant, on peut douter que la preuve soit formelle sur ce point, étant donnée la manière de Shortt de faire ses rapports mensuels à l'intimée, la possibilité qu'il y eut des retards chez les assurés à lui payer leurs primes d'assurance, et la possibilité qu'il eût des sommes d'argents qui auraient été déposées dans d'autres banques.

L'intimée n'avait qu'à garantir sa connaissance personnelle des faits de Shortt, au moment où elle faisait son application. J'ai donné plus haut mon opinion sur ce point.

L'appelante a soutenu qu'il n'était pas prouvé que le déficit, au sujet duquel l'intimée réclame le montant de la police, était pour les primes des mois de l'année spécifiés dans son action.

Dans mon opinion, et après avoir donné beaucoup d'attention à ce moyen, cette prétention ne peut être maintenue.

Quant au dernier moyen soulevé, à savoir, que tel déficit ne constituait pas une fraude prévue dans la police et pour laquelle l'appelante était responsable, je suis absolument de l'opinion contraire.

Je suis d'opinion de renvoyer l'appel avec dépens.

Appeal allowed with costs.

Solicitors for the appellant: *Vipond & Vipond.*

Solicitors for the respondent: *Fleet, Falconer, Phelan & Bovey.*

SHIP "M. F. WHALEN (DEFENDANT)..... APPELLANT.

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*Nov. 8.
*Dec. 15.

AND

POINTE ANNE QUARRIES LIMITED (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Towage—Barges—Scows—Rectification—Damages—Limitation—Canada Shipping Act, R.S.C. [1906] c. 113, s. 921.

The owners of the tug Whalen, by contract in writing, agreed to tow the respondent's "barges" between Pointe Anne and Toronto on the terms and conditions stated.

Held, reversing the judgment of the Exchequer Court (21 Ex. C. R. 99) Idington and Anglin JJ. dissenting, that the contract did not include an undertaking to tow "scows" and that the evidence at the trial of an action claiming damages for loss of a scow did not warrant a rectification to bring such towage within its terms.

Per Duff J.: The trial judge was wrong in holding that he could resort to the negotiations prior to the contract for evidence of warranty of the tug's capacity and that the contract could be rectified on a mere preponderance of evidence.

Per Duff J.: Qu. Has the Exchequer Court, setting as a Court of Admiralty, the equitable jurisdiction required to empower it to rectify instruments?

The owners of the tug "Whalen" wished to sell her to the respondent and entered into a contract to tow the latter's barges from Pointe Anne to Toronto, thus giving respondent an opportunity to test her capacity. In sending her to Pointe Anne the owners instructed her master to take orders from respondent's manager who tendered a loaded scow for towage. The tug had not sufficient power for this towage in November (the time of performance) and on the voyage the tow was cast adrift and lost.

Held, per Duff J.: Under the circumstances the respondent's manager in tendering the scow for towage was not a wrongdoer; the master of the tug was guilty of improper navigation on the voyage, and for this act of negligence the owners were responsible to the respondent.

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*PRESENT:—Sir Louis Davies C. J. and Idington, Duff, Anglin and Mignault JJ.

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Per Davies C. J. and Duff J., Idington and Anglin JJ. *contra* and Mignault J. expressing no opinion. Such negligence of the master was without the fault or privity of the owners and the damages should be limited under sec. 921 of the Canada Shipping Act.

Owing to this difference of opinion the judgment appealed from could neither be affirmed nor reversed *in toto*. In the result it was varied by directing a limitation of the damages.

APPEAL from a decision of the Exchequer Court of Canada (1) affirming the judgment of the Local Judge of the Toronto Admiralty District in favour of the respondent.

The facts are sufficiently stated in the above headnote.

Holden K.C. for the appellant. The evidence shown that "scows" were not omitted from the contract by a mutual mistake and the trial judge should not have allowed the amendment.

As to limitation of liability see *"The Richard Q. Young"* (2).

Woods K. C. and G. M. Jarvis for the respondent. The findings of fact by the trial judge approved by the Exchequer Court should not be disturbed. To justify the rectification of the contract see *Dominion Trust Co.* v *New York Life Ins. Co.* (3).

In any event the damages should not be limited, *"The Minnehaha"* (4).

THE CHIEF JUSTICE.—After having given the facts of this case and the evidence a great deal of consideration, I have reached the conclusion that the reformation made by the trial judge of the written contract

(1) 21 Ex. C.R. 99.
(2) 245 Fed. R. 499.
(3) [1919] A. C. 254.
(4) Lush 335 at page 347.

contained in the letter of the respondent plaintiffs to the appellants dated October 27th, 1920, by the addition thereto of the words "and scows" after the word "barges" cannot be upheld, and that the towing contract must be read and be held to have been as stated in the plaintiffs' letter covering barges only. The letter reads as follows:—

POINTE ANNE QUARRIES LIMITED

TORONTO, ONT., Oct. 27th, 1920.

The Kirkwood Steamship Line,
14 Place Royale, Montreal, Que.

DEAR SIRS:—

This will confirm arrangement made with your Mr. T. R. Kirkwood this morning, whereby you agree to send the "M. F. Whelan" to tow our barges between Pointe Anne, Presqu'Ille and Toronto at the following rates:—

From Pointe Anne to Toronto—
General business..... 75c. per yard
Crib filling stone..... 90c. per yard
From Presqu'Isle to Toronto—
General business..... 60c. per yard
Crib filling stone..... 75c. per yard

It is understood that the tug will take her towing orders from the Superintendent Mr. Thompson, taking down whatever is light at this end and bringing up what is loaded at the quarry end; we to look after fuelling arrangements and purchase of supplies.

(Sgd.) J. F. M. STEWART.
Manager.

In the absence in the above letter of the words added by the trial judge I do not think this action against the defendants would lie at all as the towed scow damaged was not under any construction a barge. There is a broad and well understood distinction between the two the "scow" not having any rudder or steering gear or crew. So the contract as altered or amended or reformed by the trial judge was a much more onerous one on the tug and its owners than that entered into by the appellants.

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The difference between a barge and a scow is fully explained by Mr. Kirkwood, the appellants' manager, in his evidence. "One (the barge) has a rudder and crew which steer it, making it sure of navigation, towing behind, and the other (the scow) has no rudder, and is square built"; and as Mr. Lambert, the naval architect and marine surveyor, testified this scow is "a very lumbering, awkward heavy built boat" and a very tough proposition for towing in any case and in rough weather tougher still.

The defendants sent their tug the "M. F. Whalen" specifically named in the contract to Presqu'Isle to carry it out giving the captain instructions as provided in the contract to take his orders from the plaintiff's superintendent Thompson. The captain obeyed his instructions and Thompson attached a laden scow to the tug instead of a barge. The captain knew nothing of the terms of the contract. The fact that Thompson attached a loaded scow which was not within the contract cannot make or create a new and more onerous contract as against the defendants. I have reached the further conclusion that even if the reformation of the contract by the trial judge is justified on the evidence, section 921 of the Canada Shipping Act (R.S.C. c. 113) applies to and limits the owners' liability in this action. That section limits, to an aggregate amount not exceeding thirty-eight dollars and ninety-two cents per ton for each ton of the ship's tonnage the liability whenever inter alia "without their actual fault or privity" any loss or damage is, by reason of the improper navigation of such ship caused to any other ship or boat or its cargo. I am clearly of the opinion that in this case there was no such actual fault or privity on the part of the owners

of the tug which caused the damage complained of and in my opinion their liability, even under the reformed contract, must be limited to $4,389.01, and the judgment appealed from amended accordingly.

The tug was, as I have before mentioned, specifically named as the one defendants were to send to carry out the contract. If the loss or damage sued for occurred by reason of the improper or wrongful navigation of the tug that is just such a case as the statute expressly mentions and was intended to cover and even assuming the contract to have been rightly amended or reformed I cannot see how the specific thing, the tug "M. F. Whalen," having been selected and agreed to by the parties and named in their contract as the tug to be sent, her alleged unsuitability for the work the contract provided for her to do can be successfully argued as a reason for refusing the statutory limitation of liability.

In an ordinary contract of towage when the tug is not specifically named there is an implied obligation that the tug shall be efficient and properly equipped for the services required. (See *"The Undaunted"* (1) *"The West Cock "* (2) cited and relied upon by the learned trial judge). But these two cases relate to general contracts to supply tugs for towage purposes and do not apply to contracts where a tug is specially named and agreed upon as was the case in this action.

The learned trial judge based his judgment for an unlimited liability on the part of the defendants, the Kirkwood Steamship Lines and T. R. Kirkwood,

for any deficiency that might be found in the amount owing to the plaintiffs after crediting them with the net amount realized by the sale of the tug "M. F. Whalen"

(1) 11 P. D. 46. (2) [1911] P. D. 208.

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upon first, the want of proper seamanship and resource on the captain's part, and, secondly,

the inability of the tug to maintain its horse power at an efficient figure

which inability he thought was due

either to want of capacity to develop or to maintain sufficient power in bad weather or to do so with the crew on board

and he concluded that both factors were present on the occasion in question.

As I have already stated, the defendant owners' liability for damages arising from the improper or wrongful navigation of the tug by the captain and crew which are without the owners' fault or privity clearly come within the statute. With regard to the second ground of the judgment, the want of capacity of the tug to maintain sufficient horse power in the bad weather experienced, I am of the opinion that the implied rule or obligation which applies in an ordinary contract of towage, that the tug supplied should be sufficient as regards seaworthiness, equipment and power to perform the service she undertakes in weather and circumstances reasonably to be expected, does not apply to this case of the contract for the specially mentioned tug, the "M. F. Whalen." Bucknill, "The Law Relating to Tug and Tow," 1913, page 18 says:

> where a contract is made with reference to a specific thing, qualities in that specific thing which are in fact absent will not be implied by law. A tug cannot increase her size or power, and if a "named" tug is engaged to tow, there is no implied warranty by the tug-owner that the tug is different from her real nature, and the other contracting party must be taken to know the size and power of the tug which he has selected as the instrument of the towage.

(See also *Robertson* v *Amazon Tug Company* (1) Court of Appeal, 1881.)

(1) 7 Q.B.D. 598.

Brett L. J., page 606:

When there is a specific thing, there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the great distinction between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made.

Bramwell L. J. dissented upon another point, but he also dealt with this question as follows p. 602 :

Now the plaintiffs' complaint was not that the vessel was unfit for the voyage and work; that it was not properly built or strong enough. Nor did he complain that the machinery or boiler was inadequate, not of the best make, or a good make, or strong or large enough. Had such been his complaint, then I think it ought to have failed because his engagement was with respect to specific things, and he took them for better or worse.

See also Marsden, "Collision at Sea," pages 181, 186 and 187, *The Warkworth* (1) *The Diamond* (2).

IDINGTON J. (dissenting)—This appeal arises under the following circumstances: The owners of the appellant were desirous of selling her to respondent and negotiations opened by the son of the owner of the appellant with that in view; after conversations with someone on behalf of respondent and correspondence with respondent in course of which he wrote, on 11th September, 1920, a long letter describing her and a sister ship in laudatory terms at the conclusion thereof he says:—

They will stand very heavy weather, and therefore will not lose any money on that score. They are certainly an exceptional bargain at the price which, of course, is subject to being unsold.

That was followed by a submission to him of an account of what another vessel owned or managed by one Russell had done in the month of August

(1) [1884] 9 P.D. 145. (2) [1906] P. D. 282.

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from which it appears that said vessel had been engaged by respondent in the service it required and that set forth fourteen trips of towing service of which ten were towing scows and only four for towing barges.

Then ensued the bargain now in question which evidently was intended as a test of the suitability of the appellant for such a service as now in question.

Using that as a basis or rather guide of what might be reasonable in regard to charges for such an experiment, the said representative of the appellant's owner and the agent of respondent orally agreed upon the terms upon which she should do towing service for respondent.

Thereupon the respondent's agent dictated to a stenographer the following:—

POINTE ANNE QUARRIES, LIMITED

TORONTO, ONT., Oct. 27th, 1920.

The Kirkwood Steamship Line,
14 Place Royale,
Montreal, Que.

DEAR SIRS,

This will confirm arrangement made with your Mr. T. R. Kirkwood this morning, whereby you agree to send the "M. F. Whalen" to tow our barges between Pointe Anne and Toronto at the following rates:—

From Pointe Anne to Toronto:—

General Business.....	75c. per yard
Crib filling stone.....	90c. per yard

From Presqu'Isle to Toronto:—

General Business.....	60c. per yard
Crib filling stone.....	75c. per yard

It is understood that the tug will take her towing orders from our superintendent Mr. Thompson, taking down whatever is light at this end and bringing up what is loaded at the quarry end; we to look after fuelling arrangements and the purchase of supplies.

Yours very truly,

(Sgd.) J. F. M. STEWART,
Manager.

It is to be observed this is not signed by any one on behalf of the appellant but seems to have been given as evidence of the oral contract that preceded it.

It was argued before the learned trial judge that the word *barges* did not include *scows*. At first he seemed of the opinion that it would cover the towing of scows, but later allowed an amendment by way of reforming the contract, as he expressed it, and evidence was directed to that which taken with what appears above clearly demonstrated that towing of scows as well as barges was understood to have been the bargain in fact.

There was a conflict of evidence between the agent of appellant's owner and the signer of the above memo. as to whether scows as well as barges had been mentioned.

The learned trial judge accepted the latter's version of the facts, disregarded that of appellant's agent, and allowed the reformation of the contract, if such necessary to maintain respondent's action, for evidently in his own opinion it was not.

It seems to me not only from the foregoing but from that to which I am about to refer, that the evidence is overwhelmingly against appellant on this point.

Not only did the appellant entering upon the service accept the duty of towing barges, but towed also the scow, without any remonstrance as to the latter before towing the scow now in question but also when the master of the appellant cut loose her tow in a storm and went into port and refused to go next day after it when the storm had abated, there ensued the following correspondence by telegraph.

The master of the appellant early on the day following his cutting the scow adrift sent the following:—

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COBOURG, ONT., Nov. 12.

Kirkwood Steamship Lines,
14 Place Royale, Montreal, Que.

Lost scow last night about two miles west Port Hope south west gale.

Filed June 4th, 1921.
C. M., R.E.C.

H. MALLETTE.

That was apparently followed by a message from respondent as follows:—

TORONTO, Nov. 12-20.

Kirkwood Steamship Co.,
Montreal, Que.

Whalen threw big scow adrift off Port Hope twelve last night. Absolutely no reason except Capt. not control his crew. Scow still floating and have sent steamer from here but cannot reach scow till dark. Whalen in Cobourg wind off shore and crew refuses to go for scow.

POINTE ANNE QUARRIES LTD.

And that in turn by the following:—

MONTREAL, Nov. 12, 1920.

Captain Harry Mallette,
Tug Mary Francis Whalen,
Cobourg, Ont.

Pointe Anne Quarries wire that you threw scow adrift without reason and that scow still floating and you refuse to go for it. If you can save this scow without risk to your tug do so.

KIRKWOOD STEAMSHIP LINE

Which was followed by the following:—

TORONTO, ONT., Nov. 12-20.

Kirkwood Steamship Line,
14 Place Royale Montreal, Que.

The scow the Whalen lost was built last year and cost over thirty thousand dollars. She carried a cargo worth twenty-five hundred dollars. No reason why tug should not get it and you should give Captain orders to this effect.

POINTE ANNE QUARRIES LTD.

And again replied to by the following:—

MONTREAL, Nov. 12, 1920.

Pointe Anne Quarries Ltd.,
McKinnon Bldg., Melinda St.,
Toronto, Ont.

Wire received T. R. Kirkwood leaving for Cobourg first train to investigate have wired Captain to save scow if at no risk to tug.

KIRKWOOD STEAMSHIP LINE.

And the man who pretends he never would have undertaken to tug a scow with the appellant followed all the foregoing by an expensive trip to find out what became of this scow.

And in all this not a word of remonstrance or objection to the towing of a scow, though he pretends he contracted only to tow barges, whatever that may mean in English.

It requires more than usual boldness in face of such recognition of duty to try to support the contention that someone later on no doubt suggested as to *scows* not being covered by the generic word *barges*.

Such a surprising suggestion has induced me to look up the meaning of the words "barge" and "scow".

I find in the Century Dictionary the following, of many meanings:—

Barge. 1. A sailing vessel of any sort. 2. A flat-bottomed vessel of burden used in loading and unloading ships, and, on rivers and canals, for conveying goods from one place to another.

Scow. 1. A kind of large flat-bottomed boat used chiefly as a lighter; a pram. 2. A small boat made of willows, etc., and covered with skins; a ferry-boat.

Murray has the following :

Barge. 1. A small sea-going vessel with sails; used *specifically* for one next in size above the Balinger, and *generally* as—Ship, vessel (in which use it is now superseded by *Bark*) *Obs.* (except when historians reproduce it in a specific sense).

2. A flat-bottomed freight boat, chiefly for canal and river-navigation, either with or without sails; in the latter case also called a *lighter;* in the former, as the Thames barges, generally dandy-rigged, having one important mast.

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There are besides these two leading meanings in Murray five others which show how comprehensive the word barge is, and how it has been applied to a great variety of vessels by no means consistent with the local application of the term as suggested herein. Then follow illustrations from many authors.

Illustrative of what I have just said the following appears in the Encyclopedia Britannica, descriptive of a *barge*.

> *Barge*. Formerly a small sailing vessel, but now generally a flat-bottomed boat used for carrying goods on inland navigations. On canals barges are usually towed, but are sometimes fitted with some kind of engine; the men in charge of them are known as bargees. On tidal rivers barges are often provided with masts and sails ('sailing barges') or in default of being towed, they drift with the current, guided by a long oar or oars ('dumb barges'). Barges used for unloading, or loading, the cargo of ships in harbours are sometimes called 'lighters' (from the verb 'to light'—to relieve of a load). A state barge was a heavy, often highly ornamented vessel used for carrying passengers on occasions of state ceremonials. The college barges at Oxford are houseboats moored in the river for the use of members of the college rowing clubs. In New England the word barge frequently means a vehicle, usually covered, with seats down the side, used for picnic parties or the conveyance of passengers to or from piers or railway stations.

and no meaning is found in that work for the word "scow".

The word "scow" appears in Murray as a "large flat-bottomed lighter or punt", and a number of meanings cited from different authorities but nothing to justify the local description presented in argument herein.

It would seem from the evidence that there must be a local form of English and if that is resorted to and to be relied upon I prefer the conduct of the parties as above set forth as explanatory of what was intended by the use of the word *barges*.

I agree, in regard to other points made, fully with the reasoning of the learned trial judge and Mr. Justice Audette in appeal, but have thought it well to develop the foregoing as my own way of looking at what in the argument seemed to me rather a remarkable contention.

The appeal should be dismissed with costs.

DUFF J.—I am unable to say that the conclusion I have reached in this case is entirely satisfactory to my own mind. I can only say that of the three possible results, each one of which has met with acceptance by one or more members of this court, that conclusion appears to me to be supported by the weight of argument.

The first point for examination is whether the express contract between the parties is to be considered as embodied in the letter of the 27th October signed by Mr. Stewart, the manager of the respondent company, and addressed to the owners of the appellant ship whom I shall refer to as the appellants. That letter was dictated on the day of its date by Mr. Stewart in the presence of Mr. Kirkwood, the appellants' manager. Beyond question it was, as Mr. Stewart explicitly says, intended to record the arrangement between the two parties and it was dictated by him, as already mentioned, in the presence of Mr. Kirkwood as embodying that arrangement and it was afterwards received and accepted by Mr. Kirkwood as the authentic record of it.

This document therefore, *prima facie*, constitutes the exclusive evidence of the contract between the parties. On behalf of the respondent it has, however, been contended that in truth the contract was some-

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thing different; that the parties had agreed upon a contract in different terms and that it was through the common mistake of both of them that the letter does not express the terms of the bargain they had concluded. This contention raises perhaps the most important issue on the appeal. Before proceeding to discuss it I quote the letter, which is as follows:

POINTE ANNE QUARRIES LIMITED

TORONTO, ONT., Oct. 27th, 1920.

The Kirkwood Steamship Line,
14 Place Royale, Montreal, Que.

DEAR SIRS:—

This will confirm arrangement made with your Mr. Kirkwood this morning, whereby you agree to send the "M. F. Whalen" to tow our Barges between Pointe Anne, Presqu'Isle and Toronto at the following rates:—

From Pointe Anne to Toronto—	
General Business	75c. per yard.
Crib filling stone	90c. per yard
From Presqu'Isle to Toronto—	
General Business	60c. per yard
Crib filling stone	75c. per yard

It is understood that the Tug will take her towing orders from our Superintendent Mr. Thompson, taking down whatever is light at this end and bringing up what is loaded at the Quarry end; we to look after fueling arrangements and purchase of supplies.

Yours very truly,
(Sgd.) J. F. M. STEWART,
Manager.

The respondent company says that the agreement was one to tow scows and barges and that it was by mistake that Mr. Stewart used the words "to tow our barges" when to express the meaning of the parties the words should have been "to tow our barges and scows".

I refer for a moment to the suggestion that the word barge is in itself sufficient, that it denotes scow as well as barge. The distinction is drawn very clearly in the evidence.

What is more important to note is this: The evidence of Mr. Stewart, that of Mr. Lambert as well as that of Mr. Kirkwood establish (and indeed I should be surprised to hear it disputed) that the distinction is one regularly observed in common speech and Mr. Stewart gives point to this by insisting that during the interview at the conclusion of which the letter was written scows were specifically mentioned and that the distinction between barges and scows was present to the mind of Mr. Kirkwood as well as his own and implies that the word "barge" would not have been used by either of them as a common term designating scows as well as barges. In answer to a request for an explanation of the terms of the letter he says:

> I dictated it and there is no explanation except that that is the way the letter was written. It don't convey the intention.

The evidence negatives decisively this suggestion as to the scope of the word "barge".

My conclusion is that on this issue (as to the terms of the contract) the respondent company fails. I shall first give my reasons based upon the record as presented to us before discussing the judgments in the Exchequer Court. This, I think, is the more convenient course because I think effect ought not to be given to the findings of the two courts below. This is not a case falling within the general rule which gives an almost conclusive effect to such concurrent findings for reasons which will be discussed later. Before proceeding to discuss the facts it should be observed that the proposition of the respondents in the form it ultimately assumes is this: That the appellants warranted the sufficiency of the tug Whalen for all the purposes of their business in the transportation of

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stone from their quarries at Pointe Anne to Toronto and that this included a warranty of sufficiency to tow a scow of the type of that lost carrying a burden of 1875 yards of stone in the heavy weather of November.

By their statement of claim the respondents rested their cause of action upon the contract of the 27th October, paragraphs 2 and 3 being in the following terms:—

2. On October 27th, 1920, a contract was entered into between the plaintiff and the owners of the Ship "M. F. Whalen", an ocean going steam tug of 200 I.H.P. registered at Halifax, for towage by the "M. F. Whalen", of the plaintiff's barges, light and loaded, between Pointe Anne, Presqu'il and Toronto.

3. On the 11th day of November, 1920, in pursuance of the said contract, the "M. F. Whalen" left Presqu'il for Toronto at about 7 a.m. having in tow a barge of the plaintiff's laden with a cargo of stones. The tow was under control of the "M. F. Whalen" and the latter was manned and controlled by the servants of the owners of the "-M. F. Whalen" and no officer, agent or servant of the plaintiff was on board either the "M. F. Whalen" or the tow.

The appellants by their statement of defence set up the writing of the 27th October and denied that under the contract thereby disclosed they were under any obligation to assume the towage of scows. At the trial the letter of the 27th October was first put in by the defence and it was only in rebuttal that respondents produced the evidence of Mr. Stewart who signed the letter, to the effect that the agreement between himself and Mr. Kirkwood in the interview on the 27th October was an agreement to tow scows as well as barges. During the cross-examination of Mr. Kirkwood, counsel for the defence objected to cross-examination on the ground that the contract spoke for itself and that matter dehors the contract was inadmissible. The learned trial judge overruled the objection apparently taking the view that as

some evidence of this character had been received without objection it was too late for the appellants to insist upon the contract as it stood and thereafter the trial proceeded upon that footing. At the conclusion of the evidence counsel for the respondents asked for leave to amend by adding a plea for rectification. This application was reserved by the trial judge and granted by him in giving judgment in the action.

In discussing the point now under consideration it ought to be unnecessary to observe that where the parties have finally reduced their agreement to writing, a writing that is to say which is intended to be the record of the agreement between them, it was not at common law competent to either of them to resort to previous negotiations or contemporary conversations or other matters for the purpose of varying or adding to its terms as expressed in the writing; and where the language is unambiguous, that is to say, capable of only one necessarily exclusive signification, that it was not competent to refer to such extraneous matter for the purpose of giving colour to the plain meaning of the document. As Lord Bramwell, then Bramwell B. said in *Wake* v *Harrop* (1)

they put on paper what is to bind them and so make the written document conclusive evidence between them.

The rule is obviously not a technical rule. It is founded upon the highest considerations of convenience and the value of it could hardly be better illustrated than by a case such as this where two men of affairs, thoroughly accustomed to transacting business, meeting after a negotiation with the object of making an agree-

(1) 6 H. & N. 768 at p. 775.

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ment upon business which had been the subject of full consideration by each and after discussion of the matter deliberately set down in writing in perfectly unambiguous language that upon which they have agreed. In commercial affairs it is of great importance that such documents should be regarded as final and on this principle the courts have uniformly acted recognizing that the very purpose of expressing agreements in writing is to reduce the terms of them to permanent form and to preclude subsequent disputes as to such terms.

Courts of equity on the other hand have from early times possessed and exercised authority to rectify documents in which parties have professed to express their contracts, a jurisdiction now exercisable by courts having equitable powers. The point was not argued and I express no opinion upon it but I am not prepared without further consideration to say whether the Exchequer Court of Canada in its Admiralty jurisdiction under the Admiralty Act of 1861 is endowed with the power to rectify instruments. Assuming that to be so it is important to note that an attempt to reform an instrument by invoking this equitable jurisdiction can only succeed where two conditions are fulfilled.

First, it must be shown not only that the agreement as stated in the writing, the agreement in this case to tow barges, was not the whole of the agreement between the parties and it must further be shown that the parties did agree upon something which did not appear in the writing, in this case to tow barges plus scows, and that the agreement, that is to say the intention to contract in this sense, continued concurrently in the minds of both parties down to the

time the document went into operation. The other condition relates to the character and probative force of the evidence required. Where one of the parties denies the alleged variation the parol evidence of the other party is not sufficient to entitle the court to act. Such parol evidence must be adequately supported by documentary evidence and by considerations arising from the conduct of the parties satisfying the court beyond reasonable doubt that the party resisting rectification did in truth enter into the agreement alleged. It is not sufficient that there should be a mere preponderance of probability; the case must be proved to a demonstration in the only sense in which in a court of law an issue of fact can be established to a demonstration, that is to say, the evidence must be so satisfactory as to leave no room for such doubt. *Hart* v *Boutilier*, (1) at page 630; *Fowler* v *Fowler* (2) at page 264; *Clarke* v *Joselin* (3) at page 78.

Here as in all such cases the fundamental fact is the existence of the document prepared and executed with the intention of stating the terms agreed upon by the parties so executing it; and the importance of that fact in the present case is increased by the cirsumstance that it was prepared on the very occasion on which the parties concluded their agreement and prepared in such circumstances as virtually to make it their joint production. I do not attach as much weight to the fact, although that is by no means without importance, that the letter was dictated by Mr. Stewart, as to the fact that it was dictated in the presence of Mr. Kirkwood when the very words of their conversation must have been fresh in the minds

(1) 56 D.L.R. 620. (2) 4 deG. & J. 250.
(3) 16 O.R. 68.

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of both of them and in circumstances calculated to bring the attention of both to bear upon the phraseology used. I find it very difficult indeed to reconcile with these facts the statement of Mr. Stewart that he was mainly concerned as to the capacity of the tug in respect of the towage of scows and that this point had been the subject of specific discussion during the moments which preceded the dictation of the letter.

The circumstances mainly relied upon by the respondents in corroboration of Mr. Stewart's evidence may conveniently be commented upon in discussing the judgments in the Exchequer Court. As regards these judgments it should first be observed that there are cogent reasons why in this court the findings of fact cannot be regarded as decisive. The learned trial judge appears to have proceeded upon the view that even assuming the letter of the 27th October embodied the concluded contract between the parties he was still bound to give effect to a warranty which he conceived to be disclosed by the correspondence preceding the contract; and in deciding that the document of October 27th was to be rectified it seems reasonably clear that his attention was not drawn either to the rules by which courts of equity have governed themselves in granting this relief or to the force of the considerations derived from the circumstances in which the letter was written. The letter, indeed, is treated by the learned judge as only one of a series of facts of co-ordinate evidentiary value.

The question of rectification is thus disposed of:

The evidence makes it clear that these words were omitted by inadvertance, to use the language of Mr. Kirkwood, and also that he knew the equipment of the plaintiffs included 'scows' and that the "Whalen" was intended to do for the plaintiffs the work done by Russell's tug "Lakeside" whose place this tug was to take, and I so find.

There is no explicit finding that there was a concluded agreement made orally on the 27th October binding the respondents to employ the Whalen and the appellants to tow the respondent's scows with her. Rather excessive importance seems to be attached to a statement by Mr. Kirkwood at the trial that he had become convinced that Mr. Stewart had not intended "to deceive" him but had intended to provide for the towage of scows as well as barges. Mr. Kirkwood did, with a candour that does him no discredit, say that but at the same time he insisted explicitly that while he knew the barges of the respondents and was willing to undertake their towage and to warrant the capacity of the Whalen to tow them he would not have agreed to undertake the towage of scows of undefined weight and dimensions in the rough weather of November and he adds that he never would have agreed to tow a scow of the type of that which was lost since the Whalen, and this is common ground, was insufficiently powered for that purpose. He denies, moreover, that he knew that scows formed part of the "equipment" of the respondents although he admits that he was aware that scows had been used for the purpose of carrying the respondents' stone in August by one Russell whose account had been brought to his attention, adding however, that he was unaware whether or not these scows belonged to the respondent or to Russell himself; and stating moreover, that it was one thing to undertake the towage of such craft in August when steady weather would be assured and a totally different thing to consider the towage of them in November. He denies also in the most explicit manner that the scows were mentioned during the interview.

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The learned trial judge in finding that Kirkwood knew the intention of the respondents to be that the Whalen was intended to tow in November the same class of craft as Russell towed in August is drawing a conclusion from the evidence of Stewart alone; so likewise when he finds that Kirkwood knew scows were part of the "equipment" of the plaintiffs. It is not denied that Kirkwood had not seen the respondents' scows and it is not suggested that he had any information as to their weight or size. The view taken by the learned trial judge is in effect that the appellants being in ignorance upon these points undertook to tow whatever might be assigned for towage.

Stewart says that on the voyage in which the mishap occurred he was engaged in testing the capacity of the tug and the question at this point for consideration is: Is it conclusively (in the sense above mentioned) established that Kirkwood intended to enter into a contract and did enter into a contract warranting the capacity of his tug to tow in November successfully any scow which the respondents might see fit to provide for the purpose of giving her what they might consider to be a satisfactory test for the purposes of their business?

It is common ground, and indeed it is the basis of one branch of the respondents' case, that the Whalen was insufficiently powered for the towage of the lost scow in November and there seems little reason to doubt Kirkwood's statement that he would never have entered into a contract for the towage of such a craft at that season, that is to say a contract warranting the tug's capacity to deliver her tow safely; nor does there seem any reason to doubt his statement that he would not have entered into a contract for the towage of craft of that character of which he did not know

the weight or dimensions. One must assume that he is a normally prudent man; and in examining Kirkwood's evidence it should be remembered that it was on his cross-examination that for the first time he received notice that he was expected to discuss the allegation by the respondents that he had entered into a contract of the kind now set up and notwithstanding this his evidence on the various points made against him is clear and consistent throughout. Weighing against Stewart's oral evidence the fact of the document itself and the facts connected with the litigation—the allegation that the contract of the 27th was a contract to tow barges and only barges, and the basing of the plaintiff's claim upon that contract the failure to bring forward the suggestion of mistake in the writing of the letter until the latest possible moment—I am unable to discover anything to justify the conclusion that the prayer for rectification is supported by that kind of weighty proof which the law demands in such cases. One must bear in mind, in the language of Sir W. M. James in *MacKenzie* v *Coulson* (1)

> that it is always necessary for the plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified * * * * * * * It is impossible for this court to rescind or alter a contract with reference to the terms of the negotiation which preceded it.

I cannot pass by the suggestion made during the argument founded upon a statement of Stewart's that the defence resting upon the terms of the contract was an afterthought of Kirkwood's and that Stewart became aware that these terms were limited only when the statement of defence was filed. That is an extraordinary and incomprehensible suggestion having regard to the terms of the second paragraph of the statement of claim.

(1) L.R. 8 Eq. 375.

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Independently of the letter of the 27th October the learned trial judge finds in the correspondence a warranty of capacity

> to tow whatever the plaintiffs had been in the habit of trusting to tug-boats.

I have already pointed out that the letter is the governing document. I am unable, moreover, to agree with the trial judge in his construction of this correspondence considered independently. Let us see what it discloses. The appellants had two tugs which they wished to dispose of, and with a view to a sale they had been pressing the respondents to inspect them and to make trials of them. After some delay the appellants were informed by the respondents that they were not likely to make a purchase before the following spring. At the same time the respondents suggest that they employ one of these tugs in their service between Pointe Anne Quarries and Toronto and they add that this will give them an opportunity of making a test. The fact that in August scows were employed seems to have been magnified beyond its real significance; it did not follow that the respondents would entrust their cargoes to scows in November.

The trial judge also proceeds upon the instructions given to the master. The master, he says, was given definite instructions to take orders from the plaintiffs and there was no limitation upon these instructions. This he seems to think is sufficient to fasten upon the respondents responsibility for everything undertaken by the master on the instructions of Thompson. It is important in considering the effect of this circumstance to bear in mind the terms of the contract. The contract provided that the captain of the Whalen was to take his towing orders from the respondents,

but this provision, it is quite plain, is a provision touching the execution of the contract, that is to say, it is a provision relating to the employment of the Whalen in the towing of barges. To enlarge the obligations of the contract by reason of a general provision of this nature is quite inadmissible. The instructions to the master were given pursuant to this term of the contract and in performance of it and can have no significance or effect as touching legal responsibilities of the parties.

The reciprocal rights and liabilities therefore of the parties to the appeal are to be determined by the application of the law to this state of facts. The appellants had undertaken to tow the respondent company's barges and for that purpose had placed their tug with its master and crew under the control of one of the respondent company's officers which officer used the tug for a service the appellants had not agreed to perform—a service admittedly more difficult and admittedly one which the tug was incapable efficiently to perform in the event which supervened—an event which might have been anticipated—heavy weather on Lake Ontario in November.

In these circumstances it seems clear, too clear for discussion, that the appellants are not responsible as for a warranty of sufficiency of power, of equipment or of crew. But a question arises, and it is this question which occasioned me the greatest concern in determining the appeal, the question whether, namely, having regard to all the circumstances of the case, the appellants are not in some degree responsible. Thompson, in so far as he professed to act under the contract, was doing an unauthorized thing when he directed the master of the tug to take the scow in tow, but I think, not without much hesitation, that having regard to the facts as a whole he was not, strictly

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speaking, a wrongdoer. I think there are facts in evidence pointing to the conclusion that the appellants, while they would not contract to tow scows and did not contract to tow scows, were not unwilling that Thompson should in any reasonable way test the capacity of the tug with reference to the possibility of purchasing her.

Looking at the relations between the parties and considering the object they both had in view, I have come to the conclusion that Thompson was not a wrong-doer in using the Whalen for the purpose of testing her with regard to the towing of scows. Admittedly that is what he was doing; Mr. Stewart, the manager of the respondents, says so explicitly. I think that, having regard to all the circumstances, Thompson might not unreasonably have assumed that he was at liberty to employ the tug in this way, but what is the legal relation arising from such employment? There was no contract by the owners of the Whalen respecting the capacity of their tug in relation to the towage of scows; the respondents employed the tug at their own risk, they took her as she was with her imperfections whatever they might be. At the same time while the captain was to take his towing orders from Thompson, he still was, in the navigation of the tug, I think, the servant of the appellants and therefore the appellants would be answerable for his negligent misfeasance in the course of such navigation. In the result the risk of deficiency of power must be borne by the appellants, and while adequate power would have saved the situation it is equally true that proper seamanship as the trial judge has found and I think satisfactorily found, would also have saved the situation. It follows, I think, that the appellants are responsible for the consequences of the negligent

navigation. With respect to the events of the 12th, I am unable to ascribe to the appellants responsibility for any wrong arising out of those events; the refusal of the crew to go out was due, no doubt, to the experience of the day before, which was the consequence largely of the fact that Thompson had exercised his discretion by assigning to the tug a task which she was incapable of performing. That must have been obvious to the crew and it is not surprising that they declined to go; and it was not an unreasonable thing I think for the appellants, having been informed of the fact that the crew had refused to go out, to attach the condition that the tug should not be put in danger. They had not contracted that the safety of the tug should be risked in the towage of scows.

In the result the appellants are responsible but are entitled to a declaration limiting their liability under the statute.

Having regard to the difference of opinion, I agree to the disposition of the costs proposed.

ANGLIN J.—For the reasons given by Mr. Justice Hodgins, sitting as local judge in Admiralty, I would affirm the judgment in favour of the respondents on the two matters to which the defendants restricted this appeal, viz., the reformation of the contract, or, more accurately, the determination of its scope, and the refusal of limitation of liability under section 921 of the Canada Shipping Act.

The question as to the terms of the contract depends chiefly on the respective credibility of the witnesses Kirkwood and Stewart. Giving to the letter on the 27th of October the weight to which it is undoubtedly entitled as evidence, nothing brought to my attention would lead me to boubt the soundness of the view

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on this aspect of the case, taken by the learned trial judge and affirmed on appeal. It would, I think, be a rash proceeding on our part to reverse the finding of the judge who tried the case and saw the witnesses on a pure question of credibility. *Nocton* v *Ashburton* (1) at page 945; *Wood* v *Haines* (2).

Assuming therefore that the contract included the towing of the plaintiff's scows, the evidence is abundantly clear that the owners of the defendant tug were fully cognizant of the inadequacy of her power and equipment to handle those scows in such weather as was to be expected on Lake Ontario during November. Indeed the witness Kirkwood himself says that he would not have undertaken that responsibility because

> she (the M. F. Whalen) was not capable for it at that time of the year. It was dangerous. She might land them in, but it was risky business.

The evidence supports the finding that the inadequacy of the Whalen's powers was a contributing cause—probably the chief cause—of her captain finding himself obliged to cut the plaintiff's scow adrift.

The Whalen was not chosen by the plaintiffs for the purpose of towing their vessels. She was selected by her owners and accepted for their towing by the plaintiffs who had never seen her, on the assurance of the owners that she was equal to the "Metax" for which they had asked. Admittedly the Whalen did not develop as much power as the "Metax" did and her crew was inferior to that carried by the sister tug. The owners when sending the Whalen knew

(1) [1914] A. C. 932; (2) 38 Ont. L. R. 583.

the capacity of the plaintiff's scows and, if they did not impliedly warrant that that tug was capable of handling them in such weather as might be expected at the season when it was employed, they at least undertook that she was as fit for that purpose as care and skill could render her. *The West Cock* (1). Their knowledge of her deficiency in power and probably likewise of the inefficiency of her crew, which seems also to have been a contributing cause in bringing about the situation that led to the sending of the scow adrift, constituted fault on their part and deprives them of the benefit of section 921 of the Merchant Shipping Act.

I also rather incline to accept the view put forward on behalf of the respondents that the refusal of the master of the Whalen to go out from Cobourg on the 12th day of November to pick up the plaintiff's scow, held to have been wrongful, was not "improper navigation" within sec. 921 (d) and that so far as it may have rendered the defendant liable the case is therefore not one for the application of that section.

The appeal should be dismissed with costs.

MIGNAULT J.—The appellant's counsel submitted his case on two points only:—

1. The learned trial judge should not have reformed the written contract by adding the words "and scows" after the word "barges," thus making the agreement one for the towage of the respondent's scows as well as barges.

2. The appellant is entitled to claim limitation of liability under section 921 of the Canada Shipping Act.

(1) [1911] P. 23, 208.

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Mignault J.

On the first point we have the fact that the letter prepared by the respondent's manager, Mr. J. F. M. Stewart, on the 27th of October, 1920, after an interview of an hour's duration with Mr. T. R. Kirkwood, manager of the Kirkwood Steamship Line, owner of the appellant ship, mentions the towage of barges only. I must assume that this letter was deliberately prepared and that Mr. Stewart, who had dictated it, read it before he signed it. We have the further fact that when this action was started, the respondent, in its statement of claim, dated the 8th of January, 1921, alleged a contract made by the owners of the appellant ship for the towage "of the plaintiffs' barges, light and loaded." And when the statement of defence, dated the 15th of January, 1921, set out that the contract did not cover the towage of the plaintiffs' scows, but only of its barges, the plaintiff, on the 21st of January, joined issue on the statement of defence without otherwise referring to the contract.

Up to the time of the trial, it was therefore common ground between the parties that the contract was for the towage of the respondent's barges. During the trial, the respondent asked leave to amend its reply so as to claim that the towage included its scows as well as its barges, and by his judgment the learned trial judge rectified the contract accordingly.

On the issue of rectification of the contract, the evidence is restricted to the testimony of Kirkwood and of Stewart, the former of whom denied that the towage of the plaintiff's scows had been discussed. Stewart began by stating that the agreement with Kirkwood was that the tug furnished by him would tow all "our equipment." When the learned trial judge asked Stewart why he called it "equipment" all

the time, he answered " it was a floating plant," and to a further question whether that was the word used by him throughout, he replied "no, we would speak of barges by name and the scows by scows." Stewart cannot say whether Kirkwood ever saw the scows, but he says he certainly heard of the scows at that interview. He is unable to explain the letter of October 27th, except that "that is the way the letter was written, it don't convey the intention".

I would naturally give every weight to the finding of a trial judge on a question of fact. But here I cannot agree that a proper case was made out at the trial for adding to the contract, after the word "barges," the further words "and scows." With deference, this is permitting a plaintiff, who finds that the letter evidencing the contract which he himself prepared and which he alleges and produces does not support his action, to have it rectified at the trial on his own testimony so as to bring in something which the writing does not mention. I do not think that Stewart's evidence really goes further—and in this he is contradicted by Kirkwood—than to state that scows were discussed at the interview with Kirkwood, and to say that Kirkwood was mistaken when he stated that he did not know that the boat was to tow scows. Stewart entirely fails to explain why, if scows were discussed, they were not mentioned in the letter, and it is his own letter which he now attempts to contradict. In my opinion he has failed in his attempt to contradict it and I find no evidence explicit enough to show that the towage of scows was a part of the contract agreed to by the owners of the tug. And if such towage was not a part of the contract the action cannot be maintained.

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On this point, therefore, without it being necessary to discuss the second question, I would allow the appeal.

Judgment appealed from varied with a special direction as to costs.

Solicitors for the appellant: *Meredith, Holden, Hague, Shaughnessy & Heward.*

Solicitors for the respondent: *Rowell, Reid, Wood, Wright & McMillan*

THE WOLFE COMPANY (SUPPLIANT)..... APPELLANT;

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*Nov. 16.
*Dec. 9.

AND

HIS MAJESTY THE KING (RESPONDENT)..... RESPONDENT.

JOHN POWERS AND GEORGE POWERS (SUPPLIANTS)..... APPELLANTS;

AND

HIS MAJESTY THE KING (RESPONDENT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown—Public work—Injury to property—Negligence of Crown officials—Exchequer Court Act—R.S.C. [1906] s. 20; 7-8 Geo. V, c. 23.

Under a lease for an indefinite period and terminable on fourteen days' notice the Government of Canada occupied the basement and first floor of a building as a recruiting station in 1916-17. A fire originating on the premises while so occupied destroyed property belonging to the tenants of adjacent premises who claimed compensation by petition of right.

Held, affirming the judgment of the Exchequer Court (20 Ex. C.R. 306) Duff J. dissenting, that the portion of the building so occupied by the Government was not a "public work" within the meaning of that term as used in subsec. (c) of sec. 20 of the Exchequer Court Act.

Per Duff J.: The meaning of "public work" as that term is used in subsec. (c) is not confined to property of which the Crown has a title not less ample than a title in fee simple or to property constructed or in course of construction by the Crown.

Per Anglin and Mignault JJ.: It includes any operation undertaken by or on behalf of the Crown in constructing, repairing or maintaining public property.

PRESENT:—Sir Louis Davies CJ. and Idington, Duff, Anglin and Mignault JJ.

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APPEAL from the judgment of the Exchequer Court of Canada (1) in favour of the Crown.

The material question raised by the appeal and the facts on which it depends are stated in the head-note. As to whether or not the fire which destroyed the suppliant's property was caused by the negligence of an officer or servant of the Crown the opinion of the majority of the Court appears to be against the judgment appealed from.

Fripp K.C. for the appellants. The fire was caused by negligence of servants of the Crown in placing a stove close to inflammable woodwork. See *Scott* v. *London and St. Katherine Dock Co.* (2). *McLean* v. *Rhodes Curry & Co.* (3).

The recruiting station was a public work for the purposes of the Exchequer Court Act. The provisions of the Public Works Act may be applied to construe subsection (c) and leave no doubt on the matter.

Hogg K.C. for the respondent referred to *Larose* v. *The Queen* (4); *City of Quebec* v. *The Queen* (5)

THE CHIEF JUSTICE.—The suppliants in each of these cases in their respective petitions of right claimed damages against the Crown, the former to the extent of $23,245.85 and the latter to the extent of $18,800.00, on the grounds that they were carrying on business in Ottawa on the 13th of December, 1917, and for some years previously and that as stated in their petition

(1) 20 Ex. C.R. 306
(2) 3 H. & C. 596.
(3) 10 D.L.R. 791.
(4) 6 Ex. C.R. 425; 31 Can. S.C.R. 206.
(5) 24 Can. S.C.R. 420 at p. 448.

on the said 13th day of December, A.D. 1917, the Department of Militia and Defence occupied the adjoining premises, a public work of Canada, and, owing to the negligence and want of proper care on the part of the said Department, its servants and agents, by using a defective stove and pipes and by negligence over-heating of the same and by neglect of a watchman in charge of said stove in leaving the premises while the stoves and pipes were overheated, the said premises were carelessly and negligently set on fire, destroying the said building and premises so occupied by the Department, and also the stock-in-trade of the suppliants.

The two appeals were by order consolidated and heard together.

The two questions on which the appeals turned were whether the premises occupied by the Department of Militia and Defence at the time of the fire were a public work within the meaning of the Exchequer Court Act, or the Public Works Act of Canada, and, if so, whether the fire originated from the negligence of the officials of the department acting within the scope of their duties or employment.

Mr. Justice Audette of the Exchequer Court held adversely to the appellants on both grounds and after giving the arguments at bar and the evidence every consideration, I have reached the conclusion that he was right.

As a fact it appears that the Department of Militia occupied only the basement and ground floor of the Arcade Building as a recruiting station for soldiers under an agreement to vacate at any time after giving fourteen days' notice. The Arcade Building itself was not leased nor occupied by the department but only the ground floor and basement, and the occupation was merely temporary, determinable on giving fourteen days' notice.

It may be, I admit, somewhat difficult to decide in some cases what is or is not a public work within the meaning of the Act and I do not think it desirable to attempt any definite interpretation of the words "public work". Every case arising must be deter-

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mined on its own special facts. But in the cases now before us it is sufficient to say, and I have no hesitation in holding, that the temporary occupation of the basement and ground floor of the Arcade Building subject to its being determined on a fourteen days notice could not constitute the whole building a public work or, apart from the whole building, make the basement which was occupied such a work. To my mind such a conclusion offends one's common sense and I agree with the finding of Audette J. when he says:

> The words "public work" mentioned in section 20 of *The Exchequer Court Act* must be taken to be used as verily contemplating a public work in truth and reality, and not that which is mentioned in *The Public Works Act* or in *The Expropriation Act* for the purposes of each Act.

This conclusion makes it, perhaps, unnecessary to determine the other point of alleged negligence on the part of the Crown officials causing the fire. I feel bound to say, however, after a close examination of the evidence, that I am unable, like the learned trial judge, to discover any such negligence. The evidence given by the fire inspector, Latimer, as to conditions found by him after the fire was over, was that the stove standing in the south-east corner of the basement and which it was suggested caused the fire, had not burnt the floor on which it stood; "that part of the floor", he said "was all right and the wood-work around there was there still. The wood-work, except a piece of the ledge of the window, was intact". Altogether I could not help being satisfied from this and other evidence that the surmise of some witnesses of the fire having originated from the stove in the south-east corner of the basement could not be upheld. On the contrary, it is my opinion that the fire originated from other causes unknown.

I would, therefore, dismiss the appeal with costs.

IDINGTON J.—I have read the evidence in this case to see if by any possibility there was any evidence upon which to rest the claims herein of negligence on the part of those in respondent's service being the cause of the fire in question.

I can find none. The mere surmise or suspicion of a fire inspector is far from proof of anything.

We cannot hold, even if a negligent state of things exist in a given place, that a fire which started in that place must of necessity be attributable to such negligence.

It needs something else to establish legal liability and I cannot find such facts existent herein as to justify the inference we are asked to draw.

These appeals should therefore be dismissed with costs.

DUFF J. (dissenting).—The Department of Militia and Defence leased and occupied the basement and first floor of the Arcade Building at a rental of $200 a month, a term of the agreement being that the department was to be at liberty to vacate the premises so leased at any time upon giving 14 days notice to the owner of their intention to do so. The three flats above the first floor in the same building were vacant. The Militia Department used the building as a recruiting office and for that purpose occupied it during the years 1916-7. On the 13th December, 1917, these premises were destroyed by fire and the appellants, Wolfe & Co. and Powers Bros., who occupied the premises immediately adjoining on either side, had their several stocks in trade destroyed by a fire which indisputably originated in the recruiting office.

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The question to be determined is whether a right of action against the Crown has been established within the scope of section 20 of the Exchequer Court Act as amended in 1917. As a result of that amendment s.s. (c) of that section takes the following form:—

> The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—(c) Every claim against the Crown arising out of any death or injury to a person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

The first point for examination, and indeed it is the point upon which Mr. Hogg chiefly relied, is whether, assuming the allegation that the fire in question arose from the negligence of some officer or servant of the Crown while acting within the scope of his duties in the recruiting office, that office, that is to say, the basement and the first floor of the Arcade building occupied by the Militia Department for the purposes of that office, was a "public work" within the meaning of this subsection. Public money, it may be mentioned, had been expended upon improving and fitting the premises in order to adapt them to the purposes for which they were occupied.

I have little difficulty in reaching the conclusion that these premises were a "public work" within the meaning of the enactment under consideration. The term "public work" is defined in at least two statutes, the Public Works Act and the Expropriation Act. In the Public Works Act it includes "the public buildings", "property, * * repaired and improved at the expense of Canada". And by definition in the Expropriation Act it also includes in the same terms "the public buildings" and "property repaired or improved at the expense of Canada". The defin-

itions of the term "public work" to be found in these two statutes (they are substantially, if not quite, the same) have immediate statutory effect only in the interpretation of the enactments in which they are found; but they may very properly be resorted to for the purpose of throwing light upon the meaning of the same phrase found in another enactment with no legislative interpretation expressly attached to it. *Prima facie* it appears to me that the meaning of the phrase in the Exchequer Court Act is no less comprehensive than that to be gathered from these two definitions. *Prima facie* therefore the premises in question were a "public work" within the meaning of the Exchequer Court Act. Two points, however, are raised for consideration by the argument. 1st, it is argued that a "public work" within the meaning of this provision means a work of which the Dominion Government is proprietor and by that is meant, I presume, a work vested in the Crown by virtue of an estate not less ample than an estate in fee simple.

That appears to me to be a contention which must be rejected. It would exclude from the operation of this clause a building erected by the Crown under the provisions of a building lease giving a right of occupation for a very extended term and it is difficult to understand how a restriction involving such a consequence can be discovered in or attached to the general language employed by the Act. Sub-section 2 of section 8 of the Expropriation Act makes provision for taking lands compulsorily, for the purpose of constructing a public work, for a limited period only. It is a provision which appears to be sufficiently comprehensive to entitle the Crown to take such premises as those under consideration for a limited period.

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The word "land" in the Expropriation Act is comprehensively defined to include "all real estate" and consequently includes erections upon land as well as the soil itself. I can see no reason why the basement and first floor of the Arcade Building might not have been expropriated by the Crown; and if so, there is no question that the Crown could have taken those premises compulsorily upon the very terms upon which they were occupied by the agreement with the owner. Why that property so taken should not be embraced within the meaning of the phrase "public work" as well as a building actually constructed by the Crown, I am unable to comprehend, and it can make no possible difference that the property was not compulsorily acquired but procured through private treaty.

The other point raised for consideration rests upon the language of s.s. (b) of sec. 20 of the Exchequer Court Act. That Act gives jurisdiction to the court to entertain claims for damage to property injuriously affected by the "construction of any public work." It is suggested that in some way which I do not fully comprehend the juxtaposition of s.s. c with this s.s. b is a reason for limiting the scope of the phrase "public work" in the first named subsection. It is quite true that s.s. b applies only to cases where something falling within the category "public work" has been constructed or is being constructed but it seems an extraordinary conclusion from this that the class of things denoted by "public work" is limited to those members of that class to which s.s. b applies. It seems an unwarranted conclusion. The meaning of "public work" is not limited by s.s. b, it is only the application of this sub-section which is necessarily limited by the language defining the class

of cases to which it applies. My conclusion is that these premises were a "public work" within the meaning of the Act.

The last question for consideration is, was there evidence of facts giving a cause of action? On this point I think the learned judge of the Exchequer Court has failed to take account of this, namely, that the fact being established that a fire originated on these premises, and that is not disputed, the onus rested upon the occupier to exculpate himself by shewing that the fault neither of the occupier nor of the occupier's servants nor of his contractor, was the cause of the fire. *Becquet* v. *MacCarthy* (1). Therefore if on the facts the matter is left in doubt the occupier does not escape responsibility.

The appeal should be allowed.

ANGLIN J.—I have had the advantage of reading the opinion to be delivered by my brother Mignault. I concur in his conclusions and, speaking generally, with the reasons on which they are based. If the building in which the fire that destroyed the appellant's property originated had been a "public work" within the meaning of that term as used in s.s. (c) of s. 20 of the Exchequer Court Act I should, with respect, have inclined to the view that the proper inference from the evidence, taken as a whole, is that it was ascribable to the negligence of some

officer and servant of the Crown, while acting within the scope of his duties or employment.

If s.s. (c) of s. 20 as enacted by 7 & 8 Geo. V. c. 23, stood alone I should be disposed to give to the words "upon any public work" a very wide meaning—

(1) 2 B. & Ad. 951 at p. 958.

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to treat them as equivalent to "while engaged in any public undertaking." But in the construction of clause (c) we must not lose sight of the fact that Parliament has placed it in juxtaposition to clause (b) which confers jurisdiction on the Exchequer Court to entertain

> every claim against the crown for damage to property injuriously affected by the construction of any public work.

The words "any public work" in this subsection are undoubtedly limited to physical works which are the subject of "construction". I am, with respect however, not inclined to accept the view that the jurisdiction conferred by clause (b) is restricted to claims for compensation against the Crown for injurious affection of property occasioned by the exercise of powers to take land, etc., under the Expropriation Act. I would prefer to leave that question open. I am therefore not prepared, for the present at least, to accept the definition of "public work" in clause (d) of s. 2 of the Expropriation Act as applicable to s.ss. (b) and (c) of s. 20 of the Exchequer Court Act. While, because the phrase "any public work" is found in s.s. (b) of the Exchequer Court Act as well as in s.s. (c) its construction in the latter phrase should be governed largely by that given to it in the former, *Blackwood* v. *The Queen* (1) at page 94, I find nothing in either clause at all inconsistent with the construction which, in *Compagnie Générale d'Enterprises Publiques* v. *The King* (2) at page 532, I placed on the words "any public work" as used in s.s. (c) as it stood before the amendment of 1917, viz.,

> not merely some building or other erection or structure belonging to the public, but any operation undertaken by or on behalf of the Government in constructing, repairing or maintaining public property.

(1) 8 App. Cas. 82. (2) 57 Can. S.C.R. 527.

To that view I respectfully adhere. The Arcade Building temporarily occupied as a recruiting station did not in my opinion fall within the purview of the phrase "any public work" as used in s.s. (c) even with the extended meaning which I would be disposed to place on it.

MIGNAULT J.—These two petitions of right were argued together. The same evidence applies to both, and both involve the question whether under the circumstances an action in tort lies against the Crown. The learned trial judge dismissed both petitions of right, holding that the cases did not come within subsection (c) of section 20 of the Exchequer Court Act. He also held that the fire which caused damage to the appellants was of an accidental character and that negligence had not been proved. These two questions are the only ones which call for determination on this appeal.

First question. Does the cause of action come within the terms of subsection (c) of section 20 of the Exchequer Court Act?

The object of section 20 is to determine in what matters the Exchequer Court has exclusive original jurisdiction, although of course it also creates liability. Subsection (c) as amended in 1917, by 7-8 Geo. V., ch. 23, reads as follows:—

> (c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

In the French version the words "any public work" are translated by "tout ouvrage public".

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Before this amendment subsection (c) was as follows (R.S.C. ch. 140):—

(c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any public officer or servant of the Crown, while acting within the scope of his duties or employment.

The change in subsection (c) was effected by the transposition of the words "on (upon) any public work". Before the amendment an action lay against the Crown for any death or injury to the person or to property *on any public work*, resulting from the negligence, etc. Now an action lies for any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting, etc., *upon any public work*.

Before the amendment, in *Piggott* v. *The King* (1) servants of the Crown engaged in building a cement dock on the Detroit River caused damage by their blasting operations to the suppliant's dock adjoining the work carried on by the Crown. The Exchequer Court and this court held that to render the Crown liable under subsection (c) for injury to property such property must be *on a public work* when injured. Some of the learned judges criticised the law as it then stood, holding that the words "on any public work" were misplaced. The amendment having been made in the year following this decision, it is not unreasonable to suppose that the intention was to bring such a claim as the one dismissed in *Piggott* v. *The King* (1) within the ambit of the amended clause.

The learned trial judge however held himself bound by the construction of the words "any public work" in a series of decisions enumerated in his reasons for judgment.

(1) [1916] 53 Can. S.C.R. 626.

Before referring to these decisions it will be well to mention that the appellants' claims arise out of the following circumstances. In March, 1916, the Department of Militia and Defence rented, from Messrs. A. E. Rea & Co., the ground floor and the basement of the Arcade Building, 194 Sparks Street, Ottawa, as a recruiting station for soldiers, the rent being $200.00 per month and the tenancy being terminable at any time on fourteen days notice. While the building was thus occupied, it was destroyed by fire on the night of the 12th to the 13th December, 1917, as well as the adjoining buildings occupied by the appellants, and it was alleged that their stock in trade was destroyed. The petitions of right claimed damages.

I have very carefully examined the following decisions of this court, referred to by the learned trial judge, where the construction and effect of subsection (c) before its amendment were considered.

City of Quebec v. *The Queen* (1); *The Queen* v. *Filion* (2); *Larose* v. *The King* (3); *Hamburg American Packet Company* v. *The King* (4); *Letourneux* v. *The King* (5); *Paul* v. *The King* (6); *The King* v. *Lefrançois* (7); *Chamberlin* v. *The King* (8); *Compagnie Generale d'Enterprises Publiques* v. *The King* (9).

In all these cases the collocation of the words "any public work", in subsection (c) before its amendment—which words were considered as descriptive of the locality in which the death or injury occurred—was held to govern their construction, and consequently recovery was restricted to cases where the death or

(1) [1894] 24 Can. S.C.R. 448.
(2) [1894] 24 Can. S.C.R. 482.
(3) [1901] 31 Can. S.C.R. 206.
(4) [1902] 33 Can. S.C.R. 252.
(5) [1903] 33 Can. S.C.R. 335.
(6) [1906] 38 Can. S.C.R. 126.
(7) [1908] 40 Can. S.C.R. 431.
(8) [1909] 42 Can. S.C.R. 350.
(9) [1917] 57 Can. S.C.R. 527.

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damage took place "on a public work". The words themselves were not construed independently of their collocation, but in the last mentioned case it was suggested by Mr. Justice Anglin that "public work" might be read as meaning not merely some building or other erection or structure belonging to the public, but any operations undertaken by or on behalf of the Government in constructing, repairing or maintaining public property.

It is to be observed that subsection (b) of section 20 of the Exchequer Court Act, which has not been amended, also contains the words "any public work". This subsection gives the Exchequer Court exclusive original jurisdiction as to

> every claim against the Crown for damage to property injuriously affected by the construction of any public work.

In view of the collocation of the words "any public work" in subsection (c) with the same words in subsection (b), it follows that, according to the familiar rule of legal construction, these words should, if possible, receive the same construction in both subsections. Maxwell, Interpretation of Statutes, pp. 56, 57.

I think that subsections (a) and (b) deal with claims for compensation against the Crown in the exercise by the latter of statutory powers, and not with claims for damages against the Crown in respect of a tort, the latter being the subject of subsection (c) (see opinion of Fitzpatrick C. J. in *Piggott* v. *The King* (1), but this does not present any obstacle to giving to the words "any public work" in subsections (b) and (c) the same construction which no doubt was in the mind of Parliament when it enacted section 20.

(1) 53 Can. S.C.R. 626.

It appears obvious that the "public work" mentioned in subsection (b)—the construction of which might injuriously affect property and thereby cause damage— is a public work coming within the definition of "public work" and "public works" in section 2 of the Expropriation Act (R.S.C. ch. 143), to which Act subsections (a) and (b) of section 20 of the Exchequer Court Act are properly referable. It is noticeable that no definition of a public work is contained in the latter statute, and I cannot doubt that the public work referred to in subsection (b) is the public work contemplated in the Expropriation Act, for we find, in sections 22, 25, 26 and 30 of the Expropriation Act, the very words

property injuriously affected by the construction of any public work

which are in subsection (b), which property, so affected, is a subject for compensation.

The definition of the words "public work" in section 2 of the Expropriation Act is very comprehensive, and I think, for the reason stated, that we can take it as indicating the meaning of the words "any public work" in subsection (b) and also, because of their collocation, in subsection (c) of section 20 of the Exchequer Court Act. It would at all events be impossible to give a wider meaning to these words in subsection (c) than in subsection (b).

The definition in question reads as follows:—

(d) 'public work' or 'public works' means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the lighthouses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing,

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extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which money is appropriated as a subsidy only;

Can it be said that the Arcade Building was a building repaired or improved at the expense of Canada?

If these words stood alone, such a contention might be possible, but they must be taken with the words which precede and which, to quote the whole sentence, are:

* * * and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada.

It seems impossible to contend that any repairing or improving of the Arcade Building, under a lease terminable at any time on fourteen days notice, for the purposes of a recruiting office in connection with the late war, would come within the description of the property referred to in the words I have just quoted. And if I am right in this view, I think it cannot be said that the cause of action in these two cases comes within the meaning of subsection (c). It must not be forgotten that without this subsection no action would lie against the Crown in respect of a tort, and the only recourse would be against the tortfeasor if the latter could not answer that he had exercised a statutory power and was therefore not liable. As to such a defence, I may refer to what I said in *Salt* v. *Cardston* (1) at page 621.

I have therefore come to the conclusion—and but for the collocation of the words "any public work" in subsection (c) with the same words in subsection (b) I would have been inclined to adopt the contrary view— that the first question must be answered adversely to the contentions of the appellants.

(1) 60 Can. S.C.R. 612.

Under these circumstances, it becomes unnecessary to answer the second question, but, having carefully read the whole evidence, I may perhaps say that I would have had great difficulty in considering the fire as purely accidental and not as having been caused by the negligence of officers and servants of the Crown in placing the stoves in too close proximity to inflammable partitions in the part of the premises where the medical examinations were held.

The appeals must be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellants: *Fripp & Burritt.*

Solicitors for the respondent: *Hogg & Hogg.*

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*Feb. 7, 8.
*March 29.

H. D. TWIGG AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

ISAAC GREENIZEN (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Sale of land—Fraud—Collusion between vendor and one of several purchasers—Claim by purchasers for rescission—Restoration of property—Sufficiency of restitution—Damages for deceit.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), varying the judgment of Clement J. at the trial and maintaining in part the respondent's action.

The respondent sold a tract of land to a syndicate of five who formed a joint stock company to which their trustee conveyed the land subject to a mortgage to the respondent, payment of which was guaranteed by the members of the syndicate. The company subdivided the land into townsite lots and registered a plan thereof. Thereupon the Crown, under the "Land Act" R.S.B.C. (1911) c. 129, became entitled to a conveyance of one-quarter of the lots in the subdivision, which was duly made. In a suit by the

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1921] 3 W.W. R. 493.

respondent for payment under the mortgage and guarantee, an allegation in defence, sustained on the facts by the trial judge and the Court of Appeal, was that in his conveyance the respondent fraudulently misstated the price to be $75 an acre whereas the amount to be actually received by him was $50 an acre, the balance being payable by him to a member of the syndicate, a fact unknown to his co-purchasers. The respondent, having settled with two of the other members of the syndicate, the two remaining members defended the action, and, by counter claim, sought rescission of the contract of sale. The principal answer made to this claim was that restitution of the land was impracticable. The legislature of British Columbia passed an Act, retrospective in its application ("Land Act Amendment Act" [B.C.] 1921—2nd session, c. 24), enabling the provincial government, on cancellation of the subdivision plan, to reconvey lands transferred to it, as stated above, to the persons in whom the remainder of the lands covered by the plan of subdivision are vested.

The trial judge dismissed the action unconditionally and held the appellants entitled to rescission conditionally upon their being able to re-convey the lands as they stood before the sale to the syndicate; but he put upon the respondent the burden of procuring cancellation of the plan of subdivision of the lands and reconveyance by the provincial government of the lots transferred to it. The Court of Appeal held that, restitution of the land being impracticable, rescission could not be had; but that the appellants were entitled to recover damages for deceit, based on the difference between the real and fictitious price, viz. $25 per acre, which damages should be set off against the mortgage moneys due respondent.

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TWIGG v. GREENIZEN.

On appeal the Supreme Court of Canada (Idington J. dissenting), held that the judgment of the trial judge for conditional rescission should be restored with the modification that the burden of procuring cancellation of the plan of subdivision and reconveyance of the lots transferred to the provincial government should rest on the appellants, the respondent, however, being required to deposit with the Registrar of the Supreme Court of British Columbia his consent as mortgagee to such cancellation and reconveyance: *Lindsay Petroleum Co.* v. *Hurd* (1) followed.

Should restitution, without any default of the respondent, be found impracticable, the judgment of the Court of Appeal, awarding damages for deceit, should not be disturbed.

Appeal allowed with costs.

Eug. Lafleur K.C. and *G. Barclay* for the appellants.

W. N. Tilley K.C. for the respondent.

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(1) L.R. 5 P.C. 221.

THE MUNICIPAL CORPORATION OF THE COUNTY OF LINCOLN AND THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF NORTH GRIMSBY, (DEFENDANTS)..... APPELLANTS;

1921 *Nov. 10.
1922 *Feb. 7.

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF SOUTH GRIMSBY (PLAINTIFF)..... RESPONDENT.

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

Statute—Application—45 V.C. 33 s. 8 (O)—Municipal Corporation—Maintenance of road—Exemption from rates—Change in character Highway system—Continuance of exemption—Highway Improvement Act, R.S.O. [1914] c. 40 s. 5 (1).

In 1882 the County of Lincoln owned the Queenston and Grimsby Road as county property but not as a "County road". In that year the Township of Grimsby in said county was divided into the municipalities of North and South Grimsby and the Act making the partition provided that South Grimsby should not be liable to pay any part of the cost of maintaining this road which was wholly in North Grimsby. In 1917 the county, as authorized by the Highways Improvement Act, passed a by-law for the assumption of main roads in order to form a system of county highways the Q. and G. Road being included. South Grimsby, being called upon to pay its share of the cost, brought action for a declaration that it was not liable for such payment so far as it related to the said road.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

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Held, reversing the Judgment of the Appellate Division (48 Ont. L.R. 211) that by the adoption of this system the character of the Q. and G. Road and the nature of the control over its maintenance was entirely changed and the exemption granted to South Grimsby in 1882 in respect to it no longer existed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment at the trial (2) in favour of the defendants.

The question for decision on the appeal is whether or not the exemption of the respondent from payment of rates for maintenance of the Queenston and Grimsby Road, granted by 45 Vict. c. 33 sec. 8, continued after the road became part of a system of county highways under the provisions of the Highways Improvement Act. The substance of the legislation and the municipal proceedings in respect to the road are given in the head-note.

Lynch-Staunton K.C. and *Marquis* for the appellants.

McBrayne K.C. for the respondent.

THE CHIEF JUSTICE—For the reasons stated by my brother Anglin I am of the opinion that this appeal must be allowed with costs and the judgment of the trial judge dismissing the action restored.

IDINGTON J.—The question raised herein is whether or not "The Highway Improvement Act" of Ontario, c. 40 R.S.O., 1914, can be effectively executed as provided therein in counties where prior equities have been created between municipalities in relation to any part of the roads system adopted in execution of the provisions of the said enactment.

(1) 49 Ont. L.R. 315. (2) 48 Ont. L.R. 211.

The powers given by said Act to county councils begin by the enactment contained in section 4 thereof which reads as follows:—

4.—(1) The council of any county may by by-law adopt a plan for the improvement of highways throughout the county by assuming highways in any municipality in the county in order to form or extend a system of county highways, designating the highways to be assumed and improved and intended to form or be added to such system; and in case it is impracticable to benefit all the townships in any county equitably by a system of county highways such plan may provide for compensation to any township which by reason of the location of such highways or of the unequal distribution of the expenditure thereon may not benefit proportionately by a grant of such specific amount or annual sum or both to be expended in the improvement of the highways of such township as when so expended will make such plan equitable for the whole county.

The appellant County of Lincoln adopted by its by-law no. 600 the said system covering a road mileage of one hundred and fifty-seven miles, or more, in all.

This by-law was passed by the council 3rd February, 1917, and that clearly by the consent of over two-thirds of the members of council, and hence under section 11 of the Act did not need to be submitted to the electors; and, as admitted by counsel at the trial, was assented to by the Minister of Public Works on the 26th March, 1917, which I presume means or implies the assent of the Lieutenant Governor in Council required by section 12 of the Act as preliminary to the right to receive the provincial aid proffered as an inducement to adopt such a system of county highways.

Indeed the plan adopted by the by-law to carry out the system under the provisions of the Act was the result of co-operation between the Department of Public Works, represented by its Minister and officials, of whom its chief engineer took the most active part, and the members of the council and some of the township councillors.

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Every effort seems to have been made to satisfy if possible all the municipalities and when entire satisfaction could not be produced that at least the scheme should be so equitable as to comply with the fundamental principle of the enactment.

Of course there will often be in any such case some one who cannot be satisfied unless getting more than he, or those he represents, is entitled to.

As part of the means of averting such an emergency the respondent was allotted five or six miles of new road more than it was entitled to under the plan and system in order to remove any ground of complaint such as now raised herein.

The above quoted section 4 of the Act is almost literally identical with that in the Act when first passed in 1907, but amendments had been made in almost every session intervening between that and 1917 to render the Act more clearly what it was designed to produce, *i.e.*, good roads of a kind hitherto unknown in the rural districts of the province, or indeed in many urban; and to bring home to everyone the great expense involved, far exceeding anything hitherto attempted, and thereby to justify the provincial authorities in offering millions for the promotion of the accomplishment of such an object.

I thus bring matters of common knowledge, as well as the many provisions of the Act, in accord with same line of thought, to bear upon the question of the interpretation and construction of the Act, for the reason, which I most respectfully submit, that the appellate court below seems to have overlooked such considerations, as if irrelevant, and adopted the idea that the projected system was, or had something in it which must be considered as rendering it, entirely subjective to what had gone before, instead of being, as I deem

it, an entirely new conception and enterprise founded thereon, designed to supersede, so far as applied, all else in the way of road making, and to finance the doing thereof, and fix or determine the obligations which would ensue, upon the adoption of the system by any municipal county council, imposing only one obligation and that was that it must be equitable.

The primary judges of what was to be found equitable were the two-thirds majority of the county council or the majority of the electors for the county entitled to vote on such a subject followed by the majority of the county council.

The antecedent relations of any municipality to another, springing out of impotent attempts to maintain a road in efficiency, was obviously to be forever discarded, when, where and so far as nothing new substituted therefor so long as no injustice suffered thereby.

I have read the evidence to see how the matter was dealt with by those considering the new system and the means of adopting it and am pleased to find that it seems to have been approached in a proper spirit.

Notwithstanding all that, instead of at once appealing to the court to restrain the carrying out of the said by-law and to quash it, if in fact founded upon something which had substantially discarded the equitable treatment enjoined by the section which I quote above, and is the key to all else therein, the respondent acquired most substantial benefits from the adoption of the system and refrained from taking such steps until after the appellant had incurred very heavy responsibilities and brought forward one year after another by-laws imposing the proper rates to meet such liabilities and only then, on the 19th of December, 1919, brings this action, having evidently meantime

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awaited the building of the new road within its own bounds as determined by the judgment of the county council to be an equitable basis for wiping out the past.

It is not often we meet with so unjust a demand deliberately made on the part of a municipal authority however much some of them may occasionally be wanting in due care.

The respondent rests upon the statute (of 1882) 45 Vict. c. 33 which created it, and which as between it and its junior North Grimsby in separating them, provided as follows:—

> Sec. 8. From and after the last Monday of December, one thousand eight hundred and eighty-two, any rate, tax, liability or expenditure whatsoever, which, but for the passing of this Act, would have been assessable, ratable and taxable against the said original Township of Grimsby in respect or on account of the road known as the Queenston and Grimsby Road, shall be assessed, rated and taxed against the said Township of North Grimsby, and shall be borne and paid by the said Township of North Grimsby solely, and the said Township of South Grimsby shall not thereafter be liable or be rated, assessed or taxed therefor.

This section only deals with

> any rate, tax, liability or expenditure whatsoever which but for the passing of this Act would have been assessable, ratable and taxable against the said original Township of Grimsby etc.,

clearly covering only that arising out of some obligation statutory or otherwise existent antecedent to the day next after the date named for no rate could be imposed upon something which had ceased to exist or, I submit, was conceivably possible by those legislating.

Yet the first Appellate Division of the Supreme Court of Ontario in effect holds that this provision is in force in relation to the matters involved herein under the new legislation enacted a quarter of a century later and in the absence of obligation of any kind ever having bound Grimsby as such, and declares as follows:—

1. This Court doth declare that the said Municipal Corporation of the Township of South Grimsby is not liable for any portion of the levy made on it by the Municipal Corporation of the County of Lincoln under by-law number 605 of the said Municipal Corporation of the County of Lincoln in so far as the said levy is made in respect of the Queenston and Grimsby road and doth adjudge the same accordingly.

2. And this Court doth further declare that the levy made by the said Municipal Corporation of the County of Lincoln against the Municipal Corporation of the Township of South Grimsby is, in so far as the said levy is made in respect of the Queenston and Grimsby road, illegal and void.

3. And this Court doth further declare that the said Municipal Corporation of the Township of South Grimsby shall not be assessed, rated or taxed by the said Municipal Corporation of the County of Lincoln for any portion of the cost of improvements of the Queenston and Grimsby road under the provisions of by-law number 600 of the said Municipal Corporation of the County of Lincoln and doth adjudge the same accordingly.

4. And this Court doth further declare that the Municipal Corporation of the Township of North Grimsby is liable to the Municipal Corporation of the County of Lincoln for all assessments, taxes or rates in respect of the said Queenstons and Grimsby road under the said by-law number 600 which have already been imposed or levied by the said Municipal Corporation of the County of Lincoln on the said Municipal Corporation of the Township of South Grimsby in respect of the said road and doth adjudge the same accordingly.

5. And this Court doth further declare that all assessments, taxes or rates which but for the statute 45 Victoria, chapter 33, Ontario, would be leviable against the said Municipal Corporation of the Township of South Grimsby by the Municipal Corporation of the County of Lincoln in respect of the Queenston and Grimsby road shall be levied against the Municipal Corporation of the Township of North Grimsby and doth adjudge the same accordingly.

6. And this Court doth further order and adjudge that the said Municipal Corporation of the County of Lincoln be and it is hereby perpetually restrained from assessing, levying or seeking to collect from the Municipal Corporation of the Township of South Grimsby any assessment, rate or tax in respect of the Queenston and Grimsby road under the provisions of said by-law number 600 of the said Municipal Corporation of the County of Lincoln.

To appreciate the rather sweeping character of the foregoing I must observe that the Queenston and Grimsby road in question extends from the western frontier of the County of Lincoln to Queenston on the Niagara River, and by no means in a straight line.

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By reason of the crooks and turns therein it may be thirty to thirty-five miles in length.

The length thereof through North Grimsby alone leaving out Grimsby Village, is, according to the scale given in the plan filed in evidence herein, not more than seven and a half miles.

The county appellant in order to carry out this new system and provide the necessary financial means of doing so, if considered as a county scheme, had no power save the levying upon the entire assessable property within its usual jurisdiction, and that (save in cases specially provided for in the way of exemption from the operation of this new system of which the respondent herein was not) was by the annual assessments made upon the whole ratable property, based upon the equalized assessment of each municipality for any year in question.

The only exceptional case of that kind under the new system was the case provided for in section 26 of the "Highway Improvement Act" which in the case therein provided for, enabled the county council, with the approval of the Minister of Public Works, to omit from assessment any township or townships through which the road did not pass, or it might assess any township through which the road did pass for a larger or smaller amount in order to equitably assess the costs on the council of any county in which a system of roads is established under said Act, or might, upon the application of a township council and with the approval of the Minister, levy a special rate upon the township for the construction, improvement or maintenance of the road within such township.

Herein is the only remedy given for the respondent if it supposed it was entitled to any special privilege under the Act. Yet it made no move in that direction

and I submit should not now by the means invoked herein obtain indirectly what it might have obtained directly if the county council was treating it inequitably. And a special means having thus been given it the courts have no power to step in and interfere on its behalf for substantially that which is referred to another tribunal.

The opportunity was open to it on the consideration of the by-law number 600.

The Township of North Grimsby brought the case from its point of view directly under the notice of the minister and evidently he was advised it had nothing to fear on that score.

The by-law number 605, mentioned in the first of the above quoted declarations of the appellate court below, was a by-law to raise $50,000 by way of loan for the purposes of construction.

It recited by-law number 600 and its adoption under the Highway Improvement Act and that by section 15 thereof and amendments thereto any county taking advantage of the said Act might pass by-laws to raise money on debentures payable in not more than thirty years as provided by the Municipal Act not exceeding three per centum of the equalized assessment of the county, and that by sub-section 1 of section 4, c. 16, 5 Geo. V.,

> money raised by the issue of debentures for road construction under authority of this Act shall be applied solely for that purpose, and shall not be used in paying any part of the current or other expenditure of the corporation, or for road repair or maintenance.

I respectfully submit that such an expenditure of money cannot fall within the purview or meaning of said section 8, above quoted and relied upon by the court below.

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Whatever the words in section 8 of the Act of 1882 may mean we are given the history of the road and its repair or maintenance was thenceforth all that the parties concerned in such legislation possibly had in view.

That item clearly was also excluded from the scope and purpose of this by-law No. 605 specifically dealt with by above judgment of the appellate court and the later county by-laws passed to raise further moneys for purposes of construction under the adoption of the new system.

In the first place all that said section 8 of the enactment of 1882 ever had relation to, was the seven or eight miles of the Queenston and Grimsby Road which fell within the bounds of North Grimsby and in no sense as to the remainder of a road under the same name.

And in the next place by-laws nos. 600, 605, and 620, related only to construction which related to or may have related to any part of the new system. And if purely construction in any case what was meant? Clearly not the mere repair of any part of the highway constructed after another fashion.

The parties hereto have not enlightened us as to the actual facts had in view at each step in the history of all that was in question herein, as they might usefully have done.

If, as I surmise, applying general knowledge to the whole of this new system, then the development between the passing of the Act in 1882, and the use since then of other motive powers to transportation, rendered the abandonment of such road making as had existed up to said date a necessity.

To speak of repair thereof had become an absurdity. Such repairs might be made as would answer an indictment and any other means of enforcing the obligation in contemplation by the parties concerned.

The development of the automobile and its use for travel or heavy traffic plainly demanded the construction of another kind of road than previously contemplated in 1882 and which obviously would surpass in its cost anything within the ambit of the obligation named in said Act.

To speak of the new construction needed and that which had existed as identically the same or the obligation resting upon any one to repair the old as identical with the new obligation to be undertaken to meet the modern requirements of traffic is, I most respectfully submit, quite untenable.

The tenure of the soil on which repair might be done or construction of something else needed, might remain the same, but, by the way, had not even that changed?

Are we to shut our eyes to the realities, and use but a name as a guide? I submit not.

Suppose transportation advanced a step further and its needs required the appropriation of the old road allowance to the radials to such an extent as to render the roadway useless for anything else and an Act of the legislature so approved and encouraged the county council that the radial practically occupied the same space and provided for the county assuming that new burden of building and running it, how would that little bit of an Act, such as section 8, look like as if still binding? Could it be pretended to have an operative effect such as applied by the Appellate Division to this scheme.

I put this extreme illustration, though perhaps it will not look so extreme thirty years hence, if some dreams are realized.

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From the present outlook it is not so extreme as if someone in 1882 had predicted all that has happened by reason of the automobile; and sought to assign that as within the contemplation of those concerned as it clearly never was.

I submit we must have regard not only to all that has arisen but also all that had fallen into decay and the need for something new and read the legislation bringing with it a new system and a new road in light thereof, and then there is no difficulty in holding that it has superseded the enactment of 1882 so far as relates to giving vitality and efficacy to all that is involved in allowing this appeal and maintaining the judgment of the learned trial judge herein.

Apart from all that, what right have we to assume that expenditure of the $80,000 and still larger sums under later by-laws was not properly made on the remaining part of the Queenston and Grimsby Road, yet the judgment appealed from stands as a barrier to collect such debentures.

Nor do I see any means directed by the judgment appealed from to be taken to separate the expenditures on the Queenston and Grimsby Road from all else in respect of the entire system in relation to which the assessment is made so far as down to and including 1918 is concerned under the heading of good roads debentures.

I repeat that the enactment relied upon for the said judgment in appeal related evidently to that part of that Queenston and Grimsby Road lying within the original Township of Grimsby.

The greater part of that road, so named, lies between Grimsby and the frontier town of Queenston, and forms part of the system as well as that within said original Grimsby township, and, I imagine, even whether looked at in accord with or despite the reasoning of

the judgment appealed from, should furnish grounds for assessment and levying of rates as to the other three-fourths of that road. Yet the express terms of the formal judgment appealed from stands as a barrier in the way of doing so and casts the burden to be borne by South Grimsby on North Grimsby.

The formal judgment well illustrates the dangers of taking a mere name as a guide instead of the actual realities contained in the legislative enactments of recent years descriptive of another creation known under the designation of a system and in relation to which there is no prohibition by statute or otherwise to which the name Queenston and Grimsby can be properly applied as a whole, though for the purposes of obeying the new legislation and identifying and tracing that which in a small part it comprehends, the name Queenston and Grimsby may have to be used.

I submit, most respectfully, that such names may be used without transgressing section 8 of 46 Victoria, c. 33.

And when we are dealing with the adoption of a system which in this instance is to cover one hundred and fifty-seven or more miles of road, of which at the utmost the mere name Queenston and Grimsby Road could only cover a fifth and at the true measure of its significance, if any at all, a twentieth part of the scheme or system as a whole.

And why should the mere name be so extensively applied? And again, when any significance it could have is reduced to such proportions, how can the old Act be invoked?

The truth seems to be, I repeat, that the new system or scheme was intentionally designed to supersede the old and ignore all therein so long as no actual injustice done of which, I repeat, the majority of the county council were to be primary judges.

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The only proper remedy against their transgression thereof was an appeal to the Minister of Public Works or a motion to quash which never was made.

The by-law is now unassailable. The scheme provided by the Act in question is not part of the Municipal Act and must be viewed in same light as if it had been entrusted to some other authority named by the Act and so carried out with all its consequences regardless of the Act of 1882 which had no relevancy to such a new enterprise.

And yet this declaration of right is maintained in face of the further fact that under the Provincial Highway Act of 1917, passed two months or so after the adoption by appellants of the new system, the road in question had been adopted by the province 15th August, 1918, or a year before this action brought. That legislation seems to have superseded entirely any such mere municipal theories of obligation as raised herein.

Any one who recalls the many phases through which the question of roads and building thereof has proceeded, from provincial back to provincial, should realize that there is no difficulty in finding that this new scheme or system is not to be determined by mere ordinary legislation, but by the salient fact that the appellant was a mere agent or trustee of the Government to act in clear supersession of all that had preceded it.

Much was said in argument relative to the bargaining with respondent through its then reeve and his authority on behalf of his council which tends to confusion of thought for in fact no such bargain can be relied upon further than as a means of realizing whether or not all due means were taken to enable the county council to determine whether what was proposed and done answered the equitable treatment required by the Act in adopting the new system.

In concluding, however, it seems clear that section 8 upon which so much reliance has been placed never was more than a precautionary measure having relation to the plan then observed between the county, then owner of the Queenston and Grimsby Road, and some of the municipalities through which it passed, for its maintenance. That was a more temporary expedient at its best and might have been abandoned at any time by those concerned.

The county, however, was, in 1885, by section 24 of the Municipal Amendment Act of that year, which reads as follows:

> 24. Section 565 of the said Act is hereby amended by adding thereto the following sub-section:
>
> (7) For abandoning or otherwise disposing of the whole or any portion of a toll road owned by a county, whether situated wholly within the county or partly within the county and partly within an adjoining county or counties, and on the passing of any such by-law the clerk shall forthwith forward a certified copy thereof to the local municipality or municipalities through or along which any portion of said abandoned road shall run or border upon,

enabled to abandon the whole road.

That amendment was again amended by the section 566 of the Municipal Act in the Revised Statutes of Ontario of 1887, adding a proviso requiring the approval of the Lieutenant Governor in Council.

And that in turn amended in 1890 by the Municipal Amendment Act of that year, as follows:—

> 32. Sub-section 7 of section 566 of the said Act is amended by inserting after the word "toll" in the second line thereof, the words "or any other".

Again that was amended in 1893 so as to require the assent of the municipalities affected.

Clearly the municipalities through which the road ran were alone supposed to be affected.

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Again by 3 & 4 Geo. V., c. 448, now appearing in the Revised Statutes of Ontario, 1914, c. 192, sec. 448, it was again amended as follows:—

448.—(1) The council of any county may by by-law abandon the whole or any part of a toll road owned by the corporation of the county or of any other road owned by it, whether the road is situate wholly within the county or partly within it and partly within an adjoining county.

(2) Forthwith after the passing of the by-law the clerk shall transmit by registered post to the clerk of every local municipality through or along or on the border of which the road runs a copy of the by-law certified under his hand and the seal of the corporation to be a true copy.

(3) The by-law shall not take effect unless or until it is approved by the Municipal Board, nor shall it take effect as to the part of the road lying within or along or on the border of a local municipality whose council does not by by-law consent to the by-law.

(4) From and after the taking effect of the by-law the council of a municipality within which any part of the road so abandoned lies shall have jurisdiction over that part of it which lies within the municipality, and where any part of a road so abandoned lies between or on the border of two or more local municipalities the councils of such municipalities shall have joint jurisdiction over that part of it.

(5) Nothing in this section shall extend or apply to a bridge which under the provisions of this Act is to be maintained wholly or partly by the corporation of the county.

What occurs to me reading these many amendments as part of the story is how the respondent seems to have been completely ignored and the meaning it seeks to attach to section 8 never occurred to anybody concerned in this legislation.

During the early period there was absolutely nothing but the will of the County of Lincoln appellant that need be observed.

In later years some regard was had to the possibility of how such abandonment might affect the general public.

On such a tenuous thread, in the last analysis, does the contention of respondent and the judgment appealed from now hang; that is, the non-observance by the county of its powers of abandonment in a due and orderly manner before proceeding to adopt the new system.

I have no hestitation in repeating my opinion that such like threads were all swept away and respectfully submit that they should not be considered as any obstacle in the way of the will of the legislature enacting the legislation giving effect to the new system and that of the Lieutenant Governor in Council approving of what has been done in the issue of the debentures now questioned herein.

By no means do I wish to ignore the force of the argument of the appellants' counsel that the respondent should be held estopped by its course of conduct from asserting its present pretensions.

I have thought it wiser to present my argument in the way of a close adherence to the basic principle of the equitable considerations which the enactment renders imperative.

The principle upon which estoppel rests may be but another mode of expressing the same idea. And I incline to think the estoppel argument may well answer the right to have at this stage any such declaratory judgment as appealed from.

And I may add that so far as relates to by-law no. 605 and others passed for raising money for construction, very drastic remedies were given by the enactment of 5 Geo. V, c. 16, sec. 4.

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

DUFF J.—I do not dissent from the opinion of the majority. Not without a great deal of doubt, on the whole I think the preferable view is that the situation created by the Highway Act of 1914 and the

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responsibilities arising under that Act are not within the contemplation of the special Act of 1882; and that liability in respect of the rates in question is not within the classes of liabilities dealt with by section 8 of the last named enactment.

ANGLIN J.—I am, with very great respect, of the opinion that this appeal should be allowed and the judgment of the learned trial judge dismissing the action restored.

The rates in question are imposed by the County of Lincoln for the reconstruction of the highway, formerly known as the Queenston and Grimsby Macadamized Road, as part of "a system of county highways" created and provided for by a by-law of the county municipality duly enacted and ratified under the Highway Improvement Act R.S.O. [1914] c. 40. They are rates imposed under the authority of s. 15 of that Act and are not, as I think, rates, taxes, liabilities or expenditures contemplated by, or within the purview of, the exemption in favour of the respondent township conferred by section 8 of 45 V., c. 33. The road dealt with by that exemption provision was not "a county road" in the ordinary sense of that term as used in the Municipal Act, but a road which belonged to the County of Lincoln. Its history is detailed in *Lincoln* v *St. Catharines* (1). So long as it remained such a road to be kept up by the county council like other property owned by the county, the exemption provision of 45 Vict., c. 33 applied to all expenditure for its construction, renewal or upkeep. But when the County Council determined that it should become part of a system of highways under the Highway

(1) 21 Ont. App. R. 370.

Improvement Act and enacted the requisite by-law its character was entirely changed. It became subject to the regulations of the Public Works Department with respect to the construction and repair of highways (sec. 6) under the supervision of an engineer or other competent person as county road superintendent (s. 7). Liability to contribute to the cost of its reconstruction and upkeep as a highway under that system must be determined by the provisions of that Act. As put by the learned Chief Justice of Ontario in *Village of Merritton* v. *County of Lincoln* (1).

> the liability to contribute to the cost of the improvement of the road under the Highway Improvement Act is, in my view, a very different one from that with which the special Act deals: it is not a liability in connection with the assumption of the road as a "county work," but a liability arising out of the provisions of the Highway Improvement Act, by reason of the road being made a part of a system of county roads for which that Act provides.
>
> Section 15 of the Highway Improvement Act authorizes a county to pass by-laws to raise by debentures the sums necessary to meet the expenditures on highways under the Act not exceeding two per centum of the equalized assessment of the county, or to provide the money out of county funds or by an annual county rate in the manner authorized by the Municipal Act.
>
> This section clearly authorizes the imposition of a rate to meet the debentures or an annual county rate to be imposed upon all the ratable property in the county, and is, I think, in no way in conflict with the special Act, for these expenditures are not a liability or expenditure connected with the assumption of the road by the appellant, but an entirely different liability or expenditure, incurred for the purposes of the Highway Improvement Act.

With profound respect, the distinction which the Appellate Division Court suggests between the case now before us and the *Merritton Case* (1) seems to me to be more apparent than real. The learned Chief Justice says:

(1) 41 Ont. L.R. 6.

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I am of the opinion that this case is not governed by *Merritton* v. *Lincoln* (1) and that the principle of that case is not applicable.

In that case, the liability from which certain municipalities were relieved was

"any liability or expenditure connected with the assumption by the Corporation of the County of Lincoln of the Queenston and Grimsby Road as a county road" and the *ratio decidendi* was that the liability under the Highway Improvement Act was not a liability connected with the assumption of the road as a county road but a different liability arising out of the provisions of that Act.

What by the statute relieving the appellant it was relieved from was:

"any rate, tax, liability or expenditure whatsoever which but for the passing of this Act would have been assessable, ratable and taxable against the township of Grimsby in respect, or on account of the road known as The Queenston and Grimsby Road."

This language is of the most comprehensive character and not as in the Act under consideration in *Merritton* v. *Lincoln* (1) limited to liability connected with the assumption of the road as a county road.

But in the Merritton judgment I find this passage:

> It may be assumed for the purpose of the case at bar, that the special Act relieved the exempted municipalities not only from the cost of acquiring the road but also from the expenditure for its upkeep, but it does not follow from that that they are relieved from the expenditure to be made upon it because it is made part of the good roads system of the county and, in my opinion, they are not relieved from it.

When the exempting statute in question in the *Merritton Case* (1) 26 V. c. 13 is examined we find in the preamble that maintenance of the Queenston and Grimsby Road was one of the things against which relief was sought by the local municipalities then petitioning and that the legislature deemed it expedient to grant the prayer of the petition. It would therefore seem to have been quite properly assumed by the Appellate Divisional Court in the *Merritton Case* (1) that the exemption granted extended to the expenditure for the upkeep of the road as part of that connected with (that is resulting from) its assumption. I agree in the conclusion reached in the *Merritton Case* (1) and

(1) 41 Ont. L.R. 6.

think the learned trial judge in the present case was justified in applying the principle of that decision, as he did, and that his judgment, therefore, should not have been interfered with.

Moreover, under section 26 of the Highway Improvement Act, provision is made in the case of the assumption by the County Council of a main or leading road, such as the Queenston and Grimsby Road was, as a county road for the total or partial exemption, with the approval of the Minister, from assessment for the cost of such road of any township which is not served by it equally with the other municipalities in the county. By section 12 approval of the by-law establishing the county system of highways by the Lieutenant Governor-in-Council is required and provision is made for hearing any dissatisfied township council. If South Grimsby thought itself equitably entitled to have the exemption provided for by 45 V. c. 33, extended to its liability for the reconstruction and upkeep of what had been the Queenston & Grimsby Road after it was made part of the county system of highways, its recourse was to ask the county council for relief under section 26 of the statute and, if refused, to apply to the Lieutenant Governor-in-Council to withhold his approval of the by-law establishing the system until the county council should have made what the Lieutenant Governor-in-Council should deem a fair and equitable provision in its favour under section 26. Not having taken that course, it cannot in my opinion now successfully invoke section 8 of the 45 Vict. c. 33 as entitling it to refuse to pay its proportionate share of the cost of construction and upkeep of the county system of highways under the Highway Improvement Act.

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It appears from the evidence, however, that the exemption of South Grimsby provided for by the statute of 1882 was brought to the attention of the county council when it was considering the by-law for the formation of a system of county highways and was considered by it to entitle the Township of South Grimsby to specially favourable treatment in regard to the mileage of highways to be brought under the system so as to make the plan and the distribution of expenditure under it equitable in regard to that township as contemplated by section 4, rather than to an exemption, total or partial, from assessment under section 26, which, so far as the evidence discloses, was not claimed on its behalf. I am not at all satisfied that South Grimsby was entitled to ask for "compensation" under the provisions of subsection 1 of section 4 of the Highway Improvement Act. It did not fail to "benefit proportionately" either "by reason of the location of (the) highways" to be taken into the system or "of the unequal distribution of the expenditure thereon"—which are the only grounds of claim for equitable compensation mentioned in the section. The county council, however, seems to have been disposed to treat South Grimsby with absolute fairness and accordingly included in the "system of county highways," by way of making such "compensation" to it, five miles of highway in excess of the proportion to which it would have been entitled, with the result that it has benefited by the provincial contribution of 40% of the cost of constructing such additional five miles of highway provided for by the statute (5 Geo. V. c. 16, s. 5) and by the amounts assessed therefor on the other municipalities.

MIGNAULT J.—The question to be decided in this case is whether the respondent can set up, against a by-law and a levy made by the appellant under the Highway Improvement Act (R.S.O. c 40) an exemption from taxation in respect of the Queenston and Grimsby Road granted in 1882 to the respondent.

The statute giving this exemption is 45 Vict., ch. 33 (Ontario), which divided the Township of Grimsby into two municipalities, respectively called North Grimsby and South Grimsby. Inasmuch as the Queenston and Grimsby Road crosses the northern portion of the Township of Grimsby only, section 8 of this statute provided as follows:

> From and after the said last Monday of December, one thousand eight hundred and eighty-two, any rate, tax, liability or expenditure whatsoever, which, but for the passing of this Act, would have been assessable, ratable and taxable against the said original Township of Grimsby, in respect or on account of the road known as the Queenston and Grimsby Road, shall be assessed, rated and taxed against the said Township of North Grimsby, and shall be borne and paid by the said Township of North Grimsby solely, and the said Township of South Grimsby shall not thereafter be liable or be rated, assessed or taxed therefor.

In 1907, the Ontario Legislature adopted an Act for the improvement of public highways, called the Highway Improvement Act, which, as subsequently amended, is now chapter 40 of the Revised Statutes of 1914. Section 4 of this statute (I quote from the revision) empowers the council of any county to adopt by by-law a plan for the improvement of highways throughout the county by assuming highways in any municipality in the county in order to form or extend a system of county highways. And in case it is impracticable to benefit all the townships in any county equitably by a system of county highways, such plan may provide for compensation to any township, which by reason of the location of such highways

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or of unequal distribution of the expenditure thereon may not benefit proportionately, by a grant of such specific amount or annual sum to be expended in the improvement of the highways of such township as will make the plan adopted equitable for the whole county.

The statute provides for the carrying out of the purposes of the legislature, the improvement of public highways, and gives the county council power to issue debentures or to raise money by an annual county rate in the manner authorized by the Municipal Act. Section 26 contains a provision somewhat on the lines of the latter portion of section 4 empowering the county council, with the approval of the Minister of Public Works, to omit from assessment any township through which the road assumed as a county road does not pass, or to assess the townships through which it does pass, for a larger or smaller amount, in order to equitably assess the cost.

As I have stated, the question now is whether as against the scheme authorized, by R.S.O. chapter 40, and liability for assessment thereunder, the Township of South Grimsby can claim the benefit of the exemption from taxation for the Queenston and Grimsby Road enacted in 1882.

It is explained that this road is part of the public highway from Hamilton to the Niagara River, and the improvement of a highway of this character would naturally come under such a scheme of improvement as chapter 40 establishes. The history of the Queenston and Grimsby Road may be found in the report of the case of *County of Lincoln* v. *City of St. Catharines* (1).

(1) 21 Ont. App. R. 370.

It was originally constructed by the provincial government and subsequently taken over by a joint stock road company from which the county council purchased it in 1860. In *The Queen* v. *Corporation of Louth* (1), it was decided that the county corporation held this road, not as a county road belonging to the county within the meaning of the statute, but as the assignee of the road company. Some of the local municipalities in the county of Lincoln through which the road did not pass obtained legislation relieving them from any liability for expenditure connected with its assumption by the county as a county road and charging therewith, among other municipalities, the Township of Grimsby. When the latter township was divided in 1882 by the statute above referred to, South Grimsby was exempted from any rate, tax, liability or expenditure whatsoever, which, but for the passing of the statute, would have been assessable, ratable and taxable against the original Township of Grimsby in respect or on account of the Queenston and Grimsby Road, and it was declared that North Grimsby alone should bear this liability.

In *Village of Merritton* v. *County of Lincoln* (2) the Highway Improvement Act (R.S.C. ch. 40) was considered, and the Appellate Divisional Court held that assuming the statute 26 Vict. ch. 13 (one of the Acts relieving some local municipalities from liability or expenditure in connection with the assumption by the County of Lincoln of the Queenston and Grimsby Road as a county road), relieved the exempted municipalities from the expenditure for the upkeep of this road, they were not thereby exempted from liability

(1) [1863] 13 U.C.C.P. 615. (2) 41 Ont. L.R. 6.

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for the expenditure to be made upon it in consequence of it being made part of the good roads system of the county. This decision gave to the Highway Improvement Act full effect, irrespective of the exemption from taxation of certain local municipalities by special statutes, such as the one relied on by the township of South Grimsby in the present case.

Although the statute 26 Vict. ch. 13, considered in the *Merritton Case* (1) is not in identically the same terms as section 8 of 45 Vict. ch. 33, still its general effect is similar, so that the reasons given by the Appellate Divisional Court in that case should also apply here. But looking at the two statutes only, the Highway Improvement Act and the special Act relied on by South Grimsby, my opinion is that the exemption clause of the latter would not stand in the way of the County of Lincoln in proceeding under the former statute.

The decision in the English Court of Appeal in *Sion College* v. *London Corporation* (2), seems to me in point. There the appellants relied on a statute of George III providing that certain lands in the City of London reclaimed from the River Thames, should vest in the adjoining owners "free from all taxes and assessments whatsoever". The City of London Sewers Act, 1848, subsequently authorized the collection of a consolidated rate, some of the objects to which this rate was to be applied being of a kind for which rates were made at the time of the passing of the Act of George III, the others being new. It was held that the exemption applied only to then existing taxes and assessments or others substituted for them,

(1) 41 Ont. L.R. 6.

(2) [1901] 1 Q.B. 617.

and that the consolidated rate, although it included some purposes for which rates were made when the exemption was created, was substantially a new assessment, and was therefore not within the exemption.

I would allow the appeal with costs here and in the Appellate Division and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the Appellants, County of Lincoln: *Marquis & Pepler.*

Solicitor for the Appellant, North Grimsby: *G. B. McConachie.*

Solicitors for the respondents: *McBrayne & Brandon.*

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Nov. 15.
Dec. 15.

MARGARET A. JAMIESON AND THE TRUSTS AND GUARANTEE COMPANY (PLAINTIFFS).. } APPELLANTS;

AND

JOHN A. JAMIESON (DEFENDANT)..RESPONDENT.

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

Partnership — Death of partner — Continuation of business — Election by estate between profits and interest—Partnership property devised to partner—Sale in winding-up—"The Partnership Ordinance." N.W.T. C.O. [1915] c. 94, ss. 41, 44, 45.

J. and his son, the respondent, had been partners in farming operations. J. died and by his will directed payment of his share of the net profits to his wife, one of the appellants, during her lifetime. The respondent and others, executors to the will, neglected to apply for probate or to have a legal representative of the estate appointed with whom he could establish business relations. After the respondent had carried on the business of the farm for a considerable time, the widow brought action asking for the appointment of an administrator *cum testamento annexo*, a declaration that the partnership was dissolved by the death of J and a winding up including a charging of the respondent with the profits. The appellant, the Trusts and Guarantee Co., was named administrator and was later added as a party plaintiff; and both the appellants then filed a claim of election to take interest in lieu of profits, relying on section 44 of "The Partnership Ordinance". The referee named in the winding up proceedings found that there had been no profits from the operations of the farm since J's death.

Held, Duff J. dissenting, that the administrator had the right, under the above section 44, to claim interest from the testator's death on the amount of his share of the partnership assets as the business had been carried on by the respondent "without any final settlement of accounts as between the firm and the outgoing partner's estate" and as nothing in the will authorized explicitly the continuation of the business by the respondent.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

The will directed that at the widow's death a certain half of the partnership land should be conveyed to the respondent on condition of his releasing his interest in the other half and paying off half of the mortgage indebtedness. The respondent was willing to carry out the conditions and to meet his share of the partnership debts.

Per Davies C.J. and Idington and Anglin JJ.:—Notwithstanding the devise of it to respondent, this west half of the land was still liable to be sold to satisfy claims against the partnership.

Judgment of the Appellate Division (16 Alta. L. R. 241) reversed, Duff J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Walsh J. at the trial (2) and maintaining the appellant's application for confirmation of a referee's report and for judgment on further directions, in a partnership action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

J. A. Ritchie K.C. for the appellant.

Chrysler K.C. for the respondent.

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

IDINGTON J.—The late William Crawford Jamieson and his son, the respondent John Archibald Jamieson, had been for some time before the death of the former, on the 4th April, 1917, carrying on a general farm business in section 31, township 37 range 15, west of the 4th meridian in the Province of Alberta.

(1) 16 Alta. L.R. 241; [1921] 1 W.W.R. 1208. (2) [1920] 3 W.W.R. 576.

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The memorandum of agreement dated the 16th March, 1912, forming the said partnerphip, consisted of two paragraphs as follows:—

That the partnership heretofore existing between the above partners is this day dissolved, the said William C. Jamieson taking over the interest of the said Albert A. Jamieson and all his assets in the said partnership except the lands; and the said William C. Jamieson and John A. Jamieson taking over the interest of the said Albert A. Jamieson in the said lands, being section 31, in township 37 and range 15, west of the fourth meridian.

2. It is agreed between William C. Jamieson and John A. Jamieson that they shall continue in the partnership together under the terms of the existing partnership agreement between the three herein mentioned,—except that the said interest of the said William C. Jamieson in the chattels shall be two-thirds, instead of one third as heretofore; and the interest in the land shall be each an undivided one half interest; and the firm shall be known as "William C. Jamieson & Son."

There had been a firm partnership between the father, the said J. A. Jamieson and another son which explains the reference in the above paragraph no. 2.

The father by his last will and testament, dated the 18th February, 1915, appointed said respondent, John A. Jamieson, and the two other partners executors of said will and trustees of the estate and by paragraph three thereof provided as follows:—

3. I give devise and bequeath unto my said trustees and the survivors and survivor of them all my estate, real and personal, and wheresoever situate and being upon and subject to the following trusts; (A) During the lifetime of my wife Margaret to pay over to her my estate's share of net profits derived from the operation of the Bandeath Stock Farm being two thirds of the net profits of the said farm and to pay to her all net income of every nature, kind and description derivable from my estate. (B) at the death of my wife to convey unto my son, John A. Jamieson, the west half of section 31, township 37 range 15, west of the 4th meridian being that half of the Bandeath Stock Farm upon which the buildings are situated; this devise is made upon the conditions that the said John A. Jamieson do release at that time his undivided half interest in the east half of said section and also upon the condition that the said John A. Jamieson do assume and pay half of the principal and interest owing at the time of my death or subsequently accruing on any mortgage encumbrance upon the said section. (C) Also at the time of my wife's death to convert into

money the east half of said section and to convert into money unless a division is agreed on by all parties interested by two thirds undivided interest (the other one third being owned by my said son, John A.) in the stock and other chattel property on the said farm, and all my personal effects and to pay and to divide the same equally amongst my children then living except John A. the said children now being Jessie McTavish, wife of John S. McTavish, Isabella Jane, Florence Margaret Nellie, Charles, James and Albert, deducting however, from the share of my two sons, James and Albert, each the sum of $500 advanced to them in my lifetime and divide the sum of the two deductions, being $1,000, equally between my daughters Isabella Jane and Florence Margaret and Nellie. (D) To pay or deliver over unto any child or children of any of my children who should die before the time of distribution arrives the share of its or their parent *per stirpes*

The partnership was admittedly one terminable at will or death of either party.

Section 41 of "The Partnership Ordinance" of Alberta provides that:—

> On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interest as partners to have the property of the partnership applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the court to wind up the business and affairs of the firm.

Clearly that right came into force and became effective on the death of the father but nothing was done by the respondent son, John A. Jamieson, or others named as executors as above set forth, to procure probate of said will or to establish any business relation of any kind with the widow, one of the appellants, or any one else concerned as legatees or devisees for carrying on the business. Yet the said respondent John A. Jamieson, without consulting any such interested parties continued carrying on the said farm sending no accounts to any one until appellant Margaret Annie Jamieson, the widow of his father, instituted this action on the 14th of August, 1919.

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In the course of the trial thereof the appellant, the Trusts and Guarantee Company, Limited, by the direction of the court obtained, after renunciation by the executors, probate of said will, and was added party plaintiff with said widow.

A good deal of confusion of thought might have been avoided by bringing about this creating of a duly constituted representative of the estate before launching this suit.

For clearly to my mind the question raised herein, save as to the peculiar right of the widow, to which I will presently advert, must be determined by measuring the respective rights of the Trust Company as administrator and the respondent as a surviving partner.

The learned trial judge by his formal judgment expressly and properly, as I understand the law, declared as follows:—

1. This court doth declare that the partnership subsisting between the testator and the defendant, John Archibald Jamieson, was dissolved by the death of the testator.

2. And this court doth order and adjudge that the said partnership be wound up and that for such purpose it is hereby referred to the master in chambers at Calgary to take the usual and necessary partnership accounts.

3. And this court doth further order and adjudge that the master in taking such accounts shall distinguish between the operations of the partnership up to the date of the testator's death and the operations subsequent thereto.

By subsequent order Mr. Chadwick, a barrister in Calgary, was substituted for the master and discharged a somewhat difficult duty ably and well.

He took the accounts on the footing he was directed in way of distinguishing the operation of the partnership from subsequent operations.

In taking the accounts of the subsequent operations the appellants properly declined to consider profits and losses, but declared their right of charging the respondent, John A. Jamieson, with interest on the amount of the testator's share in the partnership assets used in carrying on the business after the death of the testator and the dissolution thereby of the partnership.

The relevant law is clear and express in sections 44 and 45 of "The Partnership Ordinance" of Alberta, which read as follows:—

44. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets or to interest on the amount of his share of the partnership assets.

45. Subject to any agreement between the partners, the amount due, from surviving or continuing partners to an outgoing partner or the respresentatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

The Trust Company, the appellant, would have been grossly negligent in its discharge of duty if it had failed to make such a declaration when it was quite clear that respondent, John A. Jamieson, without the slightest foundation of right to do so, proceeded as he had done.

If he had any right to suppose he had been so authorized by his father's will, he should have got it probated first and then submitted his course of duty to the court failing to reach any basis of action between himself and those others concerned.

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The statutory enactment is a most righteous one intended to provide against just such lawless courses as he pursued and as a deterrent imposes the obligation of paying the profits or interest whichever may, in the judgment of those administering the estate of a deceased partner, elect.

The widow's election or non-election is not what is to be considered.

It is the interest of the estate which, for this purpose, is represented by the party acting as duly constituted executor or administrator.

I respectfully submit that the learned judge hearing the appeal from the report of the referee who followed the law as disclosed by the statute above quoted, erred in overruling his finding of $1,592.78, as due in that respect.

That part of the judgment appealed from maintaining that ruling, I hold should be reversed and the referee's finding restored

The next ground of appeal is against the ruling of the court below that the lands of the partnership should not be sold at present

During the argument I was inclined to think as the case was presented that possibly it was a mere temporary refusal with which we should not interfere but, enlightened by a perusal and consideration of the case and the many authorities cited in appellant's factum, I am clearly of the opinion that the appeal should be allowed on this point also.

The provision in section 41 of "The Partnership Ordinance" quoted above, expressly gives the power to the representative to apply to the court, as the Trust Company appellant did and got a judgment founding proceedings for that purpose.

I do not think, under such circumstances, that either the learned trial judge should have on the hearing of motion for further directions or the Appellate Division should have, unless to rectify mere error in the course of the trial or making of such a decree as I have above quoted from, change the clear effect of such a judgment.

But it is in effect said that the trustee is exceeding his rights and powers by insisting upon the sale of the lands because the testator had expressed in the clauses of his will above quoted another intention.

It is very difficult to understand how the testator came to make such a will without making provision for carrying it out. Clearly in law there is no power in the administrator of such a will to carry on the business of the firm, and the only chance the respondent, John A. Jamieson, ever had of doing so he renounced.

Had he taken probate of the will he might have been able to argue plausibly that the carrying on of the farm was part of the duty cast upon him as trustee, and if he had duly rendered accounts and done his best, though I do not think he should have succeeded in such contention in face of the enactments I have referred to above, and the peculiar wording, or want of wording, of the will, yet he would have had something more arguable than he has now.

Indeed, though his position in doing so would, in my opinion, be untenable, yet it would not have been so utterly hopeless as the present contention that he can hang on to the west half of the section and insist on the widow taking one third of the profits in that as fulfilment of the provision or supposed provisions, of the will.

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I most respectfully submit, and ask, can anything be more absurd in face of the large indebtedness, the absolute necessity to resort to the sale of lands to liquidate it, and the rights given by the Alberta statute to the widow who wishes to know exactly what she may get under the will and then elect to take her rights under said statute if more beneficial than to attempt to carry out part of such a will?

I am of the opinion that under such circumstances the court cannot sell part of the lands and thus protect John A. Jamieson in his supposed rights disregarding the rights of the widow and all other parties.

The learned judge who heard the motion, on further directions relied upon *In re Holland* (1).

I, with great respect, cannot see in the respective surrounding circumstances and devise or bequest there in question, and those herein involved and the nature of the devise or bequest in question here, the slightest resemblance.

The case of *Farquhar* v *Hadden* (2) referred to by the learned judge deciding *In re Holland* (1) has much more resemblance to this case.

Indeed if the litigation herein continues I imagine the resemblance will soon become identical.

The cases cited in argument in this latter case and of which one is again cited herein by appellants' factum, are much more in point on that aspect of the case.

I am, however, of opinion that the point taken therein of a condition precedent being created by the will before it became operative in the way applied below, supported by the cases of *Acherley* v *Vernon* (3); *Priestley* v *Holgate* (4); *In re Welstead* (5) is an effective answer to respondent's contention.

(1) [1907] 2 Ch. 88.
(2) [1871] 7 Ch. App. 1.
(3) [1739] Willes, 153; 125 E. Reprint 1106;
(4) [1857] 3 K. & J. 286; 69 E. Reprint, 1116;
(5) [1858] 25 Beav. 612; 53 E. Reprint, 770.

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I need not elaborate for it seems to me self evident that on the facts presented herein none of the conditions have been or can be observed.

Hence the duty is obligatory on the court to direct the sale of all the lands as declared in the case of *Wild* v *Milne* (1).

It is not necessary to follow alternative suggestions and authorities relevant thereto cited in a well prepared factum.

I think the appeal should be allowed with costs here and in the court below, so far as relevant to the said several contentions.

I may be permitted to suggest that respondent, John A. Jamieson, can protect himself by being allowed to bid at the sale of the lands.

DUFF J. (dissenting)—The point of substance to be considered on this appeal turns upon the claim by the appellant against the respondent for interest. The deceased, William Crawford Jamieson, the father of the respondent and the husband of Margaret Annie Jamieson, one of the appellants, died in April, 1917, and the claim for interest arises in this way. At the time of his death W. C. Jamieson was carrying on the business of a stock farm in partnership with his son, the respondent, on section 31, township 37, west of the fourth meridian, each partner having an undivided one half interest in the land, William Jamieson's interest in the chattels being two thirds and that of the son one third. The partnership was a partnership at will. Prior to his death the father made a will by which he gave to his three trustees, who included his son, all his real and personal estate and among other things directed as follows:—

(1) [1859] 26 Beav 504; 53 E. Reprint, 993.

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During the lifetime of my wife Margaret to pay over to her my estate's share of net proceeds derived from the operation of the Bandeath Stock Farm, being two thirds of the net profits of the said Farm and to pay to her all net income of every nature kind and description derivable from my estate.

The will was not proved until December, 1919, when letters of administration with the will annexed were delivered to the Trust Company. During the *interregnum* the business was carried on by the son there being no profits for the years 1917-18. The action was brought by the widow in August, 1919 claiming an account and praying that the defendant should be charged with the profits made in the business since the testator's decease.

The claim for interest is based upon section 44 of "The Partnership Ordinance" of Alberta (C.O. 1915, ch. 94) which corresponds with section 42 of the English "Partnership Act." In so far as relevant it is in the following words:—

> Where any member of a firm has died or ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets *without any final settlement of accounts as between the firm and the outgoing partner or his estate*, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option or himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest on the amount of his share of the partnership assets.

I am unable to agree that this section has any application to the circumstances of the present case. Impliedly the will directs that the business of the stock farm shall be carried on. The testator's interest in the partnership passed to his executors and trustees of whom the respondent was one. But the intention of the testator was that the business of the stock farm should be carried on, and there was to be no interruption, no settlement at his death. The respond-

ent was entitled to insist upon this and if the representatives of the estate declined to participate, he was still entitled to have the business proceed as directed. The co-executors might, actuated by misgivings as to the personal responsibility they would incur in carrying on the business, be loath to assume the burden of administration and difficulties so arising might be so great as to compel the son to proceed without the assistance of co-executors or co-trustees; still he was entitled to do so. There was, if my reading of the will is right, no discretion vested in the trustees upon this point. If the son was willing to proceed then the course to be pursued by the estate, whoever the representatives of the estate might be, was marked out by the will.

Notice first then that section 44 operates where the surviving partner carries on without "any final" settlement of accounts as between the firm and "the outgoing partner or his estate." The presuppositions are that there is an "outgoing partner" and that it is a case in which it is the duty of the firm on the one hand to account and the right of the "estate" to demand an account on the other. Here there was in this sense no "outgoing partner". There was no duty on part of the son to account, no right on part of the estate to demand a settlement of accounts. The section therefore by its very terms excludes this case.

But the judgment of the Appellate Division may be rested on broader grounds. The enactment (sec. 44) did not change the law as it stood at the time the Act was passed The rule to which it gives statutory expression is fully explained and discussed at p. 673 of the 8th ed. of Lindley on Partnership. It is based upon the principle that where a wrongdoer has employed the property of another in trade his respons-

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ibility is to restore the property and to make the owner proper compensation for its detention. And it was considered to be just that where there were profits the wrongdoer should not be allowed to profit by his own wrong and where there were no profits that the owner should not be deprived of compensation; and consequently the rule was that the owner should have the right to claim at his option either the profits actually made or interest at the current rate. It is not of course permissible in construing a statute passed with the object of codifying some branch of the law as was the Partnership Act to resort to previous decisions for the purpose of controlling the construction of the language of the code; but it is permissible to refer to the principle which is the foundation of a statutory rule and to the applications made of that principle for the purpose of illustrating it.

It is a misapprehension to suppose that the executor derives his authority from probate. "The probate is" in the language of a work of long established reputation and weight (Williams on Executors, at p. 207)

> however merely operative as the authenticated evidence and not at all as the foundation of the executor's title; for he derives all his interest from the will itself and the property of the deceased vests in him from the moment of the testator's death;

and this passage is supported by unimpeachable authority; *Smith* v. *Milles* (1); *Comber's Case* (2). And upon these principles, it is settled law that the executor, before he proves the will,

> may do almost all the acts which are incident to his office except only some of them which relate to suits.

(1)]1786] 1 T.R. 475, at p. 480. (2) [1721] 1 P. Wms. 766.

Williams, Executors, p. 213; and such acts will stand good though the executor die without proving the will. *Brazier* v. *Hudson* (1). Indeed, it is clear that the respondent could not have refused to prove the will if the interested parties had required him to do so. *In re Stevens* (2). It is true no doubt that upon the grant of administration to the Trust Company the powers of the executors ceased; but that (the grant operated to vest a title in the administrator only as from its date) is a circumstance as I conceive of no relevancy to the present question. Technically the act of the respondent in dealing with the testator's interest in the partnership property would be the act of all the executors; and it must be assumed—there is no suggestion to the contrary— that the respondent acted without the dissent of his co-executors.

The respondent, who in substance carried out the will, acted as the will required him to act both as partner and as executor, cannot therefore be regarded either technically or otherwise as a wrongdoer within the principle upon which the statutory rule is founded.

The appeal should be dismissed with costs.

ANGLIN J.—Upon the material which the record contains—and there is nothing to warrant our surmising the existence of a state of facts other than it discloses—subject to the dominant rights of the creditors and apart from legal considerations, having regard to the provisions of the will of the late Wm. C. Jamieson, I would be inclined to regard the disposition made in this case in the provincial courts as doing substantial justice between the appellant Margaret Annie Jamieson and the respondent John Archibald Jamieson. But the Partnership Ordinance (s. 44) appears to present

(1) [1836] 8 Sim. 67.
(2) [1898] 1 Ch. 162.

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an insuperable obstacle to maintaining the judgment of the Appellate Division. The business of the partnership formerly subsisting between the respondent and his deceased father was undoubtedly carried on after the death of the latter "without any final settlement of accounts as between the firm and the outgoing partner('s) * * * estate". It could not have been otherwise, no legal representative of that estate having been appointed. Under these circumstances the statutory right of the representatives of the deceased partner to elect either to claim profits or to claim interest appears to be absolute.

Assuming that by sufficiently distinct and definite directions in the will of a deceased partner the carrying on of the business by the surviving partner so as to bind the estate of the former, without concurrence of his personal representatives and without any accounting having taken place, could be authorized and the surviving partner thereby relieved of any obligation to the estate other than that of accounting for such profits as he might make out of the business, with respect, I do not find in the will before us anything which would suffice to sanction that being done or to exclude the operation of the statute or justify the court in declining to give effect to its explicit language. The widow, although she is a life beneficiary under the will and is also the assignee of nine of the twelve children of the testator including six of the seven, other than the respondent, who take under his will subject to her life interest (the children of the seventh, Isabella, who is dead, being minors), could not elect for profits so as to bind the personal representatives to forego the right of the estate to claim interest under the statute. On this branch of the case therefore the appeal must be allowed and the report of the master restored.

The west half of section 31, devised to the respondent after the widow's death, having formed part of the partnership assets, is liable to be sold to satisfy claims against the partnership. The other assets being apparently insufficient to meet the partnership debts, this land, notwithstanding the devise of it by the deceased partner to the surviving partner, must be so dealt with. Of course all that is devised to the respondent is his deceased partner's interest and that, it is needless to say, can be ascertained only when claims of creditors of the partnership have been satisfied. Moreover the devise to the respondent is no more specific than is the bequest of the proceeds of the east half of the section and of the testator's interest in the stock to seven others of his children *nominatim*. No doubt it is desirable to carry out the provisions of the will as far as possible. But the specifically devised assets are bound to contribute ratably towards satisfaction of the debts of the partnership which bear alike on the testator's interest in all the partnership assets. Nothing in the will exempts the respondent and imposes the exclusive burden of the debts on the other beneficiaries *inter se*.

Unless some real prejudice to the creditors might ensue, however, the master in carrying out the sale of the assets should, I think, offer the west half and the east half of section 31 as separate parcels so that the amount of the proceeds of each may be ascertained and the respective interests of the children *inter se* under the will may be protected.

The matter is not yet ripe for the exercise of the jurisdiction conferred by the "Married Women's Relief Act."

The appellants are entitled to their costs here and in the Appellate Division.

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MIGNAULT J.—The respondent was in partnership with his father, the late W. C. Jamieson, for the purpose of farming and stock raising. The father died in April, 1917, leaving a will whereby he directed his executors to pay to his wife, one of the appellants, his estate's share of net profits derived from the operations of the stock farm, and also all net income of every nature, kind and description derivable from his estate, the west half of the farm, on the death of his wife, to become the property of the respondent. The executors neglected to apply for probate and subsequently renounced thereto, and, during the pendency of this litigation, the Trusts and Guarantee Co. Ltd., the other appellant, was appointed administrator with will annexed of the property of the deceased) and was added as a party plaintiff. After his father's death the respondent continued the business.

Mrs. Jamieson, the widow, brought this action in August, 1919, against the respondent, her son. She had previously acquired the shares in the estate of all her children, with the exception of those of the respondent and of one daughter, Isabella Jane Jamieson. All the children (some of them infants represented by the official guardian) were, during the suit, added as defendants.

Mrs. Jamieson's statement of claim alleged that the partnership had come to an end on the death of W. C. Jamieson, and asked, *inter alia*, that an administrator be appointed to the estate, that an account be taken of the profits of the continuation of the business by the respondent, and that the latter be charged with the profits, if any, made in the business since the testator's death.

After its appointment as administrator and its joinder as a party plaintiff, The Trusts and Guarantee Co. Limited, elected to charge the respondent with

interest in lieu of any profits on the deceased's share in the partnership. The widow had made a similar election some time previously, but I think that having in her action demanded profits on the deceased's share, she could not change her election and ask for interest. However the administrator, as representative of the deceased's estate, was not precluded from demanding interest in lieu of profits and its election stands.

The learned trial judge, in an order dated November 27th, 1919, declared that the partnership had come to an end on the death of W. C. Jamieson, and ordered that it be wound up, referring the matter to the master in chambers at Calgary to take the usual and necessary partnership accounts.

The master found that the share of the deceased in the partnership amounted to $11,987.38 and allowed interest at 5% from April 4th, 1917, to November 30th, 1919, to wit: $1,592.78. The latter amount is the chief bone of contention between the parties, for it is common ground that the operations of 1917 and 1918 gave no profits, and the appellants will be gainers if they can demand interest in lieu of profits.

The parties having appealed from the master's report, the learned trial judge decided that the will allowed the respondent to continue the partnership, subject to paying over to the widow the share of profits attributable to the deceased's share in the partnership, and that interest could not be claimed on the deceased's share. In so far as it granted interest the master's report was set aside. This judgment was affirmed by the Appellate Division.

Not without considerable reluctance, in view of the nature of the claim made against her son by Mrs. Jamieson, I have come to the conclusion that the will did not sufficiently authorize a continuation of the

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business after the death of the testator, and I think also, under section 44 of "The Partnership Ordinance" (Alberta), that the administrator of the testator's estate is entitled to claim interest in lieu of profits on the share of the deceased. I would not have agreed to allow the widow to change the election she had already made to take profits, but she does not represent the estate and the administrator does, so that the latter clearly has the right of election given by section 44 to the respresentative of the deceased partner's estate.

The courts below made no order for the sale of the land and I would make none myself, the more so as the refusal to order the sale was not a final one, and it is still open to the parties to apply for it should circumstances, such as claims made by creditors, render it necessary. The majority of my colleagues think, however, that the land should be sold.

The widow also desired to avail herself of the "Married Women's Relief Act". The court below considered that the proceedings were not so constituted as to make it possible to deal with this question. In that I agree.

The appeal must be allowed to the extent of restoring the master's allowance of interest in favour of the administrator of W. C. Jamieson's estate. The appellants are entitled to costs here and in the Appellate Division.

Appeal allowed with costs.

Solicitors for the appellants: *Wright & Wright.*

Solicitors for the respondent: *G. F. Auxier.*

DAME ELIZA CARTER AND OTHERS (MIS-EN-CAUSE) ..... APPELLANTS;

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Nov. 21.
Dec. 9.

AND

THE MONTREAL TRUST CO. AND OTHERS (DEFENDANTS) .....

AND

MAXWELL GOLDSTEIN ES-QUAL (PLAINTIFF) ..... RESPONDENT.

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

Will—Interpretation—Residuary bequest—Intestacy—Arts. 479, 596, 597, 838, 891, 902 C.C.

The two following clauses were contained in a will:

"5. I direct and desire that my executors whom I also name as trustees, shall set apart a sum of twenty-five thousand dollars and invest the same in the securities provided by law, and pay the interest or dividends from the said sum as the same are payable to my said wife during her lifetime so long as she remains my widow but in the event of her marrying then in such case the said interest or dividends shall cease and the said sums shall revert to my estate in the same manner as it will revert to my said estate upon the death of my said wife."

* * *

"15. Should there be any issue of my marriage the residue of my estate shall be kept in trust for such issue until such issue shall attain the age of twenty-one years but the interest or revenue shall be employed in the education and support of such issue but in default of such issue, the said residue shall go to my wife to whom I give the same absolutely."

PRESENT:—Sir Louis Davies, C. J. and Idington, Duff, Anglin and Brodeur JJ.

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Held that, upon the testator's death without issue and subject to the condition against re-marriage, the sum of $25,000 passed to the wife of the testator as part of the residue of the estate bequeathed to her and did not devolve upon the heirs at law as on an intestacy Judgment of the Court of King's Bench (Q.R. 31 K.B. 157) affirmed.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec (1) reversing the judgment of the Superior Court and maintaining the respondent's action.

The late C. B. Carter, K.C., of Montreal, made on the 28th of June, 1905, his will under the olograph form, which contained the clauses above recited. He had married on the 19th of April, 1905, dame Emma Blunden; and when he died on the 9th of August, 1906, there was no issue. Mrs. Carter died on the 21st of August, 1917, leaving a will under which the respondent was appointed executor. The latter brought action against the defendants, who were the executors of Mr. Carter's will, to recover the sum of $25,000 as being part of Mrs. Carter's estate. The lawful heirs of Mr. Carter were called in the case as *mis-en-cause* and they contested the action on the ground that that sum had been devolved upon them as on an intestacy.

Eug. Lafleur K.C. and *J. E. Labelle* for the appellants—The testator, by clause 5, has clearly stated his intention not to give the property of that sum of $25,000 to his wife, as he said in formal terms: "said sum shall revert to my estate * * * upon the death of my wife".

If Mrs. Carter had remarried that sum would have reverted to her husband's estate. Then, if his wife and his succession had been one and the same person, his wife if she had remarried would have received, by clause 15, what she was losing by clause 5, which conclusion brings to an absurdity.

(1) Q.R. 31 K.B. 157 sub nom. Goldstein *v.* Montreal Trust Co.

Aimé Geoffrion K.C. and *Pierre Beullac K.C.* for the respondent:—The sum of $25,000, in case of no issue, was bequeathed to the wife under clause 15, subject to the condition against re-marriage contained in clause 5.

The word "estate" in the phrase "shall revert to my estate" means "succession" or property.

THE CHIEF JUSTICE.—The question arising on this appeal was whether a sum of $25,000 passed to the widow of the testator as part of the residue of his estate bequeathed to her, or devolved upon the heirs-at-law of the testator as on an intestacy.

I have little difficulty in reaching the conclusion that the $25,000 in question did pass to the widow of the testator.

The two clauses of the will in question upon the construction of which the dispute in question must be determined read as follows:—

5. In addition to the sum given to my said wife, I direct and desire that my executors, whom I also name as trustees, shall set apart a sum of twenty-five thousand dollars and invest the same in the securities provided by law, and pay the interest or dividends from the said sum as the same are payable to my said wife during her lifetime so long as she remains a widow, but in the event of her marrying then in such case the said interest or dividends shall cease and the said sum revert to my estate, in the same manner as it will revert to my said estate upon the death of my said wife.

* * * *

15. Should there be any issue of my marriage the residue of my estate shall be kept in trust for such issue until such issue shall attain the age of twenty-one years but the interest or revenue shall be employed in the education and support of such issue, but in default of such issue, the said residue shall go to my wife to whom I give the same absolutely.

In clause 5 the testator directed the $25,000 to be set apart and the interest or annual proceeds to be paid to his widow during her lifetime and widowhood,

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but that in the event of her marrying the interest or dividends should cease and the "said sum revert to" his estate in the same manner as it would revert to his estate upon his wife's death.

I construe the word "revert" to mean "fall back into" his estate. In that paragraph, however, he made no further disposition of the corpus of the $25,000 beyond saying that under the specified contingencies it should revert to his estate.

When, therefore, in the fifteenth clause he provides that in default of issue from his marriage the residue of his estate should go absolutely to his wife, that residue necessarily included the corpus or principal of the $25,000 which was previously undisposed of. When the possiblity of issue from his marriage ceased, the absolute devise of the corpus of the $25,000 being part of the residue of his estate, would attach and become operative.

As the widow survived him and there was no issue of the marriage the bequest to her absolutely of the corpus of the $25,000 attached and became operative.

I would therefore dismiss the appeal with costs.

IDINGTON J.—The late Christopher Benfield Carter who married Emma Blunden on the 19th April, 1905 and made his last will and testament on the 28th of June, 1905, died on the 9th of August, 1906.

He had by a marriage contract on the day of his said marriage, but preceding same, bound and obliged

himself, his heirs and representatives to pay to the future wife within three months after his death, the sum of $10,000, with the right to secure the same during his lifetime and to make payments on account either by investments in the name of the future wife, by insurance on his life, by mortgage or hypothec upon immovable property or in any other way.

This transaction is of no consequence save as illustrating the provisions made in said will in respect thereof and also, I may be permitted to think, of the mentality of the testator whose said will we are now asked by this appeal to consider and reverse the construction put thereon by the Court of King's Bench which reversed that put upon it by the Superior Court.

The said wife survived the testator and died on the 21st of August, 1917, after having made her last will and testatment in the preceding February of the same year.

The respondent Goldstein was appointed thereby executor and trustee thereof.

The Montreal Trust Company and one Armstrong, a brother-in-law of the deceased testator, were the acting trustees of the said testator's estate under the said will.

The respondent Goldstein, as executor and trustee, brought before the said Superior Court the question of his right as executor of the will of the said testatrix to recover from said trustees the sum of $25,000 or the securities in which the said sum had been invested in course of their executing the trusts under the said testator's will.

The whole difficulty arises in regard to the proper interpretation and construction of the 5th and 15th clauses of said will of the testator.

The first clause revokes all former wills.

The second deals with his burial, and the third with the direction to pay all debts and funeral expenses.

The fourth refers to the said marriage contract, directs the sum of money due thereby to be handed over and paid his said wife absolutely to be disposed of by her as she thinks proper, and asks his executors to assist his wife in the investment of said sum so that she shall not suffer any loss, and that the investment should be in the best securities.

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Then follows the fifth clause which reads as follows:

5. In addition to the sum so given to my said wife, I direct and desire that my executors whom I also name as trustees, shall set apart a sum of twenty-five thousand dollars and invest the same in the securities provided by law, and pay the interest or dividends from the said sum as the same are payable to my said wife during her life-time so long as she remains my widow but in the event of marrying then in such case the said interest or dividends shall cease and the said sums shall revert to my estate, in the same manner as it will revert to my said estate upon the death of my said wife.

Then there follow a great many bequests in which appellants and others are given personal bequests.

And amongst other bequests of that kind, he gives a total of eight thousand dollars to a number of institutions as objects of charity.

As his entire estate did not much exceed, if at all, ninety thousand dollars he clearly did not think of his own relatives, amongst whom he distributed the bulk of his estate, as needy objects of further generosity or charity, or we should have, I submit, expected something more presented in his will than what I am about to refer to which it is contended was an expression of such intention.

The fifteenth clause (which is the last in the will, save an injunction in way discharge of duty on the part of his executors was to be observed and power to discharge same), is as follows:—

15. Should there be any issue of my marriage the residue of my estate shall be kept in trust for such issue until such issue shall attain the age of twenty-one years, but the interest or revenue shall be employed in the education and support of such issue, but in default of such issue, the said residue shall go to my wife to whom I give the same absolutely.

I do not find the serious difficulty that the appellants do in the interpretation or construction of this will.

I think that these two clauses, 5 and 15 read together and in light of the whole will clearly gave the whole of that fund of $25,000 to his testators to hold as an investment solely for the benefit of his widow and possible children, but to be subject to the condition against re-marriage.

It was clearly to be for her and them subject only to a forfeiture on re-marriage.

So interpreted and construed there arises no such difficulty as suggested in argument of a bequest only to become operative on her death.

There seems to me neither such difficulty nor room for the rather curious suggestion of interpreting the words in the last part of clause 5, reading as follows

> the said sums shall revert to my estate, in the same manner as it will revert to my said estate upon the death of my said wife.

either as a bequest to his heirs or as a case of intestacy.

He certainly did not (being a member of our profession) in making such a will as before us intend that as a bequest to any one; nor did he expect to die intestate, unless his widow should remarry which as a reasonable man he would, in confronting her with forfeiture of such a bequest, consider highly improbable.

We must never forget, if we would interpret correctly the situation, that this will was made within a little more than two months after his marriage when the possibility of issue was quite conceivable.

I do not think the contention should have been continued beyond the decision of the Court of King's Bench and hence conclude that this appeal should be dismissed with costs.

DUFF J.—The intention of the testator is, I think, plainly enough evinced to dispose by testamentary disposition of the whole of his property both in extent

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and in interest. A certain interest in the investments representing the sum of $25,000 passes (under clause five) to his wife—it is not necessary, I think, to determine with precision the character of that interest. What of the interest left untouched by that clause? I see no good reason why it should be supposed that it is not captured by the residuary clause—clause fifteen—so as to pass in one event to the issue and in the other to the wife. There being no issue, the combined effect of the two pertinent clauses (five and fifteen) is to give to Mrs. Carter the entire property in the sum of $25,000 and the investments respecting it.

ANGLIN J.—The late C. B. Carter bequeathed $25,000 to trustees to pay the income derivable therefrom to his wife until her death or remarriage and directed that in the latter event

> the said sums (*sic*) shall revert to my estate in the same manner as it (*sic*) will revert upon the death of my said wife.

The residue of the estate was bequeathed to the testator's children if any (to be held in trust for them until they should attain 21 years, the income meantime to be applied for their education and support) and, if he should die without issue, to his wife absolutely. He died childless. The single question is whether the sum of $25,000 passed as part of the residue bequeathed to the wife or devolved on the heirs-at-law as on an intestacy.

I find nothing in the context to limit the universality of the word "residue". 6 Aubry & Rau, 4 ed. p. 466. There may be a question, of no practical importance since Mrs. Carter's death, whether, having regard to the trust for her of the income, she could have claimed payment of the corpus of the sum of $25,000

during her lifetime. But that the ownership of that sum became vested in her on her husband's death without any child born or *en ventre*, so as to form part of her estate, I entertain no doubt whatever.

Counsel for the appellant relied greatly on the testator's direction that in the event of his widow's remarriage the $25,000 should revert to his estate. In the first place it should be noted that the widow did not remarry and therefore this direction was inoperative. The corpus in fact does not pass under it but is undisposed of by any provision of the will other than that dealing with the residue. Moreover, the direction for reverter appears to signify nothing more than that in the event of the widow's remarriage the same disposition of the $25,000 shall ensue as would occur under the other terms of his will upon her death.

The word "revert" is obviously not applicable in the technical sense to the corpus of the $25,000. Since that sum was never taken out of the testator's estate, it could not revert to it. But in using this word the testator would seem to have had in mind as well the payments of income to his wife for the rest of her life, which had been in a sense taken out of his estate by the gift of them to her defeasible in the event of her contracting a second marriage. His use of the word "sums" would so indicate. This may explain his employing the word "revert", notwithstanding its inconsistency, if so used, with the succeeding phrase

> in the same manner as *it* will revert to my estate upon the death of my said wife.

Note that the singular pronoun "it" is used to signify the "sums" directed to "revert". Inaccuracy of diction is perhaps the most notable characteristic of this entire provision. I cannot find in the use of the word "revert" however, any indication of an inten-

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tion to divert the otherwise undisposed of corpus from the residuary legatees or legatee to the heirs-at-law. Still less can I discern in the word "estate" a designation of such heirs-at-law as its ultimate recipients to the exclusion both of the children and the widow of the testator as residuary legatees. For both would have been alike excluded if the appellant's contention is sound. I cannot conceive that that was the testator's intent. His future children, if any, were the first and direct objects of his residuary bequest.

The objection made against the wife claiming under the bequest that the benefit of it would enure only to her estate after her death does not apply to the bequests to the children. Yet if the children were to take under the residuary bequest the undisposed of corpus must have been included in the residue. Once there it is there for all the purposes of the bequest including the gift over to the wife Any other construction seems impossible unless the clearly outstanding purpose of the testator—to deal with the entire residue of his estate, including all property not otherwise effectively disposed of by his will (Fuzier-Herman, vbo. Legs. No. 8778), for the benefit in the first place of his children, if any, and failing issue, for that of his wife—should be disregarded. It is trite law, recently restated in the Privy Council (*Auger* v. *Beaudry* (1), that speculation or conjecture as to the motives that may have influenced the testator in giving to his bequests the form in which we find them cannot warrant a refusal to give effect to the fair and literal meaning of the actual language he has used. We may not reject the plain bequest to the wife because in the result it may benefit her heirs rather than the heirs of the testator.

(1) [1920] A.C. 1010.

If the right of the widow to payment of the $25,000 under the residuary bequest accrued immediately on the testator's death without children, the objection, strongly urged by Mr. Lafleur, that the bequest was to a person in whose favour it could not take effect until after her death and therefore in contravention of Art. 838 C.C. would obviously have no application. The same observation might be made if her right to payment of the corpus had arisen by reason of her remarriage. But assuming that the effect of the trust created by clause 5 of the will was, in the event which happened, to defer any right to actual payment of the corpus under the residuary bequest until her death, that suspension merely postponed the execution of the residuary disposition and did not prevent her having under it during her lifetime "an acquired right transmissible to her heirs," Art. 902 C.C." The event which gave effect to" the residuary legacy to the widow was the death of the testator without any children either born or *en ventre*. Thereupon she became "seized of the right to the thing bequeathed". Art. 891 C.C.

Whatever justification any obscurity in the late Mr. Carter's testamentary dispositions may have afforded for instituting this litigation and carrying it to the Court of King's Bench, the mis-en-cause might well have been content to abide by the judgment of that court. They should pay the respondents their costs of the unsuccessful appeal here.

BRODEUR J.—Le point en litige en cette cause est de savoir si une somme de $25,000 spécifiquement mentionnée au testament de M. l'avocat C. B. Carter de Montreal appartient aux héritiers légaux de ce dernier ou à sa femme.

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Brodeur J.

M. Carter s'est marié le 19 avril 1905, à Montréal, avec Mlle. Blunden; et par son contrat de mariage, il avait donné à sa femme une somme de $10,000 payable à sa mort, avec stipulation cependant que si elle prédécédait, la donation deviendrait de nul effet. Environ deux mois après son mariage, soit le 28 juin 1905, M. Carter faisait son testament par lequel il instituait comme ses légataires universels les enfants qui naîtraient de son mariage; et il ajoutait que s'il n'avait pas d'enfants alors l'universalité de ses biens irait à sa femme. Ce legs universel est stipulé dans la clause 15 du testament et se lit comme suit:

15. Should there be any issue of my marriage, the residue of my estate shall be kept in trust for such issue until such issue shall attain the age of twenty-one years but the interest or revenue shall be employed in the education and support of such issue, but in default of such issue, the said residue shall go to my wife to whom I give the same absolutely.

Il avait dans les clauses précédentes confirmé et ratifié la donation de $10,000 mentionnée au contrat de mariage; il avait nommé un de ses parents et un de ses amis comme exécuteurs testamentaires et fiduciaires et il avait aussi fait plusieurs legs particuliers à ses parents et à ses amis; il avait au paragraphe 5 disposé d'une somme de $25,000 dans les termes suivants:

5. In addition to the sum so given to my said wife I direct and desire that my executors, whom I also name as trustees, shall set apart a sum of twenty-five thousand dollars and invest the same in the securities provided by law and pay the interest or dividends from the said sum as the same are payable to my said wife during her life time so long as she remains my widow, but in the event of marrying then in such case the said interest or dividends shall cease and the said sums *shall revert to my estate* in the same manner as it will revert to my said estate upon the death of my said wife.

M. Carter est mort un peu plus d'un an après avoir fait son testament. Sa femme lui a survécu et aux termes du testament 'elle est devenue légataire uni-

verselle, vu qu'ils n'ont pas eu d'enfants. La somme de $25,000 a été administrée par les fiduciaires, qui étaient en même temps exécuteurs testatmentaires, et le revenu en a été payé à Madame Carter, qui ne s'est pas remariée et qui est morte elle-même le 21 août 1917, laissant un testament par lequel elle nommait l'intimé, M. Goldstein, son exécuteur testamentaire, et son frère et sa soeur qui demeuraient en Angleterre, ses légataires universels.

Les héritiers de M. Carter, qui sont les appelants, prétendent que cette somme de $25,000 mentionnée au paragraphe 5 du testament de M. Carter leur appartient et que les mots "revert to my estate" veulent dire "retourne à mes héritiers légaux." M. Goldstein, l'intimé, prétend, au contraire, que cette somme devait revenir d'abord à ses enfants sous la clause 15 de ce testament et qu'à défaut d'enfants cette somme devenait la propriété de Madame Carter, et que les représentants de cette dernière ont le droit de la revendiquer.

M. Carter avait fait son testament dans l'espoir qu'il aurait des enfants; aussi il les avait institués ses légataires universels. En même tremps, il voulait assurer à sa femme les moyens de vivre et il y avait stipulé qu'elle aurait la jouissance d'une somme de $25,000 pendant sa viduité ou sa vie durante. Si M. Carter eût laissé des enfants à son décès, il ne peut pas y avoir de doute que la nue-propriété de cette somme de $25,000 aurait fait partie du patrimoine de ces enfants comme héritiers légitimes ou comme légataires universels de leur père Mais il n'a pas laissé d'enfants et alors le legs universel stipulé en leur faveur devenait caduc et sa femme recueillait la succession comme légataire universelle.

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Maintenant dans cette succession se trouvait cette somme de $25,000 (art. 596 C.C.) Malgré l'expression un peu étrange dont se servait M. Carter dans ces mots "revert to my estate," il ne pouvait pas empêcher la nue-propriété de cette somme d'appartenir à quelqu'un à son décès. Ce bénéficiaire ne pouvait pas être l'exécuteur testamentaire ou le fiduciaire qui n'est "qu'un légataire pour la forme", obligé de tenir en dépôt la somme léguée et de l'administrer jusqu'au jour de la remise au "légataire réel." Michaux, *Des Testaments*, p. 220, no. 1428; Merlin, Répertoire, vbo. fiduciaire, no. 3; Zachariae, Aubry & Rau, vol. 6, par. 694, texte et note 9.

Cette somme de $25,000, en supposant que M. Carter eût eu des enfants à son décès, aurait donc appartenu en jouissance à sa femme et en nue-propriété à ses enfants. Du moment qu'il n'avait pas d'enfants, la somme appartenait à sa femme en jouissance et en nue-propriété, vu qu'elle était instituée sa légataire universelle à défaut d'enfants. Elle aurait eu le droit de revendiquer cette somme des légataires universels à raison des dispositions de l'art. 479 du Code Civil qui déclare que l'usufruit qui était stipulé au testament en sa faveur était éteint

> par la consolidation ou la réunion sur la même tête des deux qualités d'usufruitier ou de propriétaire.

Ce qui caractérise le legs universel, c'est la vocation du légataire à l'universalité des biens qui composent le patrimoine du testateur. Dans le cas actuel, le testateur, en léguant le surplus de ses biens à sa femme, a montré son intention bien évidente d'exclure ses héritiers légitimes de sa succession.

Laurent, vol. 13, no. 516.

Aubry & Rau, vol. 7, p. 466, parag. 714.

Demolombe, vol. 4, Donations, p. 542.

Cette somme dès le décès de M. Carter est devenue la propriété absolue de Mme Carter; et alors il n'y a pas lieu d'invoquer au soutien de leur prétention, comme les appelants l'ont fait, l'article 838 du Code Civil. Le transmission de la nue-propriété de cette somme de $25,000 ne devait pas s'accomplir qu'après la mort de Madame Carter, comme le disent les appelants, mais cette transmission s'est produite dès le décès du testateur; autrement nous serions en présence d'une disposition testamentaire illégale parce qu'elle laisserait une partie des biens sans propriétaire au décès du testateur.

Le mot succession ou "estate" ne se rapporte pas simplement à l'idée de la succession légitime; il couvre aussi la succession testamentaire. De fait, la succession légitime n'a lieu que dans le cas où le *de cujus* n'a pas laissé de testament. S'il y a un testament, et s'il y a institution d'hérédité on un légataire universel de nommé, alors cette disposition testamentaire écarte la succession légitime. (Art. 597 C.C.)

M. Carter, en donnant le surplus de ses biens à ses enfants et à leur défaut, à sa femme, a donné à cette dernière la vocation, comme disent les auteurs, à l'universalité des biens qui composant son patrimoine. [Beaudry-Lacantinerie, Des Testaments, nos. 2288 & 2298]

Je suis donc d'opinion que les héritiers légitimes de M. Carter n'ont pas le droit de recueillir cette somme de $25,000 et qu'elle doit être remise à l'exécuteur testamentaire de Madame Carter.

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L'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant H. J. Johnson:
Taillon, Bonin, Morin & Laramée.

Solicitors for the other appellants:
Beauregard & Labelle.

Solicitors for the respondent:
Goldstein, Beullac & Engel.

Solicitors for the defendants:
Brown, Montgomery & McMichael.

HIS MAJESTY THE KING.....APPELLANT; 1922

*Jan. 17, 20.

AND

GEORGE JANOUSKY.....RESPONDENT.

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

Appeal—Leave to appeal—Criminal law—Conflict of decisions—Cr. C. sect. 1024a, as added by 10 & 11 Geo. V., c. 43, s. 16.

Section 1024a of the Criminal Code provides that "either the Attorney "General of the province or any person convicted of an in- "dictable offence may appeal to the Supreme Court of Canada "from the judgment of any court of appeal * * * , if the "judgment appealed from conflicts with the judgment of any "other court of appeal in a like case."

Held that the conffict must be one on a question of law.

MOTION for leave to appeal from a decision of the Court of King's Bench, appeal side, Province of Quebec, granting a new trial to the respondent, on the ground that he had been tried, against his will, jointly with another accused party.

The facts are fully stated in the judgment of Mr. Justice Idington on the application for leave by the appellant.

Lucien Cannon K.C. for the appellant.

Robert Laurier for the respondent.

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*PRESENT:—Mr. Justice Idington in Chambers.

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IDINGTON J.—The Attorney General for Quebec applies under section 1024*a*, amending by s. 16 of ch. 43 of 10 & 11 Geo. V, the Criminal Code, for leave to appeal from the judgment of the Court of King's Bench, appeal side, whereby the above named George Janouski has been granted a new trial, and the ground taken is that said judgment conflicts with the judgment of the Court of Appeal for British Columbia in the case of *Rex* v. *Davis* (1) where a new trial was refused notwithstanding that the appellant had been tried, against his will, jointly with another accused party.

I am, after a perusal of the several notes of judgment herein and a comparison thereof with the several notes of judgment in the *Davis Case* (1) unable to recognize any such conflict between the judgment herein and that in the *Davis Case* (1) as to furnish a basis upon which I could properly rest such an order as applied for.

The result to the respective prisoner in each case is quite different, and so were the relevant facts and circumstances which the respective courts had to consider and pass upon quite different.

The court in the *Davis Case* (1) was able to say in the light of the said facts and circumstances to be considered that there was no miscarriage of justice; but in this case the court unanimously came to the conclusion that as the result of a joint trial there had been a miscarriage of justice.

In neither case were the reasons assigned such as to lead to the unanimous conclusion that a separate trial where several accused were jointly indicted could be claimed as of right.

(1) [1914] 19 B.C. Rep. 50; 22 Can. C.C. 431.

I think that the conflict had in view in the amendment, clearly must be one of law and not any one of the accidental results of litigation from a different set of facts and circumstances. The object thereby sought is to render the administration of the criminal law as uniform as possible.

I agree fully in the desirability of our doing what we can to bring about such result.

To give leave to appeal herein would not promote such an object but on the contrary, I fear, tend to confusion.

I doubt if the denial or granting of a separate trial to one jointly indicted which rests on the exercise of sound discretion can ever become the subject of leave to appeal under the amendment in question.

Having formed an opinion adverse to the application herein, I felt it advisable to consult such of my colleagues as available and may say that a sufficient number to constitute a majority of the court agree in the result reached, though in no way responsible for the foregoing reasons which I assign for refusing the order allowing appeal. I am by no means to be taken as having formed or desired to express any opinion upon the merits of the decisions either in this case or that relied upon.

Motion dismissed.

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*Feb. 27.
*Mar. 15.

MIKE PROSKO.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Charge of murder—Warrant against accused in United States as undesirable—Admissions before emigration officers—Admissibility of evidence—Voluntary statement.

A warrant of arrest having been issued against the appellant on a charge of murder committed in a lumber camp near Quebec, his presence in the City of Detroit was discovered a year later by a Canadian detective. Instead of instituting extradition proceedings, the detective obtained the arrest of the appellant under a warrant of deportation, as an undesirable, issued by the U. S. Imigration authorities. On being brought before two emigration officers and informed that he would be deported, the appellant declared that he was "as good as dead". The officers asked: "Why?"; and the appellant then answered by making certain admissions as to his presence at the lumber camp at the time of the murder. At the trial, the two officers gave evidence as to these statements by the accused.

Held that the evidence was admissible, as the statements made by the accused were "voluntary" within the rule laid down in the case of *Ibrahim* v *The King* ([1914] A.C. 599), Mignault J *dubitante.*

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, upholding the conviction of the appellant and dismissing the application made by him for a new trial on a stated case.

*PRESENT.—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Alleyn Taschereau K.C. for the appellant.

Lucien Cannon K.C. for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the Court of King's Bench of the Province of Quebec, which by a majority upheld the conviction of the appellant Prosko, or "Big Mike" as he was generally called, on the charge of the murder of a man in one of the lumber camps of Quebec. Prosko had been tried jointly with another man named Janousky before Chief Justice Sir François Lemieux and a jury. Both were found guilty by the jury; but on appeal to the Court of King's Bench, the conviction against Janousky was unanimously quashed and a new trial granted to him, while the conviction against the appellant Prosko was by a majority of that court upheld, the Chief Justice Lamothe and Greenshields J. dissenting.

The reasons of the court for quashing the conviction against Janousky substantially were that certain statements, admissions or confessions made to the police officers of the city of Detroit by Prosko when he was in custody there, as to his own and Janousky's connection with the murder for which they were being jointly tried were inadmissible as against Janousky, and calculated to prejudice his receiving a fair and impartial trial, and this notwithstanding that the trial judge in charging the jury had fully and explicitly

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told them they were not to consider or give any weight to these alleged admissions or statements or confessions, as they were called, of Prosko as against his co-prisoner Janousky.

The court was unanimous on this point of granting a new trial to Janousky but a majority, as I have stated, held, and in my opinion, properly that these statements, admissions or confessions of Prosko were admissible against himself in the circumstances and under the conditions in which they were made, and that they would not interfere, in Prosko's case, with the judicial discretion exercised by the trial judge in refusing to grant the application of counsel for a separate trial of each of the prisoners.

The questions reserved for the consideration of the Court of King's Bench were as follows:—

(1) Was there error in refusing a separate trial to the accused?

(2) Was there error in admitting the testimony of the two witnesses Heig and Mitte, as to certain statements or so-called admissions made by one of the accused, Prosko?

(*a*) as to the accused Prosko?

(*b*) as to the other accused Janousky?

(*c*) seeing the admissions made by Prosko were so made in the absence of Janousky, were the instructions of the trial judge to the jury that statements made by one of the prisoners did not make evidence against the other, sufficient?

(3) Was there error in admitting the testimony of the witness Roussin with respect to certain statements made by Prosko either before or after his arrest?

(4) Was there error in permitting the Crown to produce before and exhibit to the jury as exhibits certain objects which were found in the possession of one or other of the accused on or in the premises occupied by one or other of them?

So far as Janousky is concerned, the questions are finally disposed of and we need not concern ourselves with them. As to the other accused, Prosko, question (3) was abandoned at the hearing before us, leaving the three questions to be considered by us on this appeal:—

(1) the refusal of a separate trial to him;

(2) the admission in evidence of the statements or confessions sworn to by Heig and Mitte as having been made to them by Prosko; and

(3) the production as exhibits of clothing and other articles such as a mask, a false moustache and an electric torch, said to have been found in a valise or parcel in Prosko's room in his boarding house in Montreal.

With regard to the first of these questions, I have no difficulty in declining to interfere with the judicial discretion exercised by the trial judge in refusing to grant the application for such separate trial for Prosko. It is true the application was made twice; once, when the trial began and, afterwards, when it was proposed to put in Heig and Mitte's evidence respecting Prosko's statements or confessions (so-called) to them. But I am quite unable to find any possible prejudice which could arise to Prosko from this refusal. There might be and in fact the Court of King's Bench held it to be quite possible that a joint trial coupled with the admission of such evidence, notwithstanding the judge's charge to the jury that they were not to consider or give any weight to these alleged admissions or statements of Prosko as against his co-prisoner, might prejudice Janousky, and that it was impossible to say what effect they might have had on the minds of the jurymen. But as regards Prosko, admitting for the moment the admissibility of such evidence, I cannot find any possible prejudice which its admission would cause to him.

Then as to the admissibility of this evidence as against Prosko, I think the statement of Lord Sumner, when delivering the reasons for the conclusions of the Judicial Committee of the Privy Council, in the case of *Ibrahim* v. *The King* (1) correctly states the rule in that regard:

(1) [1914] A.C. 599 at p. 609.

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It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.

See also *The King* v *Colpus* (1); *The King* v. *Voisin* (2); *Rex* v. *Cook* (3).

I have read the evidence of each of these witnesses Heig and Mitte most carefully. I concede that they were persons in authority having at the time Prosko in their custody with the intention of bringing him before the United States Immigration Board to be examined whether or not he was an undesirable immigrant to the United States, and with a view to his deportation being ordered if he was found undesirable.

I fail to find the slightest evidence that Prosko's statements or confessions were induced or obtained from him either

by fear of prejudice or hope of advantage exercized or held out

by either Mitte or Heig to him. On the contrary I conclude that Prosko's statements were absolutely voluntary ones. After having been told by these witnesses in Detroit that they were going to take up his case with the United States Immigration officials and have him deported to Canada, Prosko replied:— "I am as good as dead if you send me over there." The officers in reply to this naturally asked "Why"? Whereupon Prosko proceeded to give his statement as given in evidence by these two witnesses. (It must be remembered that the time when he made these statements or confessions was before he was brought before the Immigration Board, and that later, when he

(1) [1917] 1 K.B. 574; (2) [1918] 1 K.B. 531;
(3) [1918] 34 Times L. R. 515.

was brought before that Board he repeated under oath, as Heig and Mitte say in evidence, the statement he had already made to them. The Immigration Board on hearing his statement or confession made the necessary order for his deportation). Under these circumstances I feel bound to answer the second question in the negative.

As regards the third question to be considered by us on this appeal, I feel bound to say that I cannot see any reason why the crown, having by its officer, Roussin, visited the boarding house in Montreal of Prosko, and having there been shown the rooms said to have been occupied by Prosko and one Yvasko, should not have produced the articles found there and put them in as exhibits. If the crown produced any of these articles found in this room of Prosko's it was bound, in my opinion, to produce all articles found there.

I do not attach any great importance to the production of these articles. They consisted in part of an electric flashlight, a false moustache, several photos of Prosko, a cap and other articles.

The question of their being improperly admitted as exhibits was not strongly pressed at bar, and even if they were improperly given in evidence as exhibits, which I do not at all concede, I cannot think it possible that "any substantial wrong or miscarriage" was thereby occasioned on the trial as regards Prosko.

Unless there was in our opinion such substantial wrong or miscarriage occasioned, we are forbidden by sec. 1019 of the Criminal Code to set aside the conviction or direct a new trial.

Under all these circumstances and on my findings with respect to the questions submitted to us, I am of the opinion that the appeal must be dismissed.

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IDINGTON J.—Four men entered, during the night of the 27th July, 1918, a lumber camp in the Province of Quebec, for the purpose of robbing the men therein, and, in the course of such pursuit, shot and killed one of the men there.

Two of the said four were convicted of the murder and were executed in July, 1920.

Thereafter the appellant and another named Janousky were placed on trial in Quebec. In their defence they were represented by the same counsel who asked the court to direct that they be tried separately, but this privilege was denied them.

The trial resulted in the conviction of both. Thereupon a stated case was directed by the Court of King's Bench and, upon the hearing thereof, a new trial was granted Janousky but, by a majority of the court, denied the appellant.

The learned Chief Justice and Mr. Justice Greenshields dissented from the said denial of a new trial to the appellant. Hence this appeal here based on some of the grounds taken in such dissent.

The first question so raised is as follows:

(1) Was there error in refusing a separate trial to the accused.?

The Court of King's Bench having unanimoulsy arrived at the conclusion that as to Janousky there was error, we have nothing to say as to that aspect of the case except to make clear the reason for so distinguishing.

There were many statements made by appellant which the trial court admitted in evidence against him, and in some of these he had referred to Janousky, under his nickname of "little George," in such a way as to implicate him.

There was a possibility of the jury having been impressed thereby to the detriment of Janousky and, in that result, to have confused that and somewhat similar incidents in other features of the case as presented by the entire evidence, nothwithstanding the clear and express direction of the learned trial judge to the jury to apply the evidence in such a way as to avoid such possible error.

There was no such counterpart in the evidence against Janousky alone as would tend to the confusion thereof with the case made against the appellant alone.

In the broad salient features of the case demonstrating the actual perpetration of the crime there was nothing to confuse. It is merely when the evidence of the identification of the accused, or either of them, came to be considered by the jury that there was a possibility of undesirable confusion of thought.

Whatever may have been possible in that regard relevant to Janousky, and to his detriment, I cannot see how appellant was likely to have suffered the like from anything in the evidence directed to Janousky's part, if any, in the matter in question.

Counsel for appellant, indeed did not point to anything specific in that regard but seemed to rest upon and press the possibility of appellant having been able to call Janousky as a witness on his behalf if a separate trial had been granted.

There is nothing specific in way of fact presented to support this contention.

Nor, so far as I can see, was such a pretension presented to the learned trial judge.

I cannot see any good ground for the allowance of this appeal by way of answering this question in the affirmative.

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The next question raised herein is as to the admissibility of the evidence of Heig and Mitte who swear that appellant, after having been presented with the decision of the authorities in Detroit that he was to be deported back to Canada as an undesirable citizen, said "I am as good as dead" which naturally evoked the question "how is that"? and he proceeded to to tell a story which, as I read its introduction, was not improperly induced within the meaning of the rule in that regard as set forth by Lord Sumner in the case cited to us, as follows:—

> It has long been established as a positive rule of English Criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.

I refer to the case of *Ibrahim* v. *The King*, (1) at foot of page 609 and top of 610. The *dictum* from which I quote was approved in the later case of *The King* v. *Voisin* (2).

As pointed out in argument the said case was decided on other grounds and the ruling only an incident, but nevertheless, this is a fair presentation of the rule invoked by the dissenting judges in the Court of King's Bench.

It is the inducement exercised by the officers in charge that is to be guarded against and not the accidental circumstances of an arrest and the bearing thereof on the mind of one accused that has to be guarded against.

And the evidence of each of these witnesses is introduced by a distant categorical denial of having exercised any of these practices which would bring the evidence given within the rule against its admission.

(1) [1914] A.C. 599. (2) [1918] 1 K.B. 531.

I think, therefore, the learned trial judge's ruling was right and that the question raised anent same must be answered in the negative.

Then as to Roussin's evidence the appellant was distinctly warned by him upon his arrest that anything he said would be used against him and hence no ground for the contention set up.

In truth it seems to have been assumed in argument here as hopeless to argue, if held that the evidence of the American detectives of statements made by accused, without express warning, was admissible, then Roussin's story in what he tells, so far as it was substantially the same as had been told by the said detectives, could not be rejected.

I am decidedly of the opinion that both were admissible.

The only other question upon which counsel for appellant rested his appeal was the fourth question of the stated case, which reads as follows:

> Was there error in permitting the Crown to produce before and exhibit to the jury as exhibirs certain objects which were found in the possession of one or other of the accused on or in the premises occupied by one or other of them?

I, with great respect, find it difficult to treat such a question seriously. Some of the articles found were not worthy of serious consideration by the jury, but the false moustache and flashlight, for example, were important items well worthy of consideration in a case such as this dependent to so great an extent as it was upon circumstantial evidence.

That which was incapable of being fitted into the chain of circumstances to be relied upon, of course, would be discarded by the jury to whom we must attribute common sense.

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It became the duty of the crown officer to present the suit-case contents as found and let the jury determine what was relevant and what was not. And then not leave the impression that accused was so intent in pursuit of easy money that he could think of nothing else, and hence carried only false moustaches, flashlights or glass cutters.

The question should be answered, as it was by the majority of the court below, in the negative.

The appeal herein should be dismissed.

ANGLIN J.—The material facts are sufficiently stated in the judgments delivered in the Court of King's Bench. Of the three questions argued before us only one in my opinion called for consideration, viz., whether certain statements alleged to have been made by the appellant to two American detectives (Heig and Mitte) were admissible in evidence against him. To both the other grounds of appeal s. 1019 Cr. C. appeared to me to afford a sufficient answer. But, having regard to the importance attached to the statements made to Heig and Mitte by the learned Chief Justice in charging the jury, the question of their admissibility cannot be thus disposed of.

My only reason for withholding concurrence in the judgment dismissing the appeal was that, owing to pressure of other work of the court, I had not had an opportunity of satisfying myself by a study of the record that the Crown had discharged the burden, which undoubtedly rested upon it, of establishing that the statements made by the appellant to Heig and Mitte were voluntary statements, in the sense that they had not been obtained from him by fear of prejudice or

hope of advantage exercised or held out by a person in authority. *Ibrahim* v. *The King* (1); *The Queen* v. *Thompson* (2); *The King* v. *Colpus* (3); *The King* v. *Voisin* (4).

The two detectives were persons in authority; the accused was in my opinion in the same plight as if in custody in extradition proceedings under a warrant charging him with murder. No warning whatever was given to him. While these facts do not in themselves suffice to exclude the admissions, as Duff J. appears to have held in *The King* v. *Kay* (5), they are undoubtedly circumstances which require that the evidence tendered to establish their voluntary character should be closely scrutinized. *Rex* v. *Rodney* (6).

If I should have reached the conclusion that the burden on the prosection of establishing the voluntary character of the alleged admissions had not been discharged, the proper result would have been to order not the discharge of the appellant (s. 1018 (d) Cr. C.), but his remand for a new trial (s. 1018 (b) Cr. C.) Since the majority of the court was clearly of the opinion that the impugned evidence was properly received and the appeal therefore failed, I did not feel justified in delaying the judgment and shortening the time available for consideration of the case by the Executive, merely to complete my own study of the evidence, especially in view of the fact that the case must in any event go before the Minister of Justice, who may, if he should entertain any doubt of the propriety of the conviction, grant the appellant the only relief to which he would in my opinion in any event have been entitled. (S. 1022 Cr. C.)

(1) [1914] A.C. 599 at p. 609.
(2) [1893] 2 Q.B. 12, at p. 17.
(3) [1917] 1 K.B. 574.
(4) [1918] 1 K.B. 531, at p. 537.
(5) [1904] 9 Can. Cr. C. 403.
(6) [1918] 42 Ont. L.R. 645, at p. 653.

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For these reasons, while not dissenting, I refrained from concurring in the judgment affirming the conviction.

Since the delivery of judgment, however, I have had an opportunity of considering the material evidence and I think I should state that I now see no reason to differ from the conclusion reached by the majority of the Court that the evidence in question was admissible. At all events the discretion exercised by the learned trial judge in receiving it could not properly have been interfered with. *The King* v. *Voisin* (1).

BRODEUR J.—Trois questions nous sont soumises.

La première est de savoir si l'accusé Prosko avait eu raison de demander un procès séparé de son co-accusé Janousky.

Le président du tribunal a refusé cette demande et les deux accusés ont subi leur procès en même temps et ont été trouvés coupables de meurtre.

La Cour du Banc du Roi a décidé que Janousky avait eu raison de demander un procès séparé parce que des aveux faits par son complice Prosko ont pu lui causer un tort réel et ont pu amener sa condamnation. La Cour du Banc du Roi a été d'opinion que Prosko n'avait souffert aucun préjudice d'avoir subi son procès en même temps que son complice. Un nouveau procès séparé a donc été accordé à Janousky, mais a été refusé à Prosko.

Ce dernier appelle de cette décision.

La preuve au procès a été en général commune aux deux accusés. Ils ont été vus tous les deux près de la scène du meurtre, avant et après. On a trouvé à leurs résidences respectives des effets dont se ser-

(1) [1918] 1 K.B. 531, at pp. 538, 539.

vent d'ordinaire ceux qui font du vol leur principale occupation. Dans le cas de Prosko, cette preuve de circonstances a été fortifiée par des aveux qu'il a faits avant et après son arrestation pour meurtre.

Il est bien évident que ces admissions de Prosko pouvaient lui nuire considérablement; mais ces aveux pouvaient être prouvés, que Prosko eût été mis seul en accusation ou qu'il l'eût été avec son complice. Alors un procès séparé ne lui aurait pas été plus favorable sur ce point. Il y a bien les effets trouvés chez Janousky dont la mention au procès de Prosko aurait pu lui porter préjudice. Mais on en a trouvé des semblables chez lui. Alors il me semble que cette preuve quant aux effets trouvés chez Janousky ne peut pas être considérée comme ayant causé un tort réel à Prosko. L'article 1019 du code criminel couvre le cas. Je dirais donc que le président du tribunal n'a pas fait d'erreur en refusant d'accorder à Prosko un procès séparé.

La deuxième question qui nous est soumise porte sur des aveux qui auraient été faits par Prosko aux témoins Heig et Mitte.

Le détective Roussin, qui avait été chargé de retrouver les auteurs du meurtre, avait appris que Prosko pouvait être l'un des meurtriers et, un an environ après que le crime eût été commis, il l'a retracé à Détroit, dans les Etats-Unis. Il s'est alors abouché avec deux détectives de cette dernière ville, Heig et Mitte, et ils ont décidé, pour éviter les frais d'un procès en extradition, que Prosko serait amené devant les autorités de l'immigration, qui, si elles trouvaient que Prosko n'était pas un citoyen désirable, pourraient le déporter des Etats-Unis au Canada.

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On l'arrête pour violation des lois d'immigration. On lui dit qu'il va être déporté au Canada, et alors il déclare en présence de Heigh et Mitte qu'il ne veut pas retourner au Canada; et il ajoute:" I am as good as dead". Les détectives lui demandent pourquoi, et alors il raconte qu'il avait été dans un camp avec certains hommes qui avaient alors commis un meurtre. Ces déclarations ont été faites volontairement, sans aucune menace et sans aucune sollicitation.

Les décisions récentes en Angleterre sont à l'effet que des déclarations faites comme dans le cas actuel doivent être reçues par les tribunaux. *Ibrahim* v. *The King* (1); *The King* v. *Colpus*, (2); *The King* v. *Voisin*, (3). Il est à remarquer que ces déclarations de Prosko ont été faites avant qu'il ne fût arrêté pour meurtre. Je suis d'opinion que la cour n'a pas fait d'erreur en recevant les témoignages de Heig et Mitte.

La troisième question est de savoir si les effets trouvés dans les chambres des deux accusés pouvaient être produits comme exhibits dans la cause.

Ces effets ont été produits comme éléments d'accusation. Il est de règle, surtout dans le cas de meurtre, de produire devant la cour les effets dont l'accusé aurait pu se servir pour commettre le crime dont il est accusé. On peut aussi produire des articles qui peuvent servir à l'identifier.

Il paraît certain dans cette cause que le vol a été le mobile du crime. Alors je ne vois pas pour ma part d'objection à ce que l'on produise devant la cour des articles qui sont généralement utilisés par les voleurs et que l'on trouve en la possession des accusés. Il est

(1) [1914] A.C. 599. (2) [1917] 1 K.B. 574.
(3) [1918] 1 K.B. 531 at p. 538.

possible que certains de ces articles n'ont pas dû servir à la commission du crime. Mais cette circonstance ne serait pas suffisante pour constituer dans le cas de Prosko un déni de justice ou un tort grave. Je répondrai donc négativement à cette troisième question.

En conséquence l'appel doit être renvoyé.

MIGNAULT J.—The only question raised by this appeal which appeared to me at the hearing to have any substance was whether the evidence of some statements made by Prosko at Detroit to the American detectives Heig and Mitte should have been allowed.

When these statements were made Prosko was under arrest by virtue of a warrant issued by the United States Immigration authorities, as an undesirable, which warrant was served on him by one Roussin, a Canadian detective, who was seeking to bring him to trial in Canada on a murder charge, and instead of instituting extradition proceedings, it was considered better to have Prosko deported as an undersirable when he would of course be arrested on the murder charge. Roussin brought Prosko before the Immigration authorities in Detroit, and when informed by them that he would be deported, Prosko told them that he was as good as dead. Heig and Mitte then questioned him and it was under these circumstances that he made the statements which were given in evidence.

I have serious doubts whether this evidence should have been allowed. The American detectives were persons in authority and Prosko's exclamation when told that he would be deported shows that he under-

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stood that his deportation was sought in order to have him brought to trial in Canada on the charge of murder. He evidently made the statements he did with the hope to escape deportation and his consequent arrest for murder, and the American detectives were persons in authority. It is true that he subsequently made similar admissions in Canada to Roussin, but the learned trial judge insisted in his charge on the evidence of Heig and Mitte as corroborating that of Roussin which otherwise the jury might have hesitated to accept as sufficient, so the introduction of this evidence may have caused a substantial wrong to the appellant.

A majority of the court is, however, of the opinion, that the evidence of Heig and Mitte was admissible, so that Prosko's appeal cannot succeed. Under these circumstances I have not entered a formal dissent, but I cannot do otherwise than express my serious doubts as to the admissibility of this evidence.

Appeal dismissed.

CANADA PAPER COMPANY.... (DEFENDANT)..... } APPELLANT;

AND

A. J. BROWN (PLAINTIFF) ..... RESPONDENT.

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Nov. 21.
1922
Feb. 7.

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

Injunction—Offensive odors and fumes—Residential neighbourhood—Proper remedy— Damages— Municipal control—Enforcement of injunction—Arts. 541, 957, 968, 971 C. C. P.—Arts. 5639 (14) and 5683 R. S. Q. (1909)—Art. 5991 R. S. Q. (1888)—41 V.c. 14, s. 12.

Nauseous and offensive odors and fumes emitted by a pulp mill to the detriment of a neighbouring property, causing to its occupants intolerable inconvenience and rendering it, at times, uninhabitable, are a proper subject of restraint; and, in such a case, the courts are not restricted to awarding relief by way of damages but may grant a perpetual injunction to restrain the manufacturer from continuation or repetition of the nuisance.

Although the entire neighbouring population is affected by such nuisance and the municipal authorities have not thought proper to interfere on its behalf, even if the respondent is the only person objecting he is entitled to maintain a demand for injunction, if the injury suffered by him is sufficiently distinct in character from that common to the inhabitants at large.

Per Davies C.J. and Anglin and Brodeur JJ.—When such an injunction is granted "under the pains and penalties provided by law", it is susceptible of enforcement under the provisions of Article 971 C.C.P. which gives power to the courts to punish for contempt by way of fine or imprisonment.

Per Davies C.J. and Anglin J.—The jurisdiction and practice of the Quebec courts in regard to the remedy of injunction would seem to resemble the jurisdiction and practice of English courts rather than of the courts of France. *Lombard v. Varennes* (Q.R. 32 K. B. 164) considered.

Judgment of the Court of King's Bench (Q.R. 31 K.B. 507) affirmed.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec (1), affirming the judgment of the trial court and maintaining the respondent's action.

The material facts of the case and the questions at issue are fully stated in the judgments now reported.

D. L. McCarthy K.C., *J. L. Perron K.C.* and *A. W. P. Buchanan K.C.*, for the appellant. If the odours complained of constitute a nuisance, it is a public and not a private nuisance, and consequently respondent is not entitled to an injunction: *Soltau* v. *de Held* (2); *Benjamin* v. *Storr* (3); *Bourdon* v. *Bénard* (4); *Senécal* v. *Edison Electric Co.* (5); *Bélair v. La Ville de Maisonneuve* (6); *Bird* v. *Merchants Telephone Co.* (7); *Adami v. City of Montreal* (8).

Adjacent proprietors are obliged to suffer the reasonable inconveniences which result from neighbourhood; Laurent, Droit civil français, vol. 6 p. 195; Macarel, Ateliers Dangereux, p. 16; Sirey, 1864-257 note: *Crawford v. Protestant Hospital for the Insane* (9); *Carpentier v. La Ville de Maisonneuve* (10); *Robins v. Dominion Coal Co.* (11); *Cusson v. Galibert* (12); *Bricault v. Masson* (13); *Black v. Canadian Copper Co.* (14).

In determining whether a lawful trade amounts to a nuisance, the court will consider the customs of the people, the characteristics of their business, the common

(1) Q. R. 31 K. B. 507.
(2) [1851] 21 L. J. Ch. 153.
(3) [1874] L.R. 9 C.P. 400.
(4) [1870] 15 L.C.Jur. 60.
(5) [1892] Q.R. 2 S.C. 299.
(6) [1892] Q.R. 1 S.C. 181.
(7) [1894] Q.R. 5 S.C. 445.
(8) [1904] Q.R. 25 S.C. 1.
(9) [1889] M.L.R. 5 S.C. 70.
(10) [1897] Q.R. 11 S.C. 242.
(11) [1899] Q.R. 16 S.C. 195.
(12) [1902] Q.R. 22 S.C. 493.
(13) [1911] Q.R. 40 S.C. 346.
(14) [1917] 13 Ont W.N. 255.

uses of property and the particular circumstances of the place: *St. Helens Smelting Co. v. Tipping* (1); *Hole v. Barlow* (2); *Sturges v. Bridgman* (3); *Drysdale v. Dugas* (4).

Private convenience must yield to public necessity; Revue Etrangère et Française de Legislation, 1843, pp. 425, 427, 428, 435, 438; Massè, Droit Commercial, vol. 2, p. 115, No. 889; High on Injunctions, 4th ed., pp. 707, 752; *Claude v. Weir* (5).

The courts will not interfere as against a trade on the mere ground of personal discomfort and inconvenience of a private individual: Garrett on Nuisances p. 172; *St. Helens Smelting Co. v. Tipping* (1); Spelling on Injunctions, ss. 394, 411, 417, 428; High on Injunctions, 4th ed. p. 716.

The courts will not destroy an industry when compensation ought to be awarded: *Black v. Canadian Copper Co.* (6); *Ware v. Regent's Canal Co.* (7).

Aimé Geoffrion K.C. and *G. H. Montgomery K.C.* for the respondent:—There is an obligation on the part of every owner to use his property in such a way as not to interfere with the enjoyment of other property by neighbours: Arts. 406, 1053, 1065, 1066 C.C.; *Carpentier v. Ville de Maisonneuve* (8) *Decarie v. Lyall* (9); *The Queen v. Moss* (10); *Drysdale v. Dugas* (4); *Adami v. City of Montreal* (11); *Lachance v. Cauchon* (12);

(1) [1865] 35 L.J. Q.B. 66.
(2) [1858] 4 C.B.N.S. 334.
(3) [1879] 48 L.J. Ch. 785.
(4) [1895] 26 Can. S.C.R. 20.
(5) [1888] M.L.R. 4 Q.B. 197; 16 Can. S.C.R. 575.
(6) 13 Ont. W.N. 255.
(7) [1858] 44 Eng. Rep. 1250 at p. 1256.
(8) Q.R. 11 S.C. 242.
(9) [1911] 17 Rev. de Jur. 299.
(10) [1896] 26 Can. S.C.R. 322.
(11) Q.R. 25 S.C. 1.
(12) [1915] Q.R. 24 K.B. 421.

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Gravel v. Gervais (1); *La Compagnie de Pulpe des Laurentides v. Clément* (2); *Montreal Water & Power Co. v. Davie* (3); *Ville de Sorel v. Vincent* (4); *Beamish v. Glenn* (5); *Francklyn v. People's Heat and Light Co.* (6).

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, I am of the opinion that this appeal should be dismissed with costs.

IDINGTON J.—The respondent as the owner of property acquired some years before the appellant, in conducting its business as the manufacturers of pulp and paper, had ventured upon methods complained of herein, and had built thereon for himself an expensive home and surrounded it with everything to make that home comfortable and enjoyable.

Such a venture was prompted no doubt by the sentimental reasons that the property had been the home of his father and ancestors for a hundred years or more and was suitable for a summer residence.

No matter, however, what his reasons were, as a matter of law he was entitled to reside there in comfort when and as he saw fit.

The appellant for mere commercial reasons, disregarding the rights of respondent and all others, saw fit to introduce, in the conduct of its business, a process in the use of sulphate which produced malodorous fumes which polluted the air, which the respondent was as owner for himself and his family and guests fully entitled to enjoy in said home and on said property, to such an extent as to render them all exceedingly uncomfortable.

(1) [1891] M.L.R. 7 S.C. 326.
(2) [1893] Q.R. 2 Q.B. 260.
(3) [1904] 35 Can. S.C.R. 255.
(4) [1889] 32 L.C. Jur. 314
(5) [1915] 9 Ont. W.N. 199.
(6) [1889] 32 N.S. Rep. 44.

The learned trial judge granted a perpetual injunction restraining the appellant from the use of such material in such a way as to produce such results.

Upon appeal to the Court of King's Bench in Quebec that court maintained said judgment and dismissed the appeal, the learned Chief Justice and Mr. Justice Guerin dissenting. (1)

I cannot agree with the entire reasoning of those so dissenting.

I agree with the learned Chief Justice when he seems to recognize that in principle the relevant law of England and Quebec are hardly distinguishable, but with great respect, I cannot follow his reasoning, much less that of his learned colleague, Mr. Justice Guerin, when attempting to give reasons which do not agree yet seem to me each to fall far short of protecting efficiently the rights of such an owner of property as appellant.

The discomforts arising from the operation of a business such as a railway duly authorized by law must be endured. The discomforts arising from the mass of impurities that city smoke produces must also, often being long established conditions of such life, be endured.

The legislative provisions made in France far in advance of anything we have in Canada dealing directly or indirectly with such a problem as presented herein and the opinion of commentators in light thereof and largely founded upon such light, cannot help us.

Nor, I submit, can the very minor modifications thereof, relegating to the municipal authorities the power to prohibit, be held as at all effective.

(1) Q.R. 31 K.B. 507.

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I cannot see why the power of a municipality to act, but which yet fails to act, can at all interfere with the rights of an owner to enjoy his property in the full sense thereof.

The municipality is not given and, I respectfully submit, should not be given power to take away unless upon due compensation the rights of the owner to enjoy his property which carries with it pure air, light and pure water.

The argument, that because the exercise by appellant of powers it arrogates to itself but are non-existent in law, may conduce to the prosperity of the little town or village in which the appellants' works are situated, seems to have led to a mass of irrelevant evidence being adduced, and as a result thereof the confusion of thought that produces the remarkable conclusion that because the prosperity of said town or village would be enhanced by the use of the new process therefore the respondent has no rights upon which to rest his rights of property.

I cannot assent to any such mode of reasoning or that there exists in law any such basis for taking from any man his property and all or any part of what is implied therein.

Yet upon some such possible basis the mass of evidence before us seems to have been presented.

The invasion of rights incidental to the ownership of property, or the confiscation thereof, may suit the grasping tendencies of some and incidentally the needs or desires of the majority in any community benefiting thereby; yet such a basis or principle of action should be stoutly resisted by our courts, in answer to any such like demands or assertions of social right unless and until due compensation made by due process of law.

Progress may be legislatively made in that direction by many means offering due compensation to the owners, but we must abide by the fundamental law as we find it until changed.

And I cannot find that in France or Quebec any such legal theory as that argument rests upon has any foundation.

In looking up authorities upon the question of injunction, such as this, I find in Kerr's Law of Injunctions, 4th edition, at middle of page 155 and following, what I think expresses the right of the owner to an injunction such as in question.

The history of that mode of remedy might require a volume, which I have no intention of writing, but to the curious I would commend the perusal of Story on Equity Jurisprudence, section 865 and following sections, as instructive of how in all probability the history of Quebec law, as also English equity jurisprudence, had its origin in regard to the assertion of a remedy by way of injunction.

It is a most beneficial remedy and should not be weakened or emaciated merely because of preference of its development in one jurisdiction over that of another.

I was, indeed, in considering this case and trying to find the relevant law, somewhat struck with a remark of V.C. Sir W. Page Wood, in the beginning of his judgment in the case of *Dent* v. *Auction Mart Co.* (1) and other cases, that though the doctrine invoked had been established by Lord Eldon in *Attorney General* .v. *Nichol,* (2) and never had been departed from, that it was remarkable how few instances had occurred until ten or twelve years before 1866, when he was speaking, and within that short period how the number had increased.

(1) [1866] L.R. 2 Eq. 238, at p. 245. (2) [1809] 16 Ves. 338.

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The wave, if I may so speak of progress, in way of applying any legal doctrine thus varies very much, but I must be permitted to think that the courts should be tenacious in the way of abiding by such a beneficient remedy as that by way of injunction.

The case of *The Directors of St. Helen's Smelting Co.* v. *Tipping*, in the House of Lords, (1) is one of the landmarks, as it were in the modern English law on the subject, and the case of *Crossley & Sons, Ltd.* v. *Lightowler*, (2) and cases cited therein, and the more recent case of *Shelfer* v. *City of London Electric Lighting Co.* (3) may be found instructive as to the later development.

I have not heard or read in factums presented here anything cited in conflict with the principles therein proceeded upon.

Many early cases, and even late cases, can be found if one fails to take the principle of law involved as his guide rather than many decisions going off on special grounds which seem to conflict with said leading authorities.

The subject is a very wide one and in many phases of its historical development do we find much that may not be worth considering because of the peculiar facts involved.

And, I respectfully submit, that as long as we keep in view the essential merits of the remedy in the way of protecting the rights of property and preventing them from being invaded by mere autocratic assertions of what will be more conducive to the prosperity of the local community by disregarding such rights, we will not go far astray in taking as our guide the reasoning of any jurisprudence which recognizes the identical aim of protecting people in their rights of property when employing their remedy of perpetual injunction.

I think this appeal should be dismissed with costs.

(1) 35 L.J.Q.B. 66. (2) [1867] 16 L.T. 438.
(3) [1895] 1 Ch. D. 287.

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Nevertheless whilst strongly holding that, in cases such as this, the remedy by way of damages being inefficient and hence a basis for a perpetual injunction, yet, inasmuch as there may ere long be discovered by science or mechanical device, or both combined, a means of using sulphates in the process of manufacturing such as in question herein, there should have perhaps been expressed in the formal judgment a reservation entitling the appellant to apply to the court below for relief in such event, if meantime it has observed the injunction.

Let us hope that such an inducement may lead to resorting to science in a way that is not obvious in the evidence to which we were referred in argument.

DUFF J.—The respondent has established that the enjoyment of his property as a dwelling house is prejudicially affected in a substantial degree and in a degree which entitles him to invoke the protection of the court against the injurious consequences of the manufacturing operations of the appellant company who are clearly chargeable as for a *quasi-delit* within Art. 1053 of the Civil Code.

The substantial question for consideration is whether or not the respondent is entitled to the injunction which has been awarded him. There appear to be good reasons for thinking that the discontinuance of the appellant company's operations would result in material loss and inconvenience to their employees and their families who would probably be obliged to leave the locality in which they live at present in order to find means of livelihood elsewhere. But I am not satisfied that this will be the necessary result of the relief granted to the respondent. Indeed my con-

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clusion, after a perusal of the whole evidence, is that the cessation of the appellant company's operations would be neither the necessary nor the probable result of that relief.

I am far from accepting the contention put forward on behalf of the respondent that considerations touching the effect of granting the injunction upon the residents of the neighbourhood and indeed upon the interests of the appellant company itself are not considerations properly to be taken into account in deciding the question whether or not the remedy by injunction should be accorded the plaintiff under the law of Quebec. The court in granting that remedy exercises a judicial discretion not, that is to say, an arbitrary choice or a choice based upon the personal views of the judge, but a discretion regulated in accordance with judicial principles as illustrated by the practice of the courts in giving and withholding the remedy. An injunction will not be granted where, having regard to all the circumstances, to grant it would be unjust; and the disparity between the advantage to the plaintiff to be gained by the granting of that remedy and the inconvenience and disadvantage which the defendant and others would suffer in consequence thereof may be a sufficient ground for refusing it. Where the injury to the plaintiff's legal rights is small and is capable of being estimated in money, and can be adequately compensated by a money payment, and where on the other hand the restraining or mandatory order of the court, if made, would bear oppressively upon the defendant and upon innocent persons, then although the plaintiff has suffered and is suffering an injury in his legal rights the court may find and properly find in these circumstances a reason for declining to interfere by exercising its

powers *in personam*. This is not, as was suggested in argument, equivalent to subjecting the plaintiff to a process of expropriation, it is merely applying the limitations and restrictions which the law imposes in relation to the pursuit of this particular form of remedy in order to prevent it becoming an instrument of injustice and oppression.

These last mentioned considerations, however, are not those which govern the disposition of the present appeal; the respondent's injury is substantial, is continuing, and there is no satisfactory ground for thinking that any kind of disproportionate injury to the appellant company or to others will ensue from putting into execution the remedy granted by the court below.

ANGLIN J.—My impression at the close of the argument was that the findings of the learned trial judge,—affirmed in appeal,—that the odours and gases emitted from the defendant's sulphate plant were so extremely offensive to the senses that they "caused sensible discomfort and annoyance" to the plaintiff and his family, diminished the comfort and value of the plaintiff's property and "materially interfered with the ordinary comfort of existence in the plaintiff's said home"; and that

> the plaintiff cannot be adequately compensated in damages for the deprivation of the useful enjoyment of his property by the nuisance created and maintained by the said defendant—

were well warranted. Subsequent consideration of the evidence has only served to convert that impression into a firm conviction. To these findings, moreover, I would add another. The evidence has also satisfied me that sulphate soda pulp can readily be purchased by the defendants, or, if they should prefer to take that course, can be made by them at some other place,—

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for instance at or near to their pulpwood limits—where its production will be innocuous. The manufacture of sulphate pulp at Windsor Mills is not at all essential to the defendants' continuing to produce there the classes and grades of paper for the making of which they now use such pulp prepared by a process in which sulphate of soda, salt or nitrate cake is an important ingredient.

As Mr. Justice Flynn points out, it is common ground that science has been unable to indicate any means whereby the emanation and diffusion of these highly objectionable gases and odours in the manufacture of sulphate pulp can be obviated.

The proposition that the existence of the state of affairs so found by the trial judge implies an invasion by the defendants of the plaintiff's right of enjoyment of his property, likely to be persistent, far in excess of anything justifiable under *les droits de voisinage*, and amounting to an actionable wrong entitling him to relief in a court of law and justice scarcely calls for the citation of authority. But, if authority be required, it may be found in abundance in the able judgment delivered by Mr. Justice Flynn and in the factum and memorandum of authorities filed by the respondent.

The power to grant an injunction is broad. Arts. 957, 968, C.P.C. I cannot think that, under such circumstances as the evidence here discloses, the court is restricted to giving such inadequate and unsatisfactory relief as the awarding of damages. Baudry-Lacantinerie, Des Biens, Nos. 215-225, notably 224; 2 Aubry et Rau (5 ed.) p. 305. See too *Wood v. Conway* (1); *Adams v. Ursell* (2).

(1) [1914] 83 L.J. Ch. 498, at p.502. (2) [1913] 82 L.J. Ch. 157.

Subject, therefore, to consideration of the several objections to that course taken in the dissenting opinions of the Chief Justice of Quebec and Mr. Justice Guerin, I should be disposed to agree with the learned judges who composed the majority of the Court of King's Bench (Flynn, Tellier and Howard JJ.) that the injunction granted in the Superior Court should be upheld.

Three difficulties are suggested by the learned Chief Justice: (1) The nuisance created is public and the right to suppress it belongs to the municipal authority under the R.S.Q. Arts. 5639 (14) and 5683 and not to the courts at the instance of a private property owner affected thereby: (2) It is in the interest of the great majority of the inhabitants of Windsor Mills that the operations of the defendant should not be interfered with; balance of convenience therefore requires that the injunction should be dissolved: (3) The injunction sought is not susceptible of enforcement without personal constraint of the defendants' officials.

Mr. Justice Guerin's view is that the injunction is

too radical and too heroic a remedy under the circumstances,

viz. the impossibility of operating the sulphate process without emitting the odors and gases complained of, and the non-interference of the municipal authorities—and that damages would be the appropriate legal remedy.

The nuisance caused by the defendants no doubt affects the entire neighbouring population and other persons who have occasion to come within the sphere of its annoyance. But the injury to the plaintiff's property is different in kind from the inconvenience

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suffered by the inhabitants at large—most of whom, moreover, are so dependent upon the operation of the defendants' mills for their support that they are quite prepared to submit to some personal annoyance rather than jeopardize their means of livelihood. The inaction of the municipal authorities is no doubt ascribable to similar influences. By the nuisance of which he complains the plaintiff's property is practically rendered uninhabitable and useless for the purposes for which he holds it. In my opinion he suffers an injury sufficiently distinct in character from that common to the inhabitants at large to warrant his maintaining this action. *Adami* v. *City of Montreal* (1); *Barthélémy* c. *Sénès* (2); *Derosne* c. *Puzin et al* (3); *Polsue & Alfieri, Ltd.* v *Rushmer* (4); *Francklyn* v. *Peoples Heat & Light Co.* (5); Joyce on Nuisances s. 14. The fact that the making of soda-sulphate pulp at Windsor Mills is not essential to the manufacture of the products which the defendant's mills turn out is an answer to the objection based on balance of convenience—if indeed mere balance of convenience would be a sufficient ground under the civil law of Quebec for refusing to enjoin the use of a process which necessarily entails an unjustifiable invasion of the plaintiff's legal right to the enjoyment of his property. Art. 1065 C.C.; Fuz. Herman, Code Annoté, Art. 544, Nos. 3 & 39; ibid. Arts. 1382-3, Nos. 105, 109, 244 bis; 16 Laurent, No. 199; 24 Demolombe, Nos. 503-5; *Décarie et vir* v. *Lyall & Sons.*(6).

(1) Q.R. 25 S.C. I.
(2) S. 1858 1, 305.
(3) S. 1844 1, 811, at p. 813.
(4) [1907], A.C. 121; [1906] I Ch. 234.
(5) 32 N.S.R. 44.
(6) 17 Rev. de Jur. 299.

I am of the opinion that the power of the Quebec Courts to punish for contempt (Art. 971 C.P.C.) affords a means of enforcing their orders which sufficiently answers the suggestion that the injunction granted cannot be executed and is therefore obnoxious to Art. 541 C.P.C. In France while the court will enjoin the defendant from doing that which he is under obligation not to do, it has not the means of enforcement of the order available under English law and in Quebec by process of punishment for contempt (Art. 971 C.P.C.; See Art. 1033m. added to old Code of Procedure by 41 V. c. 14 s. 12; Art. 5991, R.S.Q. 1888). In France, the court can award damages in advance for refusal to obey, either in a lump sum or *toties quoties*, but not as a means of constraint or of indirect compulsion. D. 82, 2, 81; S. 1897. 2. 9, 12; 3 Garsonnet, Procédure, No. 528; 24 Demolombe No. 491; Baudry-Lacantinerie, Des Biens No. 224, n. 3. France has no provision similar to Art. 971 C.C.P. and the Art. 1142 C.N. is more restrictive than the initial clause of Art. 1065 C.C. Whatever they may have been theretofore, since the changes made in 1878, by 41 V. c. 14, the jurisdiction and practice of the Quebec courts in regard to the remedy of injunction would seem to resemble the jurisdiction and practice of English courts rather than of the courts of France. *Wills* v. *Central Ry. Co.*(1). I cannot assent to the third holding in *Lombard* v. *Varennes* (2) as indicated in the head note. The arm of injunction would fail in one of its most useful applications if it should, on this ground, be held not to be available in a case such as that at bar. I am, with respect, satisfied that this objection rests on a mistaken conception of Art. 541 C.P.C.

(1) [1914] Q.R. 24 K.B. 102.
(2) [1921] Q.R. 32 K.B. 164.

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Nor is it possible to maintain that damages will afford an adequate remedy to the plaintiff. If he were confined to this method of redress he would, in effect, be forced to submit to partial expropriation of his property, as Mr. Justice Tellier suggests, without statutory authority for such an exercise of eminent domain.

No delay was established such as might debar the plaintiff from a right to relief. *Francklyn* v *People's Heat & Light Co.* (1)

In my opinion the difficulties suggested to granting the plaintiff's prayer for an injunction are more imaginary than real. I should be sorry indeed to think that this branch of the jurisdiction of the courts of Quebec is as restricted as counsel for the defendants contends.

To confine the operation of the injunction to the periods of the year during which the plaintiff, his family or friends occupy the residence at Windsor Mills seems to be scarcely practicable. But there is no reason why liberty should not be reserved to the defendants to apply to be relieved from the inhibition if they can satisfy the Court that owing to scientific discovery sulphate pulp can and will be manufactured by them without interference with the plaintiff's right to the enjoyment of his property.

I would dismiss the appeal.

BRODEUR J.—Cette cause nous amène à considérer les limites dans lesquelles se trouve circonscrit l'exercice du droit de propriété pour l'intérêt réciproque des fonds voisins.

(1) 32 N.S. Rep. 44.

L'appelante est une compagnie manufacturière qui fabrique du papier et dont les usines constituent l'industrie la plus importante de la ville de Windsor Mills qui est une ville d'environ deux mille âmes.

Le demandeur-intimé est propriétaire d'une superbe maison de campagne dans le voisinage de ces usines. C'est une propriété qui depuis plusieurs générations appartient à sa famille et qu'il a embellie depuis qu'il s'en est porté acquéreur en 1905. Il se pourvoit en dommages contre la compagnie appellante parce que l'une des usines de cette dernière transmet des odeurs fétides dont l'effet est de rendre inhabitable à certains temps sa maison et ses dépendances, et il demande à ce qu'il soit interdit à la compagnie de se servir, dans sa fabrication, du sulfate de soda qui cause ces odeurs fétides.

A l'époque où le demandeur a acheté cet établissement, la compagnie appellante, la Canada Paper Company, exploitait ses fabriques, mais cette exploitation ne causait aucun inconvénient; on s'y servait alors de matériaux et de produits chimiques qui n'avaient pas le désavantage d'incommoder les voisins. Dans ces dernières années, pour des raisons qui ne sont pas bien clairement déterminées, la Canada Paper Company a jugé à propos de faire usage de sulfate de soda et d'autres produits chimiques qui, sous certaines conditions climatériques, incommodaient gravement les voisins et notamment le demandeur Brown par leurs évaporations désagréables et insalubres.

Monsieur Brown en a alors causé avec les autorités de la compagnie, a eu la promesse qu'on remédierait à ce qu'il considérait être un exercice abusif de propriété; mais malgré ces entrevues et ces promesses rien de tangible n'a été accompli de sorte qu'il s'est

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vu dans l'obligation de recourir aux tribunaux. Il a eu gain de cause en Cour Supérieure et en Cour de Banc du Roi. Les tribunaux inférieurs cependant ne lui ont pas accordé de dommages, mais ils ont formellement ordonné à la compagnie de cesser de faire usage des produits chimiques qui causaient ces odeurs.

Quelles sont les conséquences de cet abus au point de vu légal?

Il ne peut pas y avoir de doute, vu les faits prouvés dans la cause, que ces odeurs étaient absolument insupportables et qu'elles constituaient de la part de la compagnie un exercice abusif de sa propriété au détriment de ses voisins et notamment du demandeur. Tous les juges sont unanimes sur ce point.

Fournel, dans son *Traité du voisinage*, 4ème édition, p. 336, dit:—

> Une des premières lois du voisinage est de ne laisser au dehors aucune odeur qui soit de nature à infecter l'air et à compromettre la santé de ceux qui le respirent.

Il nous cite un édit de François 1er en date du mois de novembre 1539 qui faisait les défenses les plus rigoureuses contre les causes d'infection. Cet édit est devenu en force dans la province de Québec lorsque les lois générales du royaume de France y ont été introduites en 1663.

Fournel nous cite également (loc. cit. p. 337) le cas du nommé Collin Gosselin qui au 15ème siècle veut établir un atelier de potier de terre. Les voisins ne tardèrent pas à ressentir l'inconvénient d'un pareil voisinage par l'infection qui résultait et obtinrent du Châtelet la cessation des opérations.

En 1661, une ordonnance a été rendue au même effet contre certains habitants de la Villette qui se servaient de certains abattis de boucheries pour fumer leurs terres.

Les lois modernes françaises ont donné à l'administration certains pouvoirs qui naturellement n'ont pas force de loi ici. Je crains cependant que cette législation moderne ait donné lieu à une certaine confusion dans la considération de cette cause.

La loi générale des villes donne bien aux conseils municipaux le pouvoir de légiférer contre les nuisances créées par l'industrie et de réglementer l'endroit, la construction et l'usage des établissements insalubres: (art. 5639-5683 S.R.P.Q.)

Dans notre cas, la ville de Windsor Mills n'a pas jugé à propos de faire aucun règlement au sujet des usines en question. Mais cette absence de réglementation ne saurait être considérée comme une approbation d'une nuisance.

La législature pouvait donner aux corporations municipales le pouvoir de faire des règlements qui seraient contraires à la loi générale de la province (Tiedman, par. 146). Mais aussi longtemps que cette corporation municipale n'exerce pas ce pouvoir, la loi générale s'applique à tous les habitants de cette municipalité. En France, au contraire, il faut un permis de l'autorité administrative pour établir certaines industries dans un endroit quelconque. Et si le permis est accordé, alors tous les voisins sont tenus de respecter la décision de l'autorité administrative. C'est cette différence dans la législation des deux pays qui a donné lieu à la confusion dont j'ai parlé. Ici, du moment qu'il n'y a pas de règlementation municipale, toute industrie peut s'établir dans un endroit quelconque, mais pourvu cependant que les lois générales du voisinage soient rigoureusement suivies et pourvu que cette manufacture ne transmette pas aux maisons voisines des odeurs fétides. (Aubry & Rau, 5ème éd. p. 304)

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Il n'y a pas lieu de faire la distinction dans le cas actuel entre les nuisances d'une nature privée et celles d'une nature publique. On refuse à un particulier le droit de poursuivre dans un cas où il tente d'exercer des droits appartenant au public concernant une propriété publique. Mais dans le cas où une nuisance affecte non seulement les droits privés d'une seule personne mais d'un grand nombre de citoyens, tous ces citoyens ont le droit de se pourvoir devant les tribunaux pour faire disparaître cette nuisance. Ce n'est pas le fait qu'un grand nombre de personnes souffrent qui exclut le droit de l'une d'entre elles de se pourvoir en justice. (Joyce, Law of Nuisances, sec. 14).

L'honorable juge-en-chef de la Cour du Banc du Roi est d'opinion que le jugement qui a été rendu prohibant l'usage de sulfate n'est pas susceptible d'exécution. Comme nous l'avons vu par les citations prises dans Fournel, l'ancien droit francais reconnaissait le droit aux tribunaux de faire mettre fin à des opérations qui étaient insalubres. Du moment que cette ordonnance peut être faite par un tribunal, alors si elle est violée elle donne lieu aux pénalités imposées par l'article 971 du code de procédure.

D'ailleurs les tribunaux dans les actions négatoires et possessoires émettent tous les jours des ordonnances ordonnant aux défendeurs de ne plus exercer telle servitude, de cesser de troubler un propriétaire dans la possession paisible de son héritage.

Pour ces raisons je considère que l'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *White & Buchanan.*

Solicitor for the respondent: *W. R. L. Shanks.*

ELIE MARCOUX (PLAINTIFF).....APPELLANT; 1921

*Nov. 22,23,24
*Dec. 15.

AND

LOUIS L'HEUREUX (DEFENDANT

AND

THE ATTORNEY GENERAL FOR QUEBEC (INTERVENANT).....RESPONDENTS.

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

Statute—Colonization lot—Location ticket—Notice of cancellation—Protest by ticket holder—Right to be heard—Delays for filing protest—Changes in the statute law—Retrospective effect—Whether part of the contract or question of procedure—Powers of the deputy-minister to cancel—Arts. 1527, 1574 to 1579 R.S.Q. (1909)—Arts. 1244, 1270 to 1285 R.S.Q. (1888)—Art. 1537 C.C.

The appellant obtained in 1896 a location ticket for a colonization lot situated in the Province of Quebec, but no letters patent were issued. In 1909, he was served with a notice of cancellation on the ground of non-compliance with the conditions of the licence 1° as to residence, 2° as to cultivation and building of an habitable house, and 3° as to non-payment of the nominal purchase price. Within the delays mentioned in the notice, the appellant sent a declaration under oath setting forth his reasons against cancellation, which affidavit was duly received and put on file in the department of Crown Lands. Later a superior officer of the department made a report on a printed form recommending the cancellation of this license, amongst many others, on the ground of non-compliance with all the three above-mentioned conditions and also stating that there had been no opposition by the ticket

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

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holders. The appellant's location ticket was subsequently cancelled and the same lot was re-sold under similar license to the respondent L'Heureux. The appellant then brought an *action pétitoire* against the respondent L'Heureux asking for a declaration that he was the owner of the lot; and the Attorney General for Quebec intervened in the case. The evidence shows that the two first grounds for cancellation contained in the notice were well founded but that the third one was not. At the trial, only the superior officer could give some explanations on the matter, as the deputy minister had previously died.

Held, Duff and Anglin JJ. dissenting, that upon the evidence the deputy minister, notwithstanding the erroneous report made to him, was fully acquainted with all the essential facts of the case and that he must have, after full consideration of appellant's objections, cancelled the licence for non-compliance with the two first conditions contained in the notice.

Per Duff and Anglin JJ. (dissenting)—The legislature, in providing by Art. 1579 R.S.Q. (1909) that the owner or occupant may, during the delay between notice and cancellation "set forth his reasons against such cancellation," impliedly prescribes consideration of such reasons by the officer empowered to order cancellation as a condition precedent to his exercising that power, and in this case the deputy minister ordered the cancellation of the appellant's location ticket relying upon a report made to him that there was no opposition.

At the time the appellant obtained his licence the statute law required sixty days notice of cancellation to be given; but, at the time the notice in this case was given, this law had been amended and the time reduced to thirty days. A thirty days notice was given to the appellant, who filed his objections within such delay.

Held, Duff J. *contra*, and Anglin J. expressing no opinion, that the new law was applicable to the appellant, as the statutory change was not one dealing with the conditions and obligations of the license but one pertaining to the mode and method by which the minister could exercise his jurisdiction to cancel.

Per Duff J.—A "licence of occupation" under sect. 1270 R.S.Q. [1888] confers upon the licensee not only a right of occupation and possession but an interest in the land *sui generis;* and the above legislation must be treated as affecting substantive rights of the licensee and not as an enactment relating to procedure.

Per Davies C. J. and Idington and Brodeur JJ.—The deputy minister had express power to adjudicate and sign the cancellation under art. 1244 R.S.Q. (1888); and, per Davies C. J. and Idington, J., if this article only meant that the deputy minister could sign on behalf of the minister after the latter had himself determined to cancel, it must be presumed that the minister has authorized his deputy to do so.

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APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court and dismissing the appellant's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Lafleur K.C. and *Beauregard* for the appellant.—The appellant was entitled to a notice of sixty days before cancellation as required by the statute law in force when his location ticket was granted, as the subsequent law had no retroactive effect. Art. 2613 C.C.—Art. 2 C.N.—Art. 18 R.S.Q. (1909). *Holland* v *Ross* (1); *Dechène* v *City of Montreal* (2); *Ross* v *Beaudry* (3).

The minister of Crown Lands alone has power to order the cancellation; and the deputy minister has not that power under art. 1527 R.S.Q. (1909).

There has not been a valid exercise of the power of cancellation owing to ignorance or misrepresentation of material facts, and there has been disregard of the fundamental principle of extending to a person a fair and impartial hearing before subjecting him to confiscation.

Lanctot K.C. and *Aimé Geoffrion K.C.* for the Attorney General—Notwithstanding the inaccurate report made to him, the deputy minister rightly signed the revocation with the whole file relating to the matter before him and in full knowledge of all the facts of the case.

(1) [1890] 19 Can. S.C.R. 566. (2) [1894] A.C. 640.
(3) [1905] A.C. 570.

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The change in the statute law relating to the delays of notification has a retrospective operation, as the enactment deals with procedure only and does not affect vested rights under a contract.

Major for the respondent L'Heureux.

THE CHIEF JUSTICE.—This was a dispute between two location ticket holders of provincial crown lands, lot no. 11 in the township of Nedelec, Province of Quebec. Marcoux the plaintiff, appellant, in 1896, obtained his location ticket for the lot which was subsequently cancelled by the deputy-minister of the department of Crown Lands and the lots re-sold under similar location ticket to respondent L'Heureux.

The present action is brought by Marcoux against L'Heureux to have the cancellation of the former's location ticket declared to be illegal on the grounds that (1) proper notice of the intention to cancel was not given; (2) that the deputy-minister had not the power to cancel; and (3) that if he had the power to cancel, he did so acting under false representations made to him by the superintendent Grenier to the effect that Marcoux had not paid the nominal purchase price of the lot (some $25.00) and had not made objection to the cancellation.

As to the first ground of proper notice of cancellation, I am of the opinion that it is not tenable. At the time Marcoux obtained his licence the statute law required 60 days notice of cancellation to be given, but, at the time the notice was given, this law had been amended and the time reduced to thirty days.

The contention of counsel for the appellant was that the 60 days required by the statute when the location

ticket was issued governed, and that the amendment reducing the time to 30 days did not apply to the location ticket of appellant Marcoux which was granted previously to that amendment.

The statutory provisions at the time the notice of cancellation was given were articles 1574 to 1579 of the Revised Statutes of Quebec (1909). They provided *inter alia* for the time and manner in which the notice should be given and that it should

> state that the cancellation shall take place if necessary, at any time after thirty days from the date of the posting and that during such thirty days the owner or occupant of the lot may set forth his reasons against such cancellation.

The appellant complied with this statutory right or privilege and filed his reasons against the cancellation with the department within the thirty days.

As to the conditions or obligations of the licensee under his location ticket non-compliance with which gave rise to a cause for forfeiture, they were: (1) taking possession of the land within six months; (2) continued residence thereon and occupation either by himself or other persons for at least two years; (3) within four years at the outside clearing and bringing under cultivation an area equal to at least ten acres for every hundred acres and the building of a habitable house at least sixteen feet by twenty feet.

It was not and could not be contended that these conditions were complied with. Appellant never built such habitable house, or resided on the lot personally or by others for him, or cleared or brought under cultivation part of it. The evidence as to such non-compliance was conclusive in my opinion. What was done by him was in conjunction with Dr. Bourbonnais, his brother-in-law, to erect a saw mill

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on certain other lands obtained by them from the Dominion government on an Indian reserve, over a mile distant from the lot in dispute, and to strip or partially strip this lot 11 and other adjoining lots which they held under other location tickets of lumber to supply the mill. The residences of Dr. Bourbonnais and the appellant were erected in proximity to the mill and neither of them on or near the lot in question.

The question then remains whether, even admitting such non-compliance, the necessary notice of cancellation was given before cancellation, *i.e.* whether the 30 days' notice given was sufficient.

A broad distinction exists and must be drawn, in my opinion, between a statutory change in any of the conditions or obligations of the licence non-compliance with which would give rise to a forfeiture, and such changes in the mode and method by which the Commissioner of Crown Lands when attempting to exercise his jurisdiction to cancel was to be governed. The former are, of course, part of the contract and unless covered by the express words of the amending statute would not be held applicable to location tickets, such as the one in question, previously issued.

But the manner and methods by which the commissioner should proceed in order to exercise his powers of cancellation were mere procedure. I think the statutory change in the notice required to be given to the licensee of the location ticket before cancellation from 60 to 30 days was of this latter character.

As a fact the appellant Marcoux acted upon this notice and within the thirty days filed with the Department his objections. From the evidence in the case I cannot doubt that they were considered by the deputy-minister Taché when he cancelled the location.

It is true that the report of his officer Grenier to him, which was made on a printed form recommending the cancellation of this licence amongst many others, stated as the ground of such recommendation not only the non-compliance with the conditions of the licence as to residence, cultivation, building of habitable house, etc., but also non-payment of the nominal purchase price and the want of objections to the cancellation. These two latter grounds were inaccurate. The nominal price had been paid and the objections to cancellation had been submitted to the department and were on file.

I have not any doubt at all from the evidence that Mr. Taché, the deputy minister, was fully acquainted with all the essential facts of this case, including the payment of the purchase price, the filing of the licensee's objections to cancellation and the non-compliance with the conditions of the licence. Unfortunately, however, Mr. Taché had died before the trial.

The *dossier* or file before him with reference to this lot in question and the number of times the question had been discussed in the department and the nature of the objections to cancellation made by the appellant and Dr. Bourbonnais preclude me from thinking that the deputy minister could have been misled by the report of Mr. Grenier on the two points mentioned. But this Grenier report was one referring to a number of lots besides the one in question as to which lot I am convinced the deputy minister Taché knew well the purchase price had been paid and the objections to cancellation filed. He made his order of cancellation, in my opinion, clearly on the ground of non-compliance with the conditions of the location ticket, those relating to residence, cultivation, building of a habitable house, etc., which was quite sufficient and of which there was the amplest evidence.

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As to his power to adjudicate and sign the cancellation, I am of the opinion that Art. 1244, R.S.Q. conferred upon him the express power to do so. If it only meant, as contended, that he could sign on behalf of the minister himself and that after the latter had determined to cancel, then I would say that the presumption would be that the minister has authorized him to do so. But I cannot accept the argument as to the limited character of the powers of the deputy minister under Art. 1244. I think he had ample power to adjudicate and formally to sign the cancellation.

For the foregoing reasons I would dismiss the appeal.

IDINGTON J.—The appellant obtained the following location ticket on the date thereof:—

AGENCE DES TERRES DE LA COURONNE

BAIE DES PÈRES, 3 nov. 1896.

$4.86.

Reçu de Elie Marcoux la somme de quatre $\frac{86}{100}$ piastres, étant le premier versement d'un cinquième du prix d'achat de 81 acres de terre contenus dans le lot no. 11 dans le township de Nédélec, P.Q., la balance étant payable en quatre versements égaux avec intérêt de cette date.

Cette vente, si elle n'est pas desapprouvée par le Commissaire des Terres de la Couronne, est faite sujette aux conditions suivantes, savoir:

L'acquéreur devra prendre possession de la terre ainsi vendue dans les six mois de la date de la présente vente, et continuer d'y résider et de l'occuper, soit par lui-même, soit par d'autres, pendant au moins deux ans à compter de ce temps; et, dans le cours de quatre années au plus, il devra défricher et mettre en culture une étendue d'icelle égale à au moins dix acres par chaque cent acres, et y construire une maison habitable d'au moins seize pieds sur vingt. Il ne sera coupé de bois avant l'émission de la patente que pour le défrichement, chauffage, bâtisses, ou clôtures; et tout bois coupé contrairement à cette condition sera considéré comme ayant été coupé sans licence sur les terres publiques. Nul transport des droits de l'acquéreur ne sera reconnu dans aucun cas où il y aura eu défaut dans l'accomplissement d'aucune des conditions de vente. Les lettres patentes ne seront émises dans aucune des conditions de vente. Les lettres patentes ne seront émises dans aucun cas, avant l'expiration de deux années

d'occupation, ni avant l'accomplissement de toutes les conditions, même quand le prix de la terre serait payé tout entier. L'acquéreur s'oblige à payer pour toutes améliorations utiles qui peuvent se trouver sur la terre vendue, appartenant à d'autres qu'à lui. Cette vente est aussi sujette aux licences de coupe de bois actuellement en force, et l'acquéreur sera obligé de se conformer aux lois et règlement concernant les terres publiques, les bois et forêts, les mines et pêcheries dans cette province.

A. E. GUAY,
Agent.

At foot thereof was printed on same sheet as the foregoing but in no other way forming part of the contract created by the location ticket itself, the following:—

AVIS:—Lorsque le Commissaire des Terres de la Couronne est convaincu qu'aucun acquéreur de terres publiques ou son concessionaire, représentant ou ayant cause s'est rendu coupable d'aucune fraude ou abus, ou a enfreint ou négligé d'accomplir quelque condition de la vente; aussi lorsqu'une vente a été faite par méprise ou erreur, il peut canceller telle vente, reprendre la terre y désignée, et en disposer de même que si elle n'eut jamais été vendue. (Voir l'article 1283 des Statuts Refondus de la Province de Québec.)

The appellant never erected on said land such a dwelling house as the conditions required, never in fact resided thereon, never cleared and cultivated the prescribed quantity of land required by the conditions. Yet he paid in course of time the price named of which the last instalment was paid on 7th Nov., 1903.

On the 15th April, 1909, the officers of the Crown Lands department began proceedings to have appellant's rights forfeited for breach of the conditions in said contract.

The statutory provisions then in force relative thereto were sections 1574 to 1579 inclusive, R.S.Q. [1909].

The first of these empowered the minister for many reasons, including such as I have already mentioned above as indicative of conditions, to take steps to cancel such sale as above set forth.

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By section 1575 such cancellation was declared to effect a complete forfeiture, but provided also that the minister might nevertheless grant such compensation or indemnity as he might consider just and equitable.

Sections 1576 to 1579 are as follows:—

1576. Such right of revocation shall not be deemed an ordinary right of dissolution of a contract for non-fulfilment of conditions; it shall not be subject to article 1537 of the Civil Code, and may always be exercised as occasion may require, whatever time may have elapsed since the sale, grant, location, lease or occupation licence.

1577. No cancellation under article 1574 shall be made before a notice is given by the Minister or by a Crown lands' agent authorized by him in the manner hereinafter indicated.

1578. Such notice shall be posted by the Crown lands' agent, or by any person authorized by him, on the door of the church or chapel or other public building nearest to the lots in question, and shall be sent by post card to the purchaser, grantee, locatee, or lessee of any public land or his assigns mentioned in article 1574.

The notice shall state that the cancellation shall take place, if necessary, at any time after thirty days from the date of the posting.

1579. During such thirty days the owner or occupant of the lot may set forth his reasons against such cancellation.

It is upon the operative effect of one or all of these provisions that this appeal should turn and upon the question of the deputy minister to act instead of the minister to which I will presently advert.

It was argued before us by the counsel for the appellant that the article 1283 of the Revised Statutes of Quebec referred to in the above notice, formed part of the contract in question, by virtue of the notice being so given, and by force of the statutory provision, existent in said article which was in full force and effect at the date of the location ticket and hence that the sixty days' notice required thereby, and so far as like contracts, made whilst that was in force, imperatively governed the terms upon which the Minister could act in declaring the rights acquired by the location ticket forfeited.

I cannot assent to such a proposition of law.

Of course if I could come to the conclusion, by any correct process of reasoning, that the said statute formed an essential part of the contract or created an obligation on the Crown in relation thereto and that it must be read as if it had formed part thereof, I would find some difficulty in upholding any decision wherein the minister had acted in that regard without giving the sixty days' notice.

For example we have many statutory provisions such as those declaring that, in certain cases of insurance, statutory conditions set forth must be and form part of the terms of that class of contract; in some of our western provinces provisions that certain named conditions in machine contracts are essential to the validity thereof; and in Ontario and others, as well as in England, that certain conveyances of land, or leases made pursuant thereto, must be held to contain certain covenants or other provisions which must be observed and I think in some cases of leases the right to terminate is made dependent on the observation of certain specified statutory terms.

In all such like contracts falling within the respective ambits of such like statutory rights or obligations the statutory enactment must be read as if it had by consent of the contracting parties formed part of their contract. And the provisions of later enactments cannot be regarded as a means of terminating the contractual relations so formed unless the legislature in the exercise of its supreme power over all rights of contract or property saw fit to declare same forfeit.

The means of terminating such a contract as in question herein (for breach of contractual condition) I respectfully submit is a subject entirely within the

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province of the legislature, a mere matter of judicial procedure or otherwise which may be changed from year to year as it deems fit and forms no part of the contract. Any other view seems to lead to the conclusion that inasmuch as the clause was obliterated by its repeal by virtue of another being substituted, there was left no remedy.

The reorganizing of our courts of judicature often imposes hardships or confers benefits not expected by contracting parties.

And we see by article 1576, above quoted, how careful the legislature was to observe that conception of the law by expressly withdrawing therein the peculiar procedure enacted herein from any possible operation of article 1537 of the Civil Code.

Indeed it goes so far as to substitute thereby rules of its own for the purpose by which, but for the above enactment, reliance might have been placed upon some of the other articles of the Code referred to therein somewhat of the character of legislation I have just now adverted to.

I think beyond any question the minister had the power to determine herein such questions as he did, or his deputy (if in fact he so acted in his stead) did, and the only remaining questions are, first, whether the deputy minister had the like power under and by virtue of article 1527 of the R.S.Q. 1909, which reads as follows:—

1527. Without prejudice to the control of the minister, the deputy minister shall have the superintendence of the other officers, clerks, messengers or servants, and the general control of all the affairs of the department. His orders shall be executed in the same way as those of the minister himself, and his authority shall be deemed to be that of the head of the department, so that he can validly affix his signature in his said capacity, and thereby give force and authority to all acts, receipts, occupation licences, contracts or deeds of sale, location-tickets, letters patent, adjudications, revocations of sales or locations, and all other documents within the jurisdiction of the department.

The Lieutenant-Governor in Council may, from time to time, whenever he thinks proper, revoke the powers of the deputy minister, wholly or in part.

I am of the opinion that the deputy minister had in law thereby such a power as exercised herein and now in question.

In any event, until the contrary is established by evidence, the presumption must be, if only the minister could determine, that the minister had so disposed of the matter, and the deputy minister in signing was properly discharging the duty of affixing his signature to that which his superior had determined.

There is unfortunately no evidence of fact as the deputy minister has since died.

The slovenly manner in which the formal judgment was drawn up and submitted, by alleging non-payment of the price when in fact paid, and the allegation of absence of any answer on the part of the appellant to the notice, when in fact there was abundant evidence that he had answered it, tends to shake one's confidence in the legal presumption I rely upon, yet I do not think it can be ignored when either party might, as it affected both, have adduced evidence to the contrary if it would have served him.

I suspect each knew there was nothing to be gained thereby.

As to the question so much relied upon, of no hearing given to the other side, I presume the forcible presentation thereof largely depended on the proposition that sixty days' notice was required.

I find that contention untenable, and such presentations of the appellant's case as made by himself and on his behalf by Dr. Bourbonnais, his brother-in-law, were such as secured to them all that could be said.

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In regard to the case of *Paulson* v. *The King* (1) cited in argument as sufficient to entitle appellant to claim waiver I do not, on an examination of the facts, find it applicable here.

The last payment was as stated above made in 1903 and I do not see how that would help to protect appellant to cover his persistent breach of conditions for five and a half years longer.

And in that connection I may remark that the entire misconception of appellant, as to his rights, seems to have been rather remarkable, else he never should have taken a location on such lot. Yet notwithstanding all that I should have been disposed, if given the power, to exercise that given the minister, if the facts, possibly one sided, in this case, in regard to the expense of drainage improving the land warranted doing so.

Hence I have from that and undesirable features the case presents considered whether or not costs of this appeal should be allowed but concluded we cannot afford to encourage litigation by acting in regard to costs further that it concerns those directly concerned.

And hence, hoping the intervenant may reconsider some things though deprived of costs, I would dismiss this appeal but only with costs to the respondent and no costs to intervenant despite the excellent argument presented on his behalf enuring to the benefit of respondent.

DUFF J. (dissenting)—A "licence of occupation" under sec. 1270 of the Revised Statutes of 1888 although described in terms as a licence confers upon the licensee not only a right of occupation and possession

(1) [1915] 52 Can. S.C.R. 317.

but an interest in the land, a true *droit réel;* an interest, it may be, not easily definable by reference to the ordinary juristic categories and perhaps *sui generis,* but an interest of quite definite characteristics deducible from the statute itself. This was in effect held in a series of cases in the courts of Upper Canada and Ontario decided upon statutory provisions not differing in substance from the articles of the Quebec statute now before us; and the propriety of these decisions has never been questioned. *Henderson*v. *Seymour* (1); *Henderson* v. *Westover* (2).

It was conceded by counsel for the respondents that failure on part of the licensee to perform the conditions of the licence would not *ipso jure* operate to put an end to his interest; that, it was admitted, could only take place through the act of the commissioner in exercise of the power of cancellation given by Art. 1283; and it seems permissible to speak of this divestive condition as one of the elements determining the character of the licensee's right; and consequently to describe any alteration of the terms upon which this right of cancellation becomes operative (making that right more onerous for the licensee) as an alteration of the law prejudicing the licensee in his substantive rights.

Prima facie therefore any change in the law which would, if applicable, have such effect must, if expressed in general terms, be held to exclude existing licences of occupation from its purview. "Retrospective laws are" said Willes J. for the Exchequer Chamber in *Phillips* v *Eyre* (3)

(1) [1852] 9 U.C. Q.B. 47; (2) [1852] 1. E. & A. 465.
(3) [1870] L.R., 6 Q.B. 1 at p. 23;

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no doubt *prima facie* a questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of then existing law. "*Leges et constitutiones futuris certum est dare formam negotiis non ad facta praeterita revocari; nisi nominatum et de praeterito tempore et adhuc pendentibus negotiis cautum sit.*" Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.

Is this a case governed by this general principle or does it fall within the special rule that no suitor has a vested interest in any course of procedure? Is the provision of the law requiring 60 days notice as a condition of the exercise of the power of cancellation a provision relating to "procedure" within the meaning of this rule? I have no doubt that "procedure" within this rule means procedure in a court of justice and therefore the present case is not strictly within the terms in which this exception to the general principle is commonly stated. On the other hand, the general principle itself is a principle of construction (based, Lord Coke says, 2 Inst. 292, upon "a rule and law of parliament") and the inference from this practice of parliament must, of course, give way where an intention to the contrary is plainly manifested and this intention to the contrary has sometimes been inferred from the subject matter and the circumstances of the legislation. *Gardner* v. *Lucas* (1); *West* v. *Gwynne* (2); *Welby* v. *Parker* (3). Is the analogy between this provision and an enactment relating to procedure in the strict sense, that is to say, a processual enactment sufficiently close and sufficiently obvious to justify that inference?

(1) 3 App. Cas. 582 at pp. 590 and 603.

(2) [1911] 2 Ch. 1.

(3) [1916] 2 Ch.1.

Such enactments may safely be assumed to be fashioned with a view to removing anomalies and causes of unnecessary delay and to securing the proper object of all forensic procedure, the judicial determination of controversies about legal rights after a fair hearing of the parties and to be administered accordingly, and (see Maxwell on Statutes, 400 and 401) it is no fair cause of complaint on the part of any litigant that the disposition of his cause should be regulated by rules of procedure so conceived. And when one considers the general inconvenience and confusion which must attend a system under which at one and the same time causes of the same class are regulated by different sets of procedure, the necessity becomes immediately apparent of the canon that such enactments are retrospective in the sense that they apply to all future proceedings irrespective of the time when the rights asserted in such proceedings arose, unless, to refer to Lord Blackburn's judgment in *Gardiner* v. *Lucas* (1) there is some good reason to the contrary.

These considerations are not fully applicable to the present question. The argument from inconvenience has relatively little or no weight; on the other hand it seems to be a reasonable presumption that the legislature in reducing the period from 60 days to 30 was acting upon the view that the shorter period would be sufficient and that the reduction would entail no serious risk of injustice; and that the legislature intended the amendment to be retrospective in its operation, may not unfairly be advanced as a proper deduction from this premise.

(1) 3 App. Cas. 582.

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As against that it may be said that there is a wide difference between proceedings which take place under the general system of remedial law before a court of general jurisdiction and a proceeding which merely consists of the steps that a grantor is obliged to take under the provisions of a private instrument or under the provisions of a statute, limited in its application to a particular type of instrument for the purpose of enabling him to exercise a power reserved to him to put an end to the estate or interest created by his grant. The circumstance that the grantor is the Government and that the official whose duty it is to exercise the discretion vested in the Government (although he is to exercise that discretion, it must be admitted, on grounds in relation to which he must be assumed to be personally indifferent) suggests an analogy to proceedings in a court of justice which I must say I think is deceptive. On the whole, although the point is a very debatable one, I think this legislation falls on the other side of the line and must for the purpose of determining the question before us, be treated as legislation affecting substantive rights and not as an enactment relating to procedure.

I have discussed the questions presented upon the assumption that the appellant's rights as licensee rest upon the provisions of the statute. It was argued that the reciprocal rights of the Crown and the licensee rest upon contract, the terms of the contract being those expressed in the receipt dated the 3rd November, 1896, which is in evidence. We have not before us the regulations under which this receipt is issued and I have heard no good reason for holding that the statutory rights of the appellant—and by that I mean, of course, the rights arising from the enactments of the statute considered in themselves—are to suffer

any reduction or impairment or qualification by force of the terms of a departmental receipt. If the relation is to be described as that of a contract, the provisions relating to cancellation are, in my judgment, elements of that contract and indeed I am not sure, even upon the Attorney General's hypothesis, that the *avis* appended to the receipt in which article 1283 of the Revised Statutes of 1888 is brought to the notice of the licensee, would not be sufficient in itself to produce this effect.

The Attorney General places some emphasis upon the last sentence of the receipt which is in these words:

> Cette vente est aussi sujette aux licences de coupe de bois actuellement en force, et l'acquéreur sera obligé de se conformer aux lois et règlements concernant les terres publiques, les bois et forêts, les mines et pêcheries dans cette province;

and the argument derived from this sentence is based upon the contrast between the use in the second limb of the sentence, without qualification, of the phrase "lois et règlements concernant les terres publiques &c." and the qualification appended in the first limb to the phrase "licences de coupe de bois" which are limited explicitly to those "actuellement en force" and the contention is that the employment of the phrase "lois et règlements" without qualification indicates an intention to embrace within the scope of this term of the receipt amendments made during the currency of the licence. It seems sufficient to say that this argument proves too much. It is not argued that the terms of the licence prescribing the duties of the licensee, for example, in relation to residence or to clearing are intended to be subject to such legislative change, which would be the necessary consequence fo adopting the construction contended for.

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There is another ground upon which I think the appeal should succeed. Both in the Revised Statutes of 1888, which the appellant says governed the proceedings, and in the Revised Statutes of 1909, which the respondent invokes, there is explicit provision for the presentation by the licensee of his reasons against any proposed cancellation. This provision imports, I think, what would probably be otherwise implied, that a cancellation *parte inaudita* has no validity under the statute. And I think it is established that the appellant, although he did everything it was incumbent on him to do for the purpose of bringing his representations to the attention of the Commissioner, was in effect denied this statutory right. There is no question of intentional misconduct; least of all on part of the deputy commissioner, the late Mr. Taché. For some unexplained reason, the statement of the case as presented to Mr. Taché for adjudication by the officials of the department represented that the licensee was not opposing cancellation. I am quite unable, with great respect, to follow the process by which the effect of the formal official document is sought to be displaced by reference to the vague impressions of departmental officials. There is nothing before us, in my opinion, outweighing or counterbalancing the inference properly arising from the documents themselves.

The facts in evidence, Mr. Lanctôt in his very able argument urged, leave no room for doubt that Mr. Taché in fact at the time of the adjudication was fully acquainted with all the circumstances pertinent to the inquiry with which he was charged. I think that with one qualification Mr. Lanctôt made his point good—but that qualification is fatal to the argument. I cannot infer in face of the formal statement that

Mr. Taché had before his mind the fact that the locatee was opposing cancellation or that he had before him the representations which the locatee desired the commissioner to consider in passing upon his case. Needless to say, speculation as to what the deputy commissioner might have done in any event is idle. One term of the condition to which the appellant's rights were subject was that before cancellation he should have an opportunity to present to the commissioner the considerations by which he desired to induce the government to withhold its hand and to state these reasons in his own way. That right was denied him. *Qui statuit aliquid parte inaudita altera aequum licet statuerit aequum non fuit.*

ANGLIN J. (dissenting)—I am of the opinion that the cancellation of the location ticket of the appellant should be declared null and void substantially on the ground on which Pelletier and Martin JJ. dissented from the opinion of the majority of the Court of King's Bench.

In providing by article 1579 (R.S.Q. 1909) that the owner or occupant may, during the thirty days required by article 1578 to elapse between notice and cancellation, "set forth his reasons against such cancellation," the legislature impliedly prescribes consideration of such reasons, if furnished, by the officer empowered to order cancellation as a condition precedent to his exercising that right. The appellant made an affidavit setting forth his reasons for opposing the cancellation of his location ticket and it was duly received by the department within thirty days of the posting of the notice. Nevertheless the officer in charge of the file reported, *inter alia*, that no opposition had been made; and upon that report, as appears by his certificate subjoined to it,

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the Deputy Minister ordered cancellation. I am not prepared to accept Mr. Grenier's explanations and impressions as sufficiently dependable to controvert the statements made in that official document. I think it is conclusively established for the purposes of this case that Marcoux's "reasons against cancellation" were not presented to, or considered by, Mr. Taché. There was therefore not only failure to observe the implied condition of jurisdiction imposed by the statute, but a grave disregard of a fundamental canon of natural justice—*audi alteram partem.*

Assuming, but without so deciding, that the notice given as prescribed by Arts. 1577-8 of the Revision of 1909 was sufficient and that the deputy minister was empowered by Art. 1527 to order the cancellation, I would allow the plaintiff's appeal on the ground above stated.

BRODEUR J.—Nous avons à décider dans cette cause si l'annulation par le département des Terres de la Couronne d'un billet de location a été régulière et légale.

Le 3 novembre 1896, l'agent local du département des Terres vendait par billet de location à l'appelant Marcoux le lot no. 11 du canton de Nedelec pour une somme nominale, et ce dernier s'obligeait de défricher et de mettre en culture ce lot et de s'y bâtir une maison.

Vers le même temps, le beau-frère de Marcoux, le Dr Bourbonnais, et Marcoux lui-même, se portaient acquéreurs des dix autres premiers lots du même canton.

Le Docteur Bourbonnais avait projeté de faire dans cette région une exploitation agricole et forestière et à cette fin il avait pris avec son beau-frère, sous billets de location, ces onze lots de terre qui

étaient tous boisés. Il songea d'abord à construire un moulin à scie sur les deux premiers lots qui se trouvent sur les bords de la rivière des Quinze, mais ayant constaté que ces deux lots étaient inondés la plus grande partie de l'année, il acheta du gouvernement fédéral certains lots voisins qui faisaient partie d'une réserve indienne et qui aboutaïent aux lots du canton de Nedelec. Il construisit alors sa scierie sur ses lots de la réserve indienne, y construisit en même temps des maisons, granges et dépendances et y fit du défrichement et de la culture.

Il négligea, ainsi que Marcoux, de remplir sur les lots du canton de Nedelec les obligations qu'ils avaient contractées. A l'exception de la confection d'un fossé, d'un peu d'abatis et de quelques autres menus travaux, rien n'avait été fait sur les lots de Nedelec.

La preuve nous démontre, par exemple, qu'aucune partie de ces derniers lots ne fut mise en culture et qu'aucune maison habitable n'y fut construite ainsi que le requéraient la loi et le billet de location. On s'est contenté de payer le prix de vente, qui était un prix nominal, et de représenter pendant des années et des années au département des Terres et au gouvernement que les lots Nedelec avaient pour *devanture* les lots acquis par le Dr Bourbonnais sur la réserve indienne et que les bâtisses et le défrichement faits sur ces derniers lots rencontraient sinon la lettre, du moins l'esprit de la loi.

Le département des terres, après treize ans, soit en 1909, décida d'annuler les billets de location des lots concédés dans le canton de Nedelec pour la raison que les conditions d'établissement, de résidence et de culture n'avaient pas été remplies et les revendit sous billet de location au défendeur L'Heureux.

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La présente action, qui est de la nature d'une action pétitoire dirigée contre le nouvel acquéreur L'Heureux, a été instituée par Marcoux pour faire déclarer illégal cette décision du département; et il invoque trois principales raisons contre la validité de cette décision: 1° l'insuffisance de l'avis; 2° l'incompétence du sous-ministre de prononcer la résolution; 3° les fausses représentations qui ont été faites au sous-ministre et sa négligence de considérer les objections de Marcoux.

Insuffisance de l'avis.

Quand le billet de location a été émis, la loi exigeait qu'un avis de soixante jours fût donné avant que le ministre pût annuler un billet de location. Plus tard, cette loi fut modifiée et la législature décida qu'un délai de trente jours serait suffisant. Le département a procédé sous la nouvelle loi et n'a pas donné les soixante jours d'avis. La question qui se présente à ce sujet est de savoir si la loi nouvelle a un effet rétroactif.

En principe général, les lois n'ont pas d'effet rétroactif. Lorsqu'une loi nouvelle vient remplacer une autre relative au même objet, la loi ancienne régit seule les actes juridiques qui se sont définitivement accomplis sous son empire sans que la loi nouvelle puisse leur porter aucune atteinte. Mais il arrive qu'un acte juridique accompli sous l'empire de l'ancienne loi puisse produire des conséquences sous l'empire de la nouvelle loi. Il s'agit de savoir alors quelle est la loi qui doit régir ces conséquences.

Contre le droit acquis, la loi ne peut rien faire, à moins qu'elle ne s'en soit exprimée formellement; mais l'intérêt social exige que la législation la plus récente ait son effet sur les rapports juridiques nés

avant son existence. Par droits acquis, il faut entendre les facultés légales régulièrement exercées. Si ces facultés n'ont pas été exercées, elles deviennent expectatives et sont soumises à la législation nouvelle.

Dans le cas actuel, le législateur a édicté que le gouvernement ou le département des terres peut révoquer un billet de location, si le colon ne remplit pas ses conditions d'établissement, et elle indique la procédure à suivre. Ce n'est pas l'exercice de la faculté du vendeur qui peut demander la résolution du contrat faute de paiement du prix, suivant les dispositions de l'art. 1537 du Code Civil, car l'article 1285 des statuts refondus de Québec de 1888 déclare formellement que le droit de résolution ne sera pas soumis aux dispositions de cet article du code civil. Ce droit de résolution participe du droit public; et les dispositions des articles 1283 et suivants des dits statuts refondus déterminent les conditions dans lesquelles ce droit de résolution doit être exercé et la procédure qui doit être suivie.

Cette disposition relative au délai est soit une matière de prescription, soit une matière de procédure.

La loi ancienne régit toutes les prescriptions déjà accomplies; mais la loi nouvelle régit toutes les prescriptions qui étaient en cours lors de la nouvelle loi ou qui ont commencé sous l'empire de la nouvelle loi. Or, le délai de soixante jours invoqué par l'appelant comme représentant la limite de son droit a commencé à courir sous l'empire de la nouvelle loi. C'est donc cette dernière qui doit s'appliquer. Le département n'était donc pas tenu d'attendre soixante jours pour déclarer la vente résolue, mais un délai de trente jours était suffisant. Or la décision a été rendue plus de trente jours après l'affichage de l'avis.

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Si c'est une question de procédure, il est de principe que toutes les lois de procédure sont immédiatement applicables.

Dans un cas comme dans l'autre la prétention de l'appelant est mal fondée.

Compétence du sous-ministre.

L'appelant prétend en outre que la résolution est nulle parce qu'elle a été prononcée par le sous-ministre et non par le ministre lui-même.

Je vois que le demandeur-appelant lui-même, dans sa déclaration, reconnaît que le gouvernement lui-même a décidé d'annuler les ventes en question. Mais en supposant que le gouvernement ou le ministre n'ait pas rendu la décision, la loi reconnaît formellement dans l'article 1244 S.R.P.Q. 1888, que le sous-ministre a la même autorité sur les matières de cette nature que le ministre lui-même, de sorte qu'il peut lui-même signer toute résolution d'un billet de location. Ce n'est pas étonnant que ce pouvoir soit conféré par la loi au sous-ministre, quand on voit dans le cas actuel que le billet de location a été signé par un simple agent local des terres et qu'il pouvait être alors valablement annulé par son officier supérieur, le sous-ministre.

Décision erronée et absence d'audition.

En troisième lieu, l'appelant Marcoux dit que la décision est nulle parce que le département n'a pas validement exercé ses pouvoirs d'annulation, qu'il a ignoré ou faussement représenté les faits et qu'il n'a pas fourni aux parties l'occasion d'être valablement entendues.

J'avais eu d'abord, lors de l'audition des plaidoiries, quelques doutes à ce sujet; mais une étude complète de la preuve et des documents produits me démontre que ce troisième point est également mal fondé.

Il est admis par le demandeur Marcoux qu'il n'a pas rempli les conditions d'établissement et de culture qui lui étaient imposées par son contrat et par la loi. Mais il ajoute que le rapport du surintendant Grenier, au bas duquel le sous-ministre a prononcé la sentence d'annulation, contenait deux erreurs, savoir que Marcoux n'avait pas payé son prix de vente et qu'il ne s'opposait pas à l'annulation.

Il est bien vrai que cet officier Grenier, par une négligence un peu inexplicable, a déclaré cela dans son rapport au sous-ministre. Mais il ne faut pas attacher plus d'importance qu'il n'en faut à l'erreur ou à la négligence d'un subalterne Ce que nous avons à considérer est de savoir si le sous-ministre avait des raisons justifiables pour annuler ce billet de location. Quant à cela, il ne peut pas y avoir de doute. Ce lot avait été concédé pour un prix nominal, soit environ $25.00. L'intention évidente du gouvernement en vendant ce lot était de le faire défricher et mettre en culture. Le prix de vente n'y était pour rien. Il s'agit pour le gouvernement de mettre en rapport ces nombreuses terres boisées qui pourraient donner une production agricole constituant l'une des plus grandes richesses nationales.

Le lot en question en cette cause aurait dû être défriché depuis longtemps et Marcoux aurait dû aller y résider; mais il n'avait rien fait de cela. Sept ans après qu'il eût eu la concession, l'agent local du dé-

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partement a fait rapport que les conditions d'établissement sur ce lot, ainsi que sur les autres concédés au Dr Bourbonnais et à lui-même, n'avaient pas été remplies. Le docteur Bourbonnais s'est alors adressé au ministre du temps qui a jugé à propos de temporiser et de ne pas annuler la vente. La même question était reprise de temps à autre, surtout à chaque changement de ministre, et le Dr Bourbonnais revenait à la charge en implorant ses bonnes grâces et en alléguant que ces lots du canton de Nedelec ne formaient qu'une seule exploitation avec les lots de la réserve indienne; et que l'exploitation agricole de ces derniers se faisait rapidement et profitait aux lots du canton Nedelec.

On voit donc que cette situation a été constamment débattue pendant des années et des années entre le département et les concessionnaires. De nombreuses correspondances étaient échangées sur ce sujet. Mais en 1909 la question était devenue plus brûlante. Les autorités civiles et religieuses et les agents de colonisation protestèrent contre le fait que le Dr Bourbonnais et Marcoux ne faisaient pas de défrichement sur leurs lots de Nedelec. Et alors le ministre fut obligé de prendre une décision définitive. Il eut d'abord à considérer les demandes qui étaient faites au sujet des lots 7-8-9 et 10 du même canton et il décida formellement, évidemment après consultation avec ses collègues du gouvernement, que les billets de location émis pour ces lots devaient être annulés.

Vers le même temps, des procédures étaient commencées pour faire l'annulation de la vente des autres lots et notamment du lot en question en cette cause-ci; mais quant à ces derniers lots, la question devenait à proprement parler une matière de routine, car la décision antérieure du gouvernement et du départe-

ment portait que ces ventes au Dr Bourbonnais et à Marcoux devaient être annulés. Les avis requis furent donnés. Le Dr Bourbonnais et Marcoux produisirent leurs objections; et enfin le sous-ministre, le 7 juin, prononçait l'annulation.

Le document qu'il a signé était imprimé et était dans les termes suivants:

> Je, soussigné, en vertu des pouvoirs à moi conférés par la loi, révoque et annule les ventes susmentionnées.

Et au-dessus de cette décision du sous-ministre se trouvait un rapport de l'assistant-surintendant Grenier où il donnait les numéros des lots dont la vente devait être annulée. Ce rapport imprimé mentionnait le défaut d'accomplissement des conditions, le défaut de paiement et l'absence d'opposition comme raisons pour l'annulation.

Il avait évidemment oublié de retrancher dans cet imprimé les références au défaut de paiement et aux oppositions du colon. L'appelant Marcoux prétend que le sous-ministre a prononcé l'annulation sur ce rapport erroné.

Je suis bien convaincu, au contraire, que le sous-ministre, qui est maintenant décédé et qui n'a pas pu être entendu comme témoin, a décidé en pleine connaissance de cause. Il n'était pas sans savoir que depuis dix ans près Marcoux, soit par lui-même, soit par son beau-frère, était en instances auprès du département pour le convaincre que les conditions d'établissement étaient remplies, sinon à la lettre du moins dans l'esprit de la loi. Il devait savoir également que ces lots avaient été payés. D'ailleurs le prix nominal auquel ces lots avaient été vendus ne peut avoir

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aucun effet. Ce qu'il y avait de plus important était la résidence sur ces lots et leur défrichement. Le sous-ministre savait également les objections que Marcoux faisait contre l'annulation. Depuis sept ans ces objections avaient eu à être examinées et considérées par le département.

Je ne crois donc pas que les cours peuvent intervenir pour casser la décision faite par le département. Ce serait substituer notre discrétion à celle que le tribunal constitué par la législature pouvait seul exercer.

Pour toutes ces raisons l'appel doit être renvoyé avec dépens.

Appeal dismissed with costs. (1)

Solicitors for the appellant: *Atwater & Bond.*

Solicitors for the respondent L'Heureux: *Fortier & Major.*

Solicitor for the intervenant: *Charles Lanctôt.*

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(1) Leave of appeal to the Privy Council was refused on the 6th day of March 1922.

IN THE MATTER OF THE AUTHORITY OF THE LEGISLATURE OF BRITISH COLUMBIA TO PASS "AN ACT TO VALIDATE AND CONFIRM CERTAIN ORDERS IN COUNCIL AND PROVISIONS RELATING TO THE EMPLOYMENT OF PERSONS ON CROWN PROPERTY"

1921 * Dec. 15, 16. 1922 *Feb. 7.

REFERENCE BY THE GOVERNOR-GENERAL IN COUNCIL.

Constitutional law—Jurisdiction of legislature—Employment on provincial property—Exclusion of Japanese and Chinese—Imperial treaty with Japan—"B.N.A. Act" (1867) s. 91 s.s. 25: s. 92 s.s. 5; ss. 102, 106, 108, 109, 117, 126, 132, 146—"Japanese Treaty Act" (D.) 1913— 3 & 4 Geo. V. c. 27—(B.C.) 1921, 11 Geo. V. c. 49.

The legislature of British Columbia passed an Act in 1921 (11 Geo. V. c. 49) purporting to "validate and confirm (an) order in council" which provided that "in all contracts, leases and concessions "of whatsoever kind entered into, issued or made by the govern- "ment, or on behalf of the government, provision be made that no "Chinese or Japanese shall be employed in connection therewith".

Held, that the legislature of British Columbia had not the authority to enact this legislation. Idington J. *contra* and Brodeur J. *contra* as to the part relating to Chinese.

The Japanese Treaty, made in 1911 between England and Japan, was "sanctioned and declared to have the force of law in Canada" by a Dominion statute enacted under the powers conferred by s. 132 of the B.N.A. Act (3 & 4 Geo. V. c. 27). Paragraph 3 of article 1 of the treaty states that the subjects of the high contracting parties "shall in all that relates to the pursuit of their "industries, callings, professions, and educational studies be placed "in all respects on the same footing as the subjects of citizens "of the most favoured nation."

Per Davies C. J. and Duff and Brodeur JJ.—The provincial statute of 1921, as to its part relating to Japanese, is *ultra vires* of the legislature of the province as being in conflict with the Japanese Treaty. Idington J. *contra* and Anglin and Mignault JJ. expressing no opinion.

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*PRESENT: Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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REFERENCE by the Governor-General in Council of questions respecting the validity of chapter 49 of the Statutes of British Columbia, 1921, for hearing and consideration pursuant to section 60 of the "Supreme Court Act". The questions so submitted are as follows:—

A REPORT OF THE COMMITTEE OF THE PRIVY COUNCIL APPOINTED BY HIS EXCELLENCY THE GOVERNOR-GENERAL-IN-COUNCIL, ON THE 12TH NOVEMBER, 1921.

The Committee of the Privy Council have had before them a report dated 12th October, 1921, from the Minister of Justice, submitting that the Consul General of Japan, by letter of 4th of May, 1921, addressed to the Minister of Justice, suggested that Your Excellency should exercise the power of disallowance with regard to a statute of British Columbia, assented to April 2nd, 1921, entitled "An Act to "validate and confirm certain Orders-in-Council and "provisions relating to the employment of persons "on Crown Property", being Chapter 49 of the volume of statutes for the current year; the Consul General alleging that the Act is *ultra vires*.

It is enacted by section 2 of this statute that two Orders of the Lieutenant Governor of British Columbia in Council, dated 28th of May, 1902, and 18th, June, 1902, respectively, copies of which are scheduled to the Act, are validated and confirmed, and that they shall for all purposes be deemed to have been valid and effectual from the respective dates of their approval. These Orders in Council were designed to give effect to a resolution of the Legislative Assembly of British Columbia passed on 15th of April, 1902, whereby it was resolved "that in all contracts,

leases and concessions of whatsoever kind entered" "into, issued, or made by the government, or on be- "half of the government, provision be made that no "Chinese or Japanese shall be employed in connection "therewith".

Moreover, it is enacted by section 3 of the statute in question as follows:—

"3. (1) Where in any instrument referred to in the said Orders in Council, or in any instrument of a similar nature to any of those so referred to, issued by any minister or officer of any department of the government of the province, any provision has heretofore been inserted or is hereafter inserted relating to or restricting the employment of Chinese or Japanese, that provision shall be deemed to have been and to be valid and always to have had and to have the force of law according to its tenor.

(2) Every violation of or failure to observe any such provision on the part of any licensee or other person to whom the instrument is issued or delivered or with whom it is entered into, or who is entitled to any rights under it, whether the violation of failure has heretofore occurred or hereafter occurs, shall be sufficient ground for the cancellation of that instrument, and the Lieutenant Governor in Council may cancel that instrument accordingly".

Upon reference to the Attorney General of British Columbia he reports that his government maintains the constitutionality of the Act, and expresses his intention of taking proceedings which would bring the question before the courts.

As the validity of this statute depends upon the interpretation of the legislative powers of the province under the "British North America Act", and as the time for the disallowance will expire on the 18th of April

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1922, one year after the date on which the authenticated copy of the Act was received by the Secretary of State, the Minister states that he considers it desirable that Your Excellency's Government should be advised as to the enacting authority of the province by the Supreme Court of Canada.

The Minister accordingly recommends that pursuant to the authority of Section 60 of the "Supreme Court Act" the following questions be referred to the Supreme Court of Canada for hearing and consideration, viz:

1. Had the legislature of British Columbia authority to enact Chapter 49 of its statutes of 1921, entitled "An Act to validate and confirm certain Orders-in "Council and provisions relating to the employment "of persons on crown property"?

2. If the said Act be in the opinion of the court *ultra vires* in part then in what particulars is it *ultra vires ?*

The Committee concur in the foregoing recommendation and submit the same for Your Excellency's approval.

(Signed) RODOLPHE BOUDREAU.
Clerk of the Privy Council.

E. L. Newcombe K.C. for the Attorney-General for Canada:—The legislation is wholly ineffective: 1° because, by sect. 91 of the B.N.A. Act, it is within the exclusive legislative authority of the Dominion to make laws for the peace, order and good government of Canada with relation to any matter coming within the class of subjects described as "naturalization and aliens"; *Union Colliery Co. of B.C.* v. *Bryden* (1);

(1) [1899] A.C. 580.

Cunningham v. *Tomey Homma* (1); 2° because the legislation conflicts with the "Japanese Treaty Act, 1913", as the province attempts to discriminate and to place Japanese on a footing less favourable than the subjects or citizens of more favoured nations. There is only one Crown and the Crown cannot by its provincial legislation either directly or indirectly break the treaty engagement.

Sir C. H. Tupper, K.C. for the Japanese Association. The Crown is bound by a treaty to which it is a party; *Theodore* v. *Duncan* (2).

The provincial legislation has for its purpose the object of depriving the Chinese and Japanese of any opportunity of earning their living in the industrial development of the province.

Charles Wilson, K.C. for the Shingle Manufacturers' Association of B.C.

J. W. de B. Farris K.C., Attorney-General for British Columbia with *J. A. Ritchie K.C.*—The Crown, while unquestionably one, whether in its executive or legislative capacity, has various aspects; but, within the legislative domain allotted to the provinces by the B.N.A. Act, the right of each province to make laws for its purpose is as full and absolute as the right of either the Imperial or Dominion Parliament to make laws for Imperial or Dominion purposes.

The interest of a province in its Crown lands and other property is as extensive as the interest of a private person in lands held by him in fee to his own

(1) [1903] A.C. 151.

(2) [1919] A.C. 696.

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use or in his own personal property; *St. Catherine's Milling and Lumber Co. v. The Queen* (1); *Smylie* v. *The Queen* (2).

The province has the power to legislate as might be deemed best in its interest in regard to the management of its Crown lands of which the province, upon its entry into the Union in 1871, became seized of the "entire beneficial interest".

An Imperial treaty (except possibly a treaty of peace) or an Act of the Dominion Parliament cannot override an existing law of a self-governing province.

A treaty made in time of peace does not of itself without statutory authority extend so far as to alter the law either as regards individual rights in property, rights of action or as to personal liberty: *The Parlement Belge* (3); Clements, Canadian Constitution, 3rd ed. 136; and if so, such treaty cannot do so in regard to the public rights of a self-governing province.

The cases of *Union Colliery Co. of B.C.* v. *Bryden* (4), *Tomey Homma Case* (5) and *Quong-Wing* v. *The King* (6) are not applicable; as this provincial legislation does not prohibit any Chinese or Japanese from being employed upon the Crown property, but it establishes only for the province a policy in regard to the management of a provincial property: this legislation being, in effect, a self-denying ordinance, limiting the own freedom of the province in the uses of its own property.

(1) [1888] 14 App. Cas. 46.
(2) [1900] 27 Ont. App. R.172, at p. 180; 31 O. R. 202.
(3) [1879] 48 L.J.P. 18.
(4) [1899] A.C. 580.
(5) [1903] A.C. 151.
(6) [1914] 49 Can. S.C.R. 440.

THE CHIEF JUSTICE.—In the matter submitted by His Excellency The Governor General in Council for our hearing and consideration respecting the validity of chapter 49 of the statutes of British Columbia, 1921, two questions were asked:

1. Had the legislature of British Columbia authority to enact chapter 49 of its statutes of 1921, entitled "An Act to validate and confirm certain orders in council and provisions relating to the employment of persons on crown property?

2. If the said Act be in the opinion of the court *ultra vires* in part only, then in what particulars is it *ultra vires*?

The orders in council which are scheduled to the Act in question and are attempted to be validated thereby provide that "in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith." These general words "contracts, leases and concessions" are expressly defined in the statute referred to us to include the various instruments specified in the long enumeration contained in the order in council dated 28th June, 1902. Moreover, by the earlier order in council dated 28th May, 1902, set out in the schedule to the Act, "all tunnel and drain licenses issued by virtue of the powers conferred by section 58 of the 'Mineral Act' and section 48 of the 'Placer Mining Act'", and "all leases granted under the provisions of part 7 of the 'Placer Mining Act'" are to be read subject to the clause or prohibition in question.

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I am of the opinion that the description "leases, licenses, contracts and concessions", embodied in the orders in council attempted to be validated by the said Act is comprehensive enough to comprise substantially all instruments which may be issued by the provincial government in the administration of its assumed powers, except grants of land in fee, and that the object and intention of these orders in council clearly is to deprive the Chinese and Japanese of the opportunities which would otherwise be open to them of employment upon government works carried out by the holders of provincial leases, licenses, contracts or concessions.

By section 2 of the statute it is enacted that "the said orders in council shall, for all purposes, be deemed to be and to have been valid and efficient according to their tenor from the respective dates of their approval."

Section 3 sub-sec. (1) goes further and enacts: "Where in any instrument referred to in the said orders in council, or in any instrument of a similar nature to any of those referred to, issued by any minister or officer of any department of the government of the province, any provision has heretofore been inserted or is hereafter inserted relating to or restricting the employment of Chinese or Japanese, that provision shall be deemed to have been and to be valid and always to have had and to have the force of law according to its tenor."

In this manner the legislature attempts to legalize any prohibition or restriction of any employment of Chinese or Japanese upon works of or under the government or its lessees, licensees, or contractees which in the discretion of any minister or departmental officer might be embodied in the instrument.

In my opinion this legislation is *ultra vires* the provincial legislature: (1) because, by section 91 of the "British North America Act", 1867, it is within the exclusive legislative authority of the Dominion, notwithstanding anything to the contrary in that Act, to make laws "for the peace, order and good government of Canada" with relation to any matters coming within the classes of subjects described in s.s. 25 of s. 91 as "naturalization and aliens."

This provision of the "British North America Act, 1867", was construed by the Judicial Committee of the Privy Council with relation to British Columbia legislation affecting Chinese and Japanese in two appeals to that Board: *Union Colliery Co.* v *Bryden* (1) and *Cunningham* v. *Tomey Homma* (2).

I confess it seems somewhat difficult to reconcile on all points the observations made by their Lordships who respectively delivered the judgments of the Judicial Committee in these cases. The interpretation of the Bryden decision given by the Lord Chancellor when delivering judgment of the Board in the Tomey Homma case must be accepted by all courts in Canada. He said page 157. "That case (the *Bryden Case* (1)) depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia, and in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province." His Lordship then observes "it is obvious

(1) [1899] A. C. 580. (2) [1903] A. C. 151.

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that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides" (which was the question then before the Board).

I am of the opinion that the legislation now in question is of the character described by Lord Watson in the Bryden case, as not being within the competency of the Province. His Lordship says, page 587. "Their Lordships see no reason to doubt that by virtue of section 91 s.s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the "Coal Mines Regulation Act", in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens of naturalized subjects, and therefore trenches upon the exclusive authority of the Parliament of Canada."

(2) I am also of the opinion that the legislation in question conflicts with the Japanese Treaty Act, 1913, of the Dominion of Canada (3 & 4 Geo. V, c. 27). By this Act it is declared that the Japanese Treaty of 3rd April, 1911, set forth in the schedule to the Act "is hereby sanctioned and declared to have the force of law in Canada", with the exception of two provisions neither of which is pertinent in any way to the question now before us.

Paragraph 3 of Article 1 of the scheduled treaty states that the subjects of the high contracting parties "shall in all that relates to the pursuit of their indus-

tries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation."

The Parliament of Canada derived the authority for the enactment of the Japanese Treaty from s. 132 of the "British North America Act, 1867", which provides that "the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or any province thereof, as part of the British Empire towards foreign countries, arising under treaties between the Empire and such foreign countries."

There is no general provincial prohibition or disqualification affecting the citizens of foreign nations other than those of Japan and China in British Columbia, and while the statute now in question is not expressed generally to prohibit or disqualify Japanese and Chinese from all employment, it does provide that "in all contracts, leases, licences and concessions entered into, issued or made" by or on behalf of the Crown as represented by the Government of British Columbia, "no Japanese or Chinese shall be employed in connection therewith".

Thus the province attempts to discriminate and to put the Japanese on a footing less favourable than that of the subjects of the most favoured nation.

This is contrary to the obligations of the treaty and in direct conflict with the Dominion statute which must prevail under the powers conferred by s. 132 of the B.N.A. Act above quoted.

I cannot doubt that the Japanese if employed upon the works which are by the statute in question prohibited to them would be so employed "in the pursuit of their industries, callings, professions". Certainly

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the words "industries, callings", would cover all manual labour, or other labour of a kindred character. Modern dictionaries define industry to include systematized labour or habitual employment, especially human exertion employed for the creation of value, labour.

There is only one Crown, although it may act "by and with the advice and consent of" the several parliaments or legislatures of the whole of the British Empire. The Crown which "by and with the consent and advice of the Lords and Commons of the United Kingdom" enacted the "British North America Act, 1867", conferring upon itself acting "by and with the advice and consent of the Senate and the House of Commons of Canada" the power to sanction treaty obligations affecting the Dominion of Canada or a province thereof, is the same Crown which became in 1911, a party to the Japanese Treaty, the provisions of which declared that, "they (the Japanese) shall in all that relates to the pursuit of their industries, callings, professions, educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation." It is the same Crown which in 1913, "by and with the advice and consent of the Senate and the House of Commons of the Dominion of Canada" in execution of the powers conferred by s. 132 of the B.N.A. Act, 1867, sanctioned the Japanese Treaty and enacted that it should have "the force of law in Canada"; and it is the same Crown which in 1921, "by and with the advice and consent of the legislature of British Columbia" enacted the statute in question here. If this Act is *intra vires* it is in absolute conflict with the Treaty and the Dominion statute because it prohibits the employment of Japanese in the pursuit

of their "industries and callings" in British Columbia on all provincial government works, or on works on land held by leases, licences or concessions authorized by the legislature of British Columbia. Thus the Japanese are placed on a footing less favourable than that of the subjects or citizens of more favoured nations.

The Crown was undoubtedly bound by the force of the "Japanese Treaty Act" of 1913 to perform within Canada its treaty obligations, and, if so, I cannot understand how it can successfully be contended that the Crown can by force of enactments of a provincial legislature directly or indirectly break its treaty obligations.

For these reasons I am of the opinion that the legislature of British Columbia had not the authority necessary to enact chapter 49 of the 1921 statutes of British Columbia.

As my answer to the first question is in the negative, any answer to the second question submitted is unnecessary.

IDINGTON J.—Under section 60 of the "Supreme Court Act" we are asked the following questions:—

1. Had the legislature of British Columbia authority to enact chapter 49 of its statutes of 1921, entitled "An Act to validate and confirm certain orders in council and provisions relating to the employment of persons on crown property?

2. If the said Act be in the opinion of the court *ultrà vires* in part only then in what particulars is it *ultra vires?*

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Idington J.

The second section of the said Act declares certain orders in council set forth in a schedule to the Act to have been and to be valid and effectual.

Then section 3 of said Act in question herein reads as follows:—

"(1) Where in any instrument referred to in the said orders in council, or any instrument of a similar nature to any of those so referred to, issued by any minister or officer of any department of the government of the province, and provision has heretofore been inserted or is hereafter inserted relating to or restricting the employment of Chinese or Japanese that provision shall be deemed to have been and to be valid and always to have had and to have the force of law according to its tenor.

(2) Every violation of or failure to observe any such provision on the part of any licensee or other person to whom the instrument is issued or delivered or with whom it is entered into, or who is entitled to any rights under it, whether the violation or failure has heretofore occurred or hereafter occurs, shall be sufficient ground for the cancellation of that instrument, and the Lieutenant Governor in Council may cancel that instrument accordingly."

The schedule seems to me (save as to one item) to deal entirely with the crown lands, timber, coal and other minerals and mines and water the property of the Crown on behalf of the province of British Columbia.

That province was brought into the Canadian confederation by virtue of the 146th section of the B.N.A. Act, 1867, and pursuant to the several addresses therein provided for and by the order in council of the late Queen resting thereon also so provided for.

The agreement evidenced thereby appears on pages LXXXV to CVII prefixed to the statutes of Canada for 1872.

The terms thereof render operative and effective as to the legislature of British Columbia the like powers enjoyed by the legislatures of the other provinces of Canada under section 92 of the said B.N.A. Act of 1867, and each of them contained in items 5, 10, 13, and 16, are of vital importance herein as are also other provisions of said Act such as section 109, which reads as follows:—

"109. All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same."

Section 10 of the respective addresses which formed the basis of Union and of the order in council bringing the Union into effect, reads as follows:—

"10. The provisions of the "British North America Act, 1867", shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to and only affect one and not the whole of the provinces now comprising the Dominion, and except so far as the same may be varied by this minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if the colony of British Columbia had been one of the provinces originally united by the said Act."

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That renders operative section 109 of the B.N.A. Act, 1867, and I submit, rendered all therein specified subject to the jurisdiction of the responsible government of British Columbia which thereby had power to enact such orders in council relative to the administration of all the said properties as the legislature of said province should see fit to support and so long as it so saw fit to support same.

The Act now in question of the legislature of British Columbia seems therefore well within the powers so assigned to it.

There being numerous acts of the legislature of British Columbia, such as "The Land Act"; "The Forest Act"; "The Mines Act"; and amendments thereto, each and all seeming to be expressly enacted relative to the administration of such crown properties by ministers respectively specified therein, it would not seem to require anything further than the orders in council made in course of such administration to give validity to any licences or contracts relative to the regulations of such properties of the crown.

Mr. Ritchie's argument on behalf of the Attorney General of British Columbia in taking this point seemed to me to suggest quite properly that the Acts now called in question are of minor consequence and that even the veto power if exercised would fall short of reaching the alleged evil complained of herein.

The mode of the administration of any of the properties in question seems as much subject to the will of the legislature as that of any private owner to the will of the owner thereof.

The conditions of the licences for operating upon same binding the licensees not to employ in doing so Chinese, Japanese or other orientals may be offensive

to some minds and may economically speaking be very questionable, but how can it be contended that any private owner might not so stipulate in such a licence or other contract in relation to his own property?

Counsel for the Minister of Justice and for the company which challenged the right of the government of British Columbia to so stipulate, respectively admitted on argument that the private owner could so stipulate in relation to his own property despite the treaty hereinafter referred to but counsel for the Japanese Association relied upon an American decision laying down the doctrine that it would be against public policy to so contract.

The obvious answer is that the legislature in control of the subject matter is the power to create or dictate any such provincial public policy and that must be predominant unless and until the Dominion Parliament acting *intra vires* declares otherwise.

The decision in the case of *Union Colliery* v. *Bryden* (1) was presented in argument but not as decisive of the questions raised herein.

I may point out that it was a general regulation as applicable to a private mine which was in question therein and that the judgment seems to be rested upon item 25 of the 91st section of the B.N.A. Act of 1867—"Naturalization and Aliens"—and was followed by the decision in the case of *Cunningham* v. *Tomey Homma* (2) where the Lord Chancellor, in giving the judgment of the court above does not, at foot of page 56 and following page, seem to maintain the doctrine in the judgment in the former case to the full extent declared therein and as understood by the courts in British Columbia attempting to abide by it. Hence the judgments of these courts were reversed.

(1) [1899] A. C. 580.

(2) [1903] A. C. 151.

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Idington J.

I submit that the powers I have referred to above as given the legislature of British Columbia in relation to its control of the properties in question herein are quite as explicit as anything given it in relation to the franchise.

The disposition of the question raised in the *Colliery Case*, (1) however, does not end there, for in the case *Quong-Wing* v. *The King* (2) the question of discrimination against a Chinaman, in this instance a naturalized British subject, within the ambit of our Canadian "Naturalization Act", was again raised.

The majority of this court held that, despite what was held in the *Colliery Case* (1) the legislature of Saskatchewan had the power to discriminate against him, in the same spirit as evident in relation to what is in question herein, and in the way that appears in that case.

An application on his behalf to the court above, for leave to appeal from such decision here, was refused.

And that although, as our "Naturalization Act" then stood by section 24 thereof, it provided as follows:—

"24. An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural born British subject is entitled or subject within Canada, with this qualification, that he shall not when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect."

(1) [1899] A. C. 580. (2) 49 Can. S.C.R. 440.

The question most urgently pressed in the present case by way of challenging the validity of the Act now in question herein, was the Act of our Dominion Parliament, assented to on the 10th April, 1913, and known as the "Japanese Treaty Act, 1913", declaring the treaty to have the force of law in Canada.

Section 3 of Art. 1 of the said treaty seems to contain all that can be even plausibly relied upon in such a connection. It reads as follows:—

"3. They shall in all that relates to the pursuit of their industries, callings, professions and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation."

Compare the forceful effect of the language used in the "Naturalization Act" above quoted and that just quoted from the treaty.

The former was turned down in this court and, in the court above, held not worthy of a hearing as against a provincial legislative enactment of the same tenor and purpose as that challenged herein.

I do not pretend that the aggregate consequences flowing from the Saskatchewan Act would be at all equal to those flowing from the policy of the legislature of British Columbia in doing as it pleased with its own, and complained of herein.

But I do pretend that the principle involved in the Saskatchewan Act, relative to a naturalized Chinaman, assured by our "Naturalization Act" of his right as such, in the terms above quoted, is of more serious import than anything contained in said section 3 of article 1 of the treaty above mentioned.

When we are asked to strain and positively wreck our constitution as outlined in the B.N.A. Act assuring provinces of such powers as challenged herein, I have no doubt what my answer should be to the questions submitted.

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I, before doing so, should observe that at one time in the course of the argument and consideration of the matters involved in item "N" of the schedule to the Act, which reads as follows:—"(n) Public works' contracts the terms of which are not prescribed by statute;" I was inclined to doubt if that article was maintainable.

On mature consideration I am, however, unable to discriminate between the rights of a property owner with which I have been dealing and the rights of a government executing a non-statutory contract such as covered by the last quotation.

Having considered all the supplemental factums presented in support of the argument at the hearing, I am tempted, with great respect, to suggest that the argument based upon the prerogative of the Crown, and obligations of the Crown, as if one and indivisible throughout the Empire, seems to overlook the many and varying limitations thereof brought in with the recognition of responsible government in Canada, over three-quarters of a century ago.

Even some forms of treaty must be read as being subject thereto.

I would, therefore, answer the first question in the affirmative which renders it unnecessary to answer the second.

I cannot, however, forbear asking what possible difference it can make so long as in these days of public ownership the government of British Columbia could, I submit, act directly and select its own workmen to clear its forests and exclude the Chinese and Japanese so long as public opinion would support them in doing so.

DUFF J.—The attack upon the provincial statute rests upon two principal grounds, 1st, that it is repugnant to the Dominion Act of 1913 declaring the accession of Canada to the Japanese Treaty and giving to the provisions of that treaty the force of law throughout the Dominion and 2nd, that the provincial legislation considered in itself, abstraction made from the operation of the Dominion Statute of 1913, is without legal force for the reason that it is an enactment "in pith and substance" relating to the subject of aliens and naturalized subjects, and on the principle of *Bryden's Case* (1) is *ultra vires*.

To consider, first, the second of these grounds of attack. The provincial statute professes to attach to the leases, licences, contracts and concessions which are the subject of the scheduled orders in council a condition which contains a stipulation that no Chinese or Japanese shall be employed by any of these classes of licensees, lessees and concessionaires in the exercise of the rights granted and in the case of contracts by any contractor in connection with the public work to which his contract relates; and the condition also contains a provision authorizing the cancellation of the rights of any grantee or contractor who disregards the stipulation. The instruments to which this condition applies are of two classes, 1st, contracts under which the contractor's remuneration would, in the ordinary course, be a payment of money out of the public funds of the province, and 2nd, grants of rights in and in relation to the public property of the province but grants of limited and particular rights only of which a mining lease so called may be taken as typical.

(1) [1899] A. C. 580.

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A single word of explanation may be convenient at the outset in relation to the water power certificates under the "Water Clauses Consolidation Act". These water power certificates were certificates granted to incorporated companies by the Lieutenant Governor in Council on certain specified terms and subject to such further terms as he in his discretion might see fit to exact, conferring a right upon the company receiving the certificate to apply for power purposes water power made available by authority of water records granted under the same Act and giving to the company in addition extensive compulsory powers for the construction, maintenance and operation of its works The precise point to be noted is that in the year 1892 the legislature of British Columbia, following legislation of a similar but much more elaborate character passed in the year 1890 by the Dominion Parliament relating to what was then known as the North West Territories, now the provinces of Alberta and Saskatchewan, declared that all unappropriated waters, that is to say, all water in the province not appropriated under statutory authority should be the property of the Crown in the right of the province; so that water power certificates authorizing the diversion and the application of unappropriated water for the purposes of the companies possessing such certificates are in effect conditional grants of special rights over and in relation to a subject which by the statute law of British Columbia is the property of the Crown.

The conclusion to which I have come is that the decision of the Lords of the Judicial Committee in *Bryden's Case* (1) does not in principle extend to pro-

(1) [1899] A. C. 580.

vincial legislation attaching to contracts of the kind and to grants of public property of the character to which the statute relates a condition in the terms of that now under consideration.

It is most material, I think, first of all to notice the nature and extent of the control exercisable by the legislature of a province over its public assets. The B. N. A. Act provided for the distribution not only of power, legislative and other, between the Dominion and the provinces but for the distribution of responsibilities and assets as well. The responsibilities assumed by the provinces were onerous and extensive; administration of justice, including police, public health, charitable institutions, colonization, including highways, municipal institutions, local works, including intraprovincial transport and above all, education. The responsibility in respect of agriculture and immigration was assumed jointly. In the sequel immigration has gradually become almost exclusively a Dominion matter while agriculture has been left very largely to the care of the provinces. The scheme of confederation necessarily involved a division of assets and an allotment of powers of taxation. The division of assets is the subject matter which concerns the sections of the Act numbered, 102 to 126 inclusive. By these sections the whole mass of the duties and revenues over which the provinces possessed the power of appropriation at the time of confederation is divided between the Dominion and the provinces. The sections in which their respective rights are defined being sections 102, 108, 109, 117 and 126.

Two characteristics of these provisions have often been judicially noted, 1st, they do not displace the title of the Crown in the public property. What is

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dealt with is the power of appropriation possessed by the provincial legislature at the time of Confederation (sec. 102); and 2nd, this power of appropriation is treated (secs. 108, 109, 117, 92 (5)) as equivalent to property. The interest of the Dominion as well as that of the provinces in the public property both in that assigned by the sections mentioned and that afterwards acquired as the result of taxation or from other sources of revenue is, as Lord Watson said in *Maritime Bank* v. *Receiver General*, (1) this right of appropriation; and as was said again by Lord Watson in the *St. Catherines Milling Case*, (2) this right of appropriation is equivalent to the entire beneficial interest of the Crown in such property. Ultimately in each case this power of appropriation rests with the Dominion or the provincial legislature as the case may be and that not by virtue alone of any special enactments of secs. 91 and 92 relating to property but in the case of the provinces by force of the provision giving the provinces control over the provincial constitution; and the legal effect of these provisions as Lord Watson said in the *St. Catherines Milling Case* (2) is to exclude from Dominion control any power of appropriation over the subjects assigned to the provinces which are placed under the control of the provincial legislatures. As regards the provinces this control by the legislatures over the proceeds of taxation and over the property assigned to them by the enactments of the B.N.A. Act is essential to the system set up by the B.N.A. Act. Provincial autonomy would be reduced to a simulacrum if the proceeds of provincial taxation were subject to the control of some extra-provincial authority and such proceeds are placed

(1) [1892] A.C. 437, at pp. 441 and 444. (2) 14 App. Cas. 46, at p. 57.

by the provisions referred to on precisely the same footing in respect of the legislative power of appropriation as the existing assets distributed by the Act. The title to all such property is vested in His Majesty but in His Majesty as sovereign head of the province (*Maritime Bank's Case* (1)); as regards the appropriation and disposal of such property His Majesty acts upon the advice of the provincial legislature and executive. No extra provincial authority is constitutionally competent to give such advice.

I do not mean to imply that the provinces in exercising their powers of ownership over provincial property may not be subject to restrictions arising out of the provisions of competently enacted Dominion legislation. *In re Provincial Fisheries* (2) Lord Herschell delivering the judgment of the Judicial Committee pointed out that Dominion legislation might in certain cases, in theory at least, so restrict the exercise of the provincial proprietary rights as virtually to effect confiscation of them.

But while that is so Lord Watson pointed out as already mentioned, in *St. Catherines Milling Company's Case* (3) that the legal effect of the provisions of the Act dealing with the distribution of assets was to exclude the assets assigned to the province from the Dominion power of appropriation save for the purpose mentioned in sec. 117. There is therefore this limit to the effect of Dominion legislation in this connection. The Dominion has no power to deal with provincial public assets as owner. This is illustrated by the decision in the *Fisheries Case*, (2) in which it was held that notwithstanding the Dominion power of

(1) [1892] A.C. 437, at pp. 443, 444. (2) [1898] A.C. 700.
(3) 14 App. Cas. 46, at p. 57.

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regulation of fisheries the authority remains with the province to settle the conditions upon which rights shall be granted in respect of fisheries vested in the province as owner; and at p. 713 Lord Herschell explicitly says on behalf of the Judicial Committee that an attempt on the part of the Dominion to deal with provincial public property as owner cannot be supported as an exercise of legislative authority under sec. 91.

This authority of the province in relation to its public property seems necessarily to involve the exclusive right to fix the conditions upon which public money shall be disbursed and rights in or in respect of provincial public property granted. That seems to be involved in the conception of such authority as equivalent to ownership. True it is that by section 106 and by section 126 it is provided that the duties and revenues over which the Dominion and the provinces are respectively given the power of appropriation shall be appropriated to the public service of the Dominion or of the province as the case may be. What is an appropriation to the public service of the Dominion or to the public service of a province? Is that a question reviewable by a court? Without deciding finally that point it is quite plain that the question whether a given appropriation by the Dominion Parliament or by a provincial legislature is an appropriation for the public service within the meaning of these enactments is a point upon which any court would be slow to pass. I doubt very much if such a question is reviewable judicially.

The present reference presents the question (as it was argued by counsel on behalf of the Dominion as well as on behalf of the private interests opposed to the validity of the legislation) as a question depending

upon the application of *Bryden's Case* (1). *Bryden's Case* was considered in the later case of *Cunningham* v. *Tomey Homma* (2). There are expressions in the later judgment which appear to throw some doubt upon the earlier decision but I do not think the Judicial Committee in 1903 intended to overrule the central point of the decision of 1899. In the earlier case Lord Watson laid down that the rights and disabilities of aliens constituted a matter exclusively within the legislative jurisdiction of the Parliament of Canada and having come to the conclusion that the legislation in question there did "in pith and substance" deal solely with this subject, he held that the legislation was beyond the jurisdiction of the province. According to the interpretation of *Bryden's Case* (1) laid down in 1903 the Coal Mines Legislation had been obnoxious to constitutional restrictions in the sense that in principle it involved an assertion of authority on the part of the province to exclude Chinese aliens and naturalized subjects from all employments and thus by preventing them earning their living to deny them the right of residence within the province. That I think is the pith of the earlier legislation according to the interpretation placed by the later decision upon the judgment in *Bryden's Case* (1)—an assertion of authority on the part of the province to exclude Chinese aliens or naturalized subjects from residence in the province. I shall come presently to consider the Act of 1921 from this point of view, but before doing so it is important I think, to observe that the minor premise of the judgments in *Bryden's Case* (1) and *Tomey Homma's Case* (2) was that the legislation impeached in *Bryden's Case* (1) was legislation which in substance and effect if not in its very

(1) [1899] A. C. 580. (2) [1903] A. C. 151.

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terms it would have been competent to the Dominion to enact in exercise of its power to make laws in relation to aliens and naturalization; but while I do not think an affirmative answer to the question would by any means be necessarily decisive upon the point upon which we have to pass at present it is I think pertinent and worth while to examine the question whether or not the enactment now in question is an enactment which in whole or in part would have been competent to the Dominion under section 91.

I have already in a general way pointed out the characteristics of the scheduled orders-in-council. They enact that there shall be engrafted upon each instrument of the class mentioned a stipulation against the employment of Chinese and Japanese and the statute provides that a breach of this stipulation will confer upon the government of the province a right of cancellation. Is this an enactment competent to the Dominion under its legislative authority in relation to the subject of aliens? The Judicial Committee in *Citizens Ins. Co.* v. *Parsons* (1) and very lately in the judgment delivered by Lord Haldane in the *Great West Saddlery Company* v. *The King* (2) has pointed out that the scope of the enactments of ss. 91 and 92 must be determined, and in many cases the question is one of more than a little nicety, by reference to the context furnished by the two sections as a whole. Their Lordships in *Tomey Homma's Case* (3) had to consider the scope of the legislative authority conferred in respect of the subject of naturalization in its relation to the provincial authority upon the subject of the provincial constitution and they reached the conclusion that if this limitation

(1) [1881] 7 App. Cas. 96. (2) [1921] 2 A. C. 91.
(3) [1903] A.C. 151.

at all events was imposed upon the Dominion authority that it was not of such scope as to place any restriction upon the provincial power to prescribe the conditions of such privileges as that of the right to exercise the provincial legislative suffrage. It would appear to admit of little doubt that similar considerations apply with perhaps much greater force to the Dominion authority in respect of aliens. An authority to legislate on the subject of aliens (the subjects of the provincial constitution and municipal institutions being assigned to the province) would not seem *prima facie* to embrace the authority to provide that all aliens should possess the same right to the provincial legislative suffrage as British subjects or the same right to sit in the legislature and to hold seats in the provincial executive or the same right to exercise the municipal franchises or to be members of municipal councils or to be municipal officials or (the exclusive authority to legislate on the subject of provincial officials being allotted to the province) to provide that aliens should possess equal rights with British subjects in respect of employment in the civil service of the provinces. Similar considerations again would appear to me sufficient to establish the exclusion from that authority of the power to require that aliens shall be on the same footing as British subjects in respect of the beneficial enjoyment of appropriations by provincial legislatures from public provincial funds or in respect of grants of interests in provincial property.

An attempt on part of the Dominion to enact the Act of 1921 would pass beyond the scope of the authority given by section 91. The restrictions imposed by the scheduled orders-in-council affect, it must be observed, naturalized British subjects and native

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born British subjects. Clearly the Dominion could not an any ground capable of plausible statement pass a law restricting the right of grantees of interests in provincial property in relation to the employment of native born British subjects; the *Tomey Homma Case* (1) seems to negative the existence of such an authority in relation to naturalized subjects. The proportion of naturalized and native born British subjects of Japanese and Chinese race to the whole of the population within that category in the province of British Columbia must be considerable. These considerations alone seem to present a formidable difficulty in the way of supporting such legislation as Dominion legislation under its authority in relation to aliens and naturalization.

But the Dominion authority must fail, I think, upon a broader ground. For the purpose of explaining that ground more clearly I shall assume that the condition in question affected all aliens and aliens alone. The Dominion authority in respect of aliens it must be taken I think in consequence of the decision in *Bryden's Case* (2), comprehends the right to define the rights and disabilities of aliens in a general way. But whether it comprehends the right even by general enactment to attach to grantees of rights in provincial property a special disability in relation to the employment of aliens, is, I think, at least gravely questionable; and the difficulty is not diminished when one considers the question in relation to grants of public monies. Assuming aliens to be under no applicable general disability is it truly legislation on the subject of aliens to prohibit the employment of them in circumstances in which they are to be paid out of public funds? To prohibit the provincial government from employing an alien in

(1) [1903] A.C. 151. (2) [1899 A.C. 580.

any circumstances? To place a like prohibition upon municipalities? I am not convinced that an affirmative answer can be given to these questions.

But the legislation in question goes a step—and a very long step—beyond this. It professes to attach to contracts entered into with the provincial government, to grants made by the provincial government, a stipulation and a condition the character of which has already been described, making the rights of the contractor or grantee defeasible upon nonperformance of the stipulation. It does not appear to me to admit of doubt that to impose by law such a stipulation and such a condition as part of such instruments would be an attempt on the part of Parliament to intervene in the disposition of the public funds of the province and the control and disposition of the public property of the province as owner; and therefore to transcend the restriction which as already mentioned is plainly laid down upon the activities of the Dominion parliament in exercise of the authority given by sect. 91 of the B.N.A. Act and plainly required by the decisions above mentioned. On this ground alone for the reason above given the irrelevancy of *Bryden's Case* (1) seems established.

But to come to a more particular consideration of *Bryden's Case* (1) and *Tomey Homma's Case* (2) and the application of the principle of these decisions to the statute of 1921 and the scheduled orders-in-council. The view taken in *Bryden's Case* (1) as explained by *Tomey Homma's Case* (2) of the "Coal Mines Regulation Act" was, as I have said, that it involves an assumption on the part of the province to deal with the funda-

(1) [1899] A.C. 580. (2) [1903] A.C. 151.

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mental rights of aliens and naturalized subjects in a manner and degree not consistent with a recognition of their right of residence in the province. In *Bryden's Case* (1) it was held that the necessary and indeed the only effect of the prohibition contained in the statute there under consideration was to prevent the class of Chinamen inhabiting British Columbia (aliens and naturalized subjects) from pursuing the occupation of underground coal mining. The statute and orders-in-council now under review have no such effect in fact or in principle. There is no prohibition directly levelled against Chinese and Japanese. There is a stipulation imposed, it is true, *ab extra* by the law upon instruments of the classes affected enforceable against grantees and concessionaires by the penal sanction of forfeiture which in effect excludes the employment of Chinese and Japanese, whether aliens, naturalized subjects or native born subjects in connection with the exercise of rights or the performance of duties under such instruments, but the stipulation and the condition are strictly limited to the employment of such persons in such circumstances. There is no prohibition affecting a lessee under the "Placer Mining Act", for example, or the holder of a certificate under the "Water Clauses Consolidation Act" in activities having no connection with the rights given by such instruments, and there is no general prohibition generally affecting any single occupation.

The last mentioned point requires perhaps a little elaboration. The orders in council as affecting the lumbering and logging industries, for example, are without operation in all cases in which the right to cut timber is incidental to the ownership of the land

(1) [1899] A.C. 580.

and in cases where the right to cut timber is derived through any grant of any character other than licenses and leases of the specific kinds mentioned in the orders-in-council. Without proceeding to further detail it is sufficient to point out that the vast areas of land in different parts of the province granted as subsidies for aid in the construction of railways and the timber on those areas are quite unaffected by anything in these orders-in-council. There is, for example, the great land grant in Vancouver Island embracing about one fifth of the whole area of the island given in aid of the construction of the E. & N. Ry. There is the railway belt stretching from the coast to the eastern boundary line of the province granted to the Dominion under the terms of union, and besides there are the large areas in southern British Columbia given by the legislature in aid of railway construction some thirty years ago. So as to coal mining. The effect of these orders-in-council on the industry of coal mining must be trivial because it has no application except to coal mining in lands in which the title does not remain in the Crown. So again with regard to metalliferous mining. The statute does not affect mining on Crown granted mineral claims except in a very limited degree or in mineral claims worked under the provisions of the "Mineral Act" before the issue of a Crown grant; and as regards placer mining it applies only to placer mining leases under the specified provisions and does not affect such mining pursued on placer mining claims. So again with regard to the grants of water rights. The right to divert water for agricultural purposes, for ordinary domestic purposes, for community supply, is not affected by the condition laid down, which affects only power certificates under Part IV of the Act. As regards contracts

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for public works, the incidence of the order-in-council is no doubt intended to be limited and I think that it is the proper construction of it to contracts with the government where the remuneration of the contractor is derived from the legislative appropriation of public monies. Obviously the legislature has not by the Act of 1921 attempted to deny the Chinese and Japanese the right to dispose of their labour in the province nor has it attempted to prohibit generally the employment of Chinese and Japanese by grantees of rights in the public lands of the province.

It should be noted that the provisions of the B.N.A. Act 102 to 126, in so far as they affect the public lands, contemplate not only the raising of revenue but an object at least as important, the distribution of these lands for the purpose of colonization and settlement. As Lord Selborne said in the *Attorney General* v. *Mercer Case* (1), the provisions are of a high political nature they are the attribution of Royal territorial rights for the purposes of not only revenue but for the "purposes of government" as well.

In some of the provinces perhaps the most important responsibility resting upon the legislature was the responsibility of making provision for settlement by a suitable population. This is recognized by the provision of the Act which gives to the provinces (subject to an overriding Dominion authority) the power to make laws in relation to the subject of immigration.

I find it difficult to affirm that a province in framing its measures for and determining the conditions under which private individuals should be entitled to exploit the territorial resources of the province is passing beyond its sphere in taking steps to encourage

(1) [1883] 8 App. Cas. 767.

settlement by settlers of a class who are likely to become permanently (themselves and their families) residents of the province. I see no reason for thinking that the province of British Columbia in providing, for example, that persons entitled to take advantage of the privileges given by the "Crown Lands Act" in relation to pre-emption of the public lands is entering a sphere which does not properly belong to it in enacting that such persons shall be either British subjects or those who have declared their intention to become British subjects.

These considerations are not irrelevant because they point to the conclusion that it cannot be affirmed (a condition of the applicability of *Bryden's Case* (1)) in respect of such legislation as that before us that it has no other effect than its effect upon the unrestricted opportunity which Chinese and Japanese might otherwise enjoy in disposing of their labour. That cannot be affirmed because it is impossible to say that the legislature in imposing such conditions had not in view some object falling within the scope of its political duties in relation to the interests and responsibilities committed to it.

The next point which naturally arises for consideration is whether effect should be given to the contention made on behalf of the Dominion that the Dominion statute of 1913 can be sustained as enacted in exercise of the power of the Dominion in relation to aliens. There are grave objections to this contention. One of the provisions of the treaty which is declared to have the force of law is a provision which puts Japanese subjects on the same footing as regards education

(1) [1899] A.C. 580.

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as British subjects. The subject of education, as already mentioned, is committed to the provincial jurisdiction by s. 93. One of the provisions which, as I have already said, must be regarded as fundamental. I am unable to agree that the authority of the Dominion with regard to the subject of aliens is comprehensive enough to support an enactment in the terms of the treaty clause on this subject and it is impossible, I think, to suppose that parliament in declaring this clause to have force of law was professing to exercise any authority under s. 91. But there is an objection based upon a broader ground. I am unable for the present at all events to agree with the view that the Dominion authority in relation to aliens comprehends the power to give to aliens rights having primacy over the rights of the provinces in relation to grants of public money or grants of interests in public lands. I will not elaborate this point, my reasons will sufficiently appear from what I have already said.

I now come to section 132, which is in these terms:—

"132. The parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries."

It is a condition of the jurisdiction created by this section that there shall be some obligation of Canada or of some province thereof as part of the British Empire towards some foreign country arising under a treaty between the Empire and such foreign country. A treaty is an agreement beween states. It is desirable, I think, in order to clear away a certain amount of confusion which appeared to beset the argument to emphasize this point that a treaty is a compact between

states and internationally or diplomatically binding upon states. The treaty making power, to use an American phrase, is one of the prerogatives of the Crown under the British constitution That is to say, the Crown, under the British constitution, possesses authority to enter into obligations towards foreign states diplomatically binding and, indirectly, such treaties may obviously very greatly affect the rights of individuals. But it is no part of the prerogative of the Crown by treaty in time of peace to effect directly a change in the law governing the rights of private individuals, nor is it any part of the prerogative of the Crown to grant away, without the consent of parliament, the public monies or to impose a tax or to alter the laws of trade and navigation and it is at least open to the gravest doubt whether the prerogative includes power to control the exercise by a colonial government or legislature of the right of appropriation over public property given by such a statute as the B.N.A. Act. All these require legislation. As regards these matters the supreme legislative authority in the British Empire is, of course, the Parliament of the United Kingdom. Three views are perhaps conceivable as to the scope of the authority arising under s. 132. It might be supposed that it was intended to give jurisdiction only in relation to those matters which are committed to the authority of parliament by section 91 and other provisions of the B.N.A. Act. It might be supposed, on the other hand, to constitute a delegation of the entire authority of the parliament of the United Kingdom, in so far as the execution of such authority might be required for the purpose of giving effect to the treaty obligations of the Empire within Canada or in relation to Canada. On the other hand it may be supposed that a less sweeping

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authority is conferred by this section; that it is subject to some limitations arising out of co-ordinate provisions of the B.N.A. Act itself. As to the first of these views, it may, I think, be at once rejected upon the ground that otherwise the section would be quite unnecessary. As to the other two; there are certain fundamental terms of the arrangement upon which the B.N.A. Act was founded, and these it is difficult to think it was intended that parliament should have power to disregard in any circumstances. But it is unnecessary to pass upon these points. The authority given by section 132 is an authority to deal with subjects of imperial and national concern as distinguished from matters of strictly Dominion concern only; and I am satisfied it is broad enough to support the legislation in question. The treaty validated by statute of 1913 deals with subjects which are ordinary subject matters of international convention: with precisely the kind of thing which must have been in the contemplation of those who framed this section. The effect of the Act of 1913 is, in my opinion, at least this: that with respect to the right to dispose of their labour, the Japanese are to be in the same position before the law as the subjects of the most favoured nation. Equality in the eye of the law in respect of these matters is what I think the legislation establishes. Does the Act of 1921 in its true construction infringe these rights of Japanese subjects? In my opinion it does. It excludes them from employment in certain definite cases. It is not, I think, material that the province in passing the Act is engaged in administering its own corporate economic affairs. If it goes into effect, it goes into effect (as a law of the province) abrogating rights guaranteed by the treaty. It is thus not only a law passed against the good faith of the

treaty but it is, in my opinion, a law repugnant to the treaty and as such I think it cannot prevail. I think, moreover, that the Act of 1921 views Japanese and Chinese as constituting a single group and since it cannot take effect according to its terms that it must be treated as inoperative *in toto*.

ANGLIN J.—The competency of the legislature of British Columbia to pass chapter 49 of its statutes of 1921 is the subject of a reference to this court by His Excellency the Governor General in Council, made under s. 60 of the "Supreme Court Act". The statute in question purports to validate certain orders of the provincial executive council providing for the insertion, in leases of Crown lands, Crown licences and other documents, of clauses precluding the employment by Crown lessees and licensees of Chinese and Japanese labour. Its validity is challenged on two distinct grounds: (a) that it impinges on the exclusive jurisdiction of the Dominion Parliament over "Naturalization and Aliens" (B.N.A. Act, s. 91 (25); (b) that it derogates from rights assured to the Japanese in Canada by a treaty between H.M. the King and H.M. the Emperor of Japan, "sanctioned and declared to have the force of law in Canada" by 3 & 4 Geo. V., (D), c. 27.

It seems obvious that, inasmuch as the latter ground of attack concerns only the Japanese, it will, in any event, be necessary to consider the former ground in order to answer the question propounded in so far as it relates to the Chinese, who are also affected by the impugned legislation and the orders in council it purports to confirm. Their Lordships of the Privy Council have frequently intimated that in dealing with matters akin to that now before us, those upon whom the duty

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of determining them is thrown will be well advised so far as possible to restrict their expressions of opinion to what is essential for the determination of the particular question in hand. *Citizens Ins. Co. v. Parsons* (1); *Hodge v. The Queen* (2); *Attorney General of Manitoba v. Manitoba Licence Holders' Association* (3). It would therefore seem to be desirable that the question as to the effect of the Japanese Treaty and of its sanction by the Canadian parliament should be entered upon only if the impugned legislation should be held not to invade the jurisdiction of the Dominion parliament under s. 91 (25) of the B.N.A. Act. I accordingly take up this latter question.

If the British Columbia legislation, when properly appreciated, falls within the legislative jurisdiction conferred on the Dominion Parliament by s. 91 (25), in view of the concluding proviso of s. 91—"Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local and private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces"—it should not be upheld merely because it may in some aspects be regarded as an exercise of legislative power conferred by one of the subsections of s. 92.

In determining the validity of legislation which it is sought to uphold under, and which may *ex facie* purport to have been passed in the exercise of certain legislative powers conferred by the B.N.A. Act, their Lordships have intimated that the courts should have regard to "the pith and substance of the enactment" rather than to its form or to any gloss put upon it

(1) 7 App. Cas. 96, 109. (2) [1883] 9 App. Cas. 117, at p. 128.
(3) [1902] A. C. 73, at p. 77.

(*Union Colliery Co. v. Bryden*) (1)—that they should ascertain at what the legislation is really aimed and should accordingly determine where legislative jurisdiction to enact it is to be found. *Great West Saddlery Co. v. The King* (2), *Attorney General for Canada v. Attorney General for Alberta* (3) and *The Board of Commerce Case* (4) are recent instances in which their Lordships have so dealt with Canadian statutes.

To paraphrase Lord Watson's language in the *Bryden Case* (1) the leading feature of the orders in council dealt with by the legislation in question consists in this—that they have, and can have, no application except to Japanese and Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, upon, or in the development of, any property leased from the government of British Columbia or in private enterprises which are operated in whole or in part under licences from that government; "the pith and substance of the enactments" objected to consists in establishing a prohibition which affects aliens or naturalized subjects in matters that directly concern their rights, privileges and disabilities as such; they therefore trench upon the exclusive authority of the parliament of Canada.

While the judgment in the *Bryden Case* (1) is undoubtedly explained and somewhat restricted in its application by what Lord Chancellor Halsbury said in pronouncing the judgment of the Board in the *Tomey Homma Case* (5), the authority of the former decision remains unchallenged. The legislation now before us

(1) [1899] A.C. 580, at p. 587.
(2) [1921] 2 A.C. 91.
(3) [1921] 38 Times L. R. 90.
(4) [1922] 1 A.C. 191.
(5) [1905] A.C. 151 at p. 157.

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in my opinion much more closely resembles that condemned in the *Bryden Case* (1) than that upheld in the *Tomey Homma Case* (2), where a matter of provincial electoral franchise, and therefore of the constitution of the province, was the subject of the legislation, or in the subsequent *Quong-Wong Case* (3) in this court, where a law for the suppression of a local evil was upheld. Properly appreciated, the orders in council which the British Columbia legislation of 1921 purports to validate are devised to deprive Chinese and Japanese, whether naturalized or not, of the ordinary rights of the inhabitants of British Columbia in regard to employment by lessees and licensees of the Crown and are not really aimed at the regulation and management of Crown properties or Crown rights. I am unable to distinguish the case at bar in principle from the *Bryden Case* (1). If the authority of that decision is to be destroyed, it must be by the Judicial Committee itself and not by this court.

I would therefore answer the first question on the reference in the negative, which renders an answer to the second unnecessary.

BRODEUR J.—The question we have to consider on this reference is whether the British Columbia legislature has the right to prohibit the employment of Chinese or Japanese on Crown lands or on public works.

On the 2nd April 1902 the Legislative Assembly of that province passed a resolution declaring that in all contracts, leases and concessions made by the government, provision should be made that no Chinese or Japanese should be employed in connection with these contracts, leases or concessions.

(1) [1899] A.C. 580. (2) [1903] A.C. 151.
(3) 49 Can. S.C.R. 440.

Such a resolution was never embodied before 1921 in any statute of the legislature and was not then part of the law of the land. Further it could not be disallowed by the federal authorities under the powers conferred by sections 55 and 90 of the B.N.A. Act because it was not a statute.

In conformity with the said resolution, however, the government of the province passed on the 28th of May 1902 and on the 16th day of June 1902 orders in council carrying into effect the resolution of the Legislative Assembly and since the passing of these orders in council the Government has inserted in its contracts for the construction of provincial public works a provision that no Chinese or Japanese should be employed in connection with such works and has caused it to be inserted as a term of its contracts and leases conferring rights or concessions in respect to the public lands belonging to the province, a provision that no Chinese or Japanese shall be employed about such premises.

In 1920 the provincial government of British Columbia referred to the Court of Appeal of that province the question whether the Japanese Treaty of the 3rd of April, 1911, operated as to limit the legislative jurisdiction of the Legislative Assembly.

The Court of Appeal unanimously decided that it was not competent to the provincial legislature to insert in these public contracts or leases in respect of public lands a provision that no Japanese shall be employed upon such works or lands.

In 1921 the legislature of British Columbia passed the statute ch. 49 by which the two orders in council of the 28th May 1902 and the 18th June 1902 are declared to have been valid and effectual for all purposes.

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The Consul General of Japan having suggested to the Federal government that this statute of 1921 was *ultra vires* and that it should be disallowed by His Excellency the Governor General, the Federal Government has referred to the Supreme Court the two following questions:—

"1. Had the legislature of British Columbia authority to enact cap. 49 of its statutes of 1921 "An Act to validate and confirm certain orders in council and provisions relating to the employment of persons on Crown property?

"2. If the said Act be in the opinion of the court *ultra vires* in part then in what particulars is it *ultra vires?*"

The question of restricting the employment of Chinese and Japanese labour has been for years a subject of discussion in the legislature of British Columbia and of litigation before the Canadian courts and the Privy Council. It has been also the subject of diplomatic relations between the countries interested.

We see that as far back as 1890, the legislature of that province passed the "Coal Mines Regulation Act" by which it prohibited the Chinamen from employment in underground coal workings. The Privy Council, being called upon to pass judgment on the validity of the Act, declared that the statutory prohibition in question was within the exclusive authority of the Dominion Parliament conferred by section 91, subsection 25 in regard to "naturalization and aliens": *Union Colliery v. Bryden* (1).

In 1897, the "British Columbia Electoral Act" was passed and provided that no Japanese, whether naturalized or not, should be entitled to vote. The

(1) [1899] A. C. 580.

validity of this Act was also brought before the courts, and the Privy Council upheld the validity of the Act and decided that the Dominion parliament, under sec. 91 s.s. 25 B.N.A. Act, had exclusive jurisdiction to determine how the naturalization should be constituted, but that the provincial legislature had the right to determine under sec. 92, s.s. 1 what privileges, as distinguished from necessary consequences, shall be attached to naturalization. *Cunningham v. Tomey Homma* (1).

It was said that in the *Tomey Homma Case* (1) the Judicial Committee "modified the views of the construction of subsection 25 of section 29 in the Union Collieries decision". *Quong-Wing v. The King* (2).

This *Quong Wing Case* (2) gives another instance of a legislative enactment against Orientals. It has reference to a prohibition by the legislature of Saskatchewan against the employment of white female labour in places of business kept by Chinamen, and it was decided by this court that such a provision was intra vires of the provincial legislature.

The Privy Council refused leave to appeal in this *Quong Wing Case* (2).

I can, with some difficulty, reconcile these three above decisions. (Clement's Canadian Constitution, 2nd ed. p. 673)

It appears to me however that where a province deals with a subject which evidently is within its jurisdiction, as the constitution of its legislative assembly or the making of the civil contract of hire, then it can provide against the Chinese and the Japanese becoming duly qualified electors and employing white girls. But where, under the pretence of dealing with local

(1) [1903] A. C. 151. (2) 49 Can. S.C.R. 440 at p. 446.

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undertakings, the legislature undertakes to legislate with regard to naturalization or aliens, then it is a legislation which is not within its competence. A provincial legislature cannot discriminate against an alien upon the ground of his lack of British nationality, but a person may nevertheless be under disability, civil or political by reason of racial descent, a disability which he would share with natural born or naturalized British subjects of like extraction. *Quong-Wing v. The King* (1).

By the orders in council which the British Columbia government passed in 1902 and which were confirmed by the Act whose validity is referred to us, the legislature deals with its own crown lands and enacts that a certain class of persons will not be permitted to work on those lands. It is a question of internal management which, according to section 92 s.s. 5 of the B.N.A. Act, is within the competence of the local authority.

I therefore come to the conclusion that the Legislation at issue, if it were not for the Japanese Treaty to which I will presently refer, would be *intra vires*. It is certainly *intra vires* as far as the Chinese are concerned.

In 1911, a treaty was made between His Majesty the King and the Emperor of Japan in which it was stipulated that the subjects of the contracting parties "shall in all that relates to the pursuit of their industries, callings, professions and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation."

This treaty was sanctioned and declared to have the force of law in Canada by the Canadian parliament in 1913.

(1) 49 Can. S.C.R. 440.

Now by the B.N.A. Act sec. 132, it is provided that the parliament of Canada shall have all powers necessary for performing the obligations of Canada or of any province towards foreign countries arising under treaties between the British Empire and such foreign countries.

If the treaty had not been adhered to by the Dominion parliament, it could be contended with force that a Canadian province was not bound to obey the provisions of this treaty and could discriminate against the Japanese in favour of their foreign subjects. *Walker v. Baird* (1).

The King has the power to make a treaty, but if such a treaty imposes a charge upon the people or changes the law of the land it is somewhat doubtful if private rights can be sacrificed without the sanction of Parliament. The bill of rights having declared illegal the suspending or dispensing with laws without the consent of parliament, the Crown could not in time of peace make a treaty which would restrict the freedom of parliament.

In the United States a different rule prevails. Under the United States constitution the making of a treaty becomes at once the law of the whole country and of every state. In our country such a treaty affecting private rights should surely become effective only after proper legislation would have been passed by the Dominion parliament under section 132 B.N.A. Act.

We have in the "Japanese Treaty Act" of 1913 the legislation which is required to give force of law to that agreement, and it becomes binding for all Canadians and for all the provinces.

(1) [1892] A.C. 491.

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British Columbia could not under that treaty give to the Japanese a treatment different from the one given to other foreigners.

I consider the legislation of British Columbia illegal as far as the Japanese are concerned.

I would then answer the first and second questions referred to us: That the legislature of British Columbia had authority to enact cap. 49 of its statutes of 1921 as far as the Chinese were concerned but that in so far as the Japanese are concerned such statute is *ultra vires*.

MIGNAULT J.—In answering the questions submitted by this reference, two decisions of the Judicial Committee must be considered: *Union Colliery Co. of British Columbia v. Bryden* (1), and *Cunningham v. Tomey Homma* (2).

The latter decision somewhat qualified the former, and indicated its scope in the following language:—

"This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province."

In my opinion, the purport of the legislation and orders in council referred to in the reference is well described by the above language. So far as it could do so, the government of British Columbia, with the sanction of the legislature, has excluded the Chinese and

(1) [1899] A.C. 580. (2) [1903] A.C. 151.

Japanese, naturalized or not, from the field of industry and the labour market in that province, and has, in effect, prohibited their continued residence and their earning their living in British Columbia. The case comes well within the rule of the *Bryden Case* (1) as explained in the *Tomey Homma Case* (2), and therefore the statute and the orders in council are *ultra vires*.

During the argument, counsel referred us to the Anglo-Japanese Treaty of April 3rd, 1911, sanctioned and declared to be law by the Dominion statute, 3-4 Geo. V. ch. 27, as rendering the impeached provisions void in so far as the Japanese are concerned.

This treaty is not mentioned in the reference, and inasmuch as I have come to the conclusion that this legislation is *ultra vires* under the "British North America Act" as construed by the above mentioned decisions, it is unnecessary to consider whether the treaty furnishes a further ground of nullity.

I would answer "No" to the first question of the reference. The second question requires no reply.

At the sittings on the 7th February, 1922, the Chief Justice, speaking for the court, said:—

"The answer by the court to the first question "submitted by His Excellency the Governor General "is in the negative. It is therefore unnecessary to "answer the second question. Idington J. dissenting; "Brodeur J. dissenting in part."

(1) [1899] A.C. 580.

(2) [1903] A.C. 151.

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*Feb. 7.

ST. LAWRENCE UNDERWRITERS' AGENCY OF THE WESTERN ASSURANCE COMPANY (APPELLANT);

AND

E. P. FEWSTER, (DEFENDANT)....RESPONDENT;

AND

J. MARCHIORI (PLAINTIFF).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Appeal—Jurisdiction—Action by nominal plaintiff dismissed—Motion asking payment of cost by real plaintiff—"Judicial proceeding"—"Final judgment"—Equal division of the court on motion to quash—"Supreme Court Act", R.S.C. (1906) c. 139, s. 37—"Supreme Court Act" as amended by 10 & 11 Geo. V., c. 32.

In May, 1920, the plaintiff obtained judgment before the County Court against the defendant for damages caused by an automobile collision but on appeal the action was dismissed. The costs of the trial and appeal having been taxed at $1,165.05, execution against the plaintiff was returned *nulla bona*. On February 24th, 1921, a motion was made by the respondent for an order that the appellant, on whose behalf, as insurer of the plaintiff, the action had really been prosecuted, should pay the respondent's costs. The judgment granting the motion was affirmed by the Court of Appeal, and on motion to quash an appeal to this court:

Held, Idington and Brodeur JJ. dissenting, that, as the action had been begun before the 1st of July, 1920, the right of appeal to this court must be determined upon the provisions of the "Supreme Court Act" as they stood before the amendments of 10 & 11 Geo. V., c. 32, which became effective on that date.

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

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Per Davies C. J. and Duff and Anglin JJ.—The judgment granting the motion is not susceptible of appeal as a "final judgment" under sect. 37 of the "Supreme Court Act", R.S.C. (1906), c. 139. Brodeur J. *contra.*

As three of the six judges were of opinion that the court had no jurisdiction, it was considered that a hearing on the merits would be futile and the appeal was dismissed without costs.

MOTION to quash an appeal from the judgment of the Court of Appeal for British Columbia which, on equal division of the court, had affirmed the judgment of Grant J. and maintained a motion for an order as stated in the head-note.

The plaintiff sued in the County Court for damages to his automobile sustained in a collision with that of the defendant. He recovered judgment in May, 1920, for $597 and costs. On appeal to the Court of Appeal of British Columbia this judgment was reversed, and the action was dismissed with costs. The defendant's costs of the action and appeal were taxed at $1,165.05. Execution against the plaintiff was returned *nulla bona.* The defendant having ascertained that the action had in fact been brought by the St. Lawrence Underwriters in the name of the plaintiff, whom they had insured, applied in February, 1921, to the County Court judge, upon notice, for an order that his taxed costs should be paid by the St. Lawrence Underwriters. This application was granted and, on appeal, the order of the County Court judge was affirmed, the court being equally divided. The St. Lawrence Underwriters, having obtained leave from the Court of Appeal, appealed to the Supreme Court. The defendant moved to quash the appeal.

Tilley K.C. for the motion.—The motion to the County Court judge was made in the action which was instituted before July, 1920. The amendments to

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the "Supreme Court Act" of that year do not apply.—The Court of Appeal had no jurisdiction to grant leave. The appeal, if any, lies under s. 37 of the former statute. The judgment from which it is sought to appeal is not a "final judgment" within the definition in the "Supreme Court Act" prior to 1920.

Heighington contra.—The motion to compel the appellants to pay the defendant's costs was a substantive proceeding. The amendments of 1920 apply and, leave having been obtained, the appeal lies. If not, there is a right of appeal under s. 37 of the former Act. The order of the County Court judge disposes of a substantive right of one of the parties and is therefore a "final judgment".

THE CHIEF JUSTICE.—In the opinion of a majority of the members of the court, this action having been begun before the first of July, 1920, the right of appeal must be determined upon the provisions of the "Supreme Court Act" as they stood before the amendments which became effective on that date. Three of the judges (the Chief Justice, Mr. Justice Duff, and Mr. Justice Anglin) hold the view that, having regard to its incidental nature as a step taken to secure the realization of the judgment for costs rendered against the plaintiff, the application made to the County Court judge for an order that those costs should be paid by the appellants as the real plaintiffs was not a "judicial proceeding" within the meaning of that term as used in the definition of "final judgment" enacted by 3 & 4 Geo. V., c. 51, s. 1, (*Svensson v. Bateman*, (1), and that the judgment from which it is

(1) [1909[42 Can. S.C.R. 146.

sought to appeal is therefore not a "final judgment" appealable to this court under s. 37 of the "Supreme Court Act" (R.S.C., 1906, c. 139.)

As the appeal is to be heard immediately and by the court as now constituted it is obvious that the opinion of three members of the court adverse to its jurisdiction will necessarily be fatal to the appellant's success. It would therefore seem to be futile to hear argument on the merits, which may not be considered by one-half of the court, with whom dismissal of the appeal is a foregone conclusion.

It would seem to be the better course that the motion to quash should be refused and the appeal itself now dismissed—both without costs.

IDINGTON J. (dissenting).—The respondent Fewster was sued in one of the county courts of British Columbia by one Marchiori for damages done to his automobile, and recovered judgment for $597.52 and costs.

Upon appeal the Court of Appeal reversed the judgment with costs and that judgment was duly deposited with the registrar of the County Court as provided for by one of the rules of court and thereupon the judgment derived its effect from that rule, which reads as follows:—

> 21. When the Court of Appeal has pronounced judgment, either party may deposit the same, or an office copy thereof, with the registrar of the County Court, and upon being so deposited such judgment shall be filed and may be enforced as if it had been given by the County Court.

Thereupon an execution was issued by said county court against said Marchiori and duly returned *nulla bona* by the sheriff. That return was followed by an application by the respondent Fewster to the said court to have the appellant ordered to pay the costs so awarded.

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The grounds alleged were that the appellant had in fact instigated Marchiori to bring the action. And the learned senior judge of the county court granted said order without giving any reasons.

The appellant had never been made a party to the said action, or in any way been served with notice thereof, or relating thereto, until said notice after the judgment and execution and return thereof as aforesaid.

The appellant herein appealed from said order to the Court of Appeal and contended there was no jurisdiction in the county court to make such an order.

That court, on equal division, dismissed said appeal, the learned Chief Justice and Mr. Justice Galliher being in favour of allowing said appeal and the other learned justices Martin and McPhillips, being in favour of dismissing it.

Section 161 of the "County Courts Act," R.S.B.C. (1911) c. 53, is as follows:)

> 161. All the costs of any action or proceeding in the court not herein otherwise provided for shall be paid by or apportioned between the parties in such manner as the judge shall think fit, and in default of any special direction shall abide by the event of the action, and execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said court.

It is difficult to see how the county court judge could have power to make such an order under said provision, especially as to the costs directed by the Court of Appeal which were specifically awarded by the said court and liability therefor also specifically determined and finally disposed of by virtue of said order and the Rule 21 first above quoted.

I only refer to this to shew the importance of the questions raised and the reason for that court, though so divided, agreeing to allow and granting an order giving leave to bring an appeal to this court.

The power to grant such leave to appeal here was given by section 37 of c. 32 of 10-11 Geo. V., assented to the 16th June, 1920, and radically amending the "Supreme Court Act," and which in the enacting part of the new section 37 and subsec. (a) thereof, reads as follows:

37. Subject to sections thirty-eight and thirty-nine, an appeal shall lie directly to the Supreme Court from any final judgment of a provincial court, whether of appellate or original jurisdiction, other than the highest court of final resort in the province, pronounced in a judicial proceeding which is not one of those specifically excepted in section thirty-six—

(*a*) in any case by leave of the highest court of final resort having jurisdiction in the province in which the proceeding was originally instituted; provided that except in cases in which such highest court of final resort has concurrent jurisdiction with the court from which it is sought to appeal, special leave shall not be granted in any case which is not appealable to such highest court of last resort and which has not been heretofore appealable to the Supreme Court; and, . . .

That was brought into force by the following:—

4. This Act shall come into effect on the first day of July, 1920; but in regard to appeals in proceedings which shall have been begun in the court or before the body having original jurisdiction therein before that day, the Supreme Court shall nevertheless continue to possess and exercise the jurisdiction conferred by the sections hereinbefore repealed.

The said proceeding against the appellant was first taken on the 24th February, 1921, was quite independent of the original cause of action and had no relation thereto, but to the allegation that the affidavit and exhibits thereafter referred to set forth as the foundation for the motion.

In short it was a substitution for any new action which might have been founded on the facts alleged as to the instigation of what in the final result might have been declared unfounded in law.

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It was far more such an independent proceeding than is an interpleader issue founded on a judgment and in way of enforcing execution thereof which was declared long ago to be a new proceeding and the resulting judgment therein appealable here. The decision of the Privy Council in the case of *Macfarlane* v. *Leclaire*, (1) is presented in Cameron's Supreme Court Practice as the basis of our jurisprudence in that regard.

I submit that the order in question herein as clearly was as that the beginning of a new collateral proceeding under the Act giving the Court of Appeal power to grant that leave which it has given to come here. Hence I hold the motion to quash such an appeal should not be granted.

I am unable to understand why the imperative words of the first part of the above quoted section bringing the amending Act into force on 1st July, 1920, are to be discarded when invoked in a case where the proceeding in question clearly began after that date, and clearly had, for reasons already assigned, no legal connection therewith.

At all events if that county court proceeding and judgments are to be held as so connected with the order in question as to be reasonably invoked as a barrier to the other parts of the amending Act expressly giving the power to the Supreme Court of Alberta to give such leave as given, then surely the right to appeal still exists within the remaining part of the said section 4.

I alternatively, therefore, submit that the judgment now appealed from herein, if to be so based on the appeal from the Court of Appeal as arising out of the county court suit, is appealable without leave under

(1) [1862] 15 Moore P.C. 181.

the provisions of the "Supreme Court Act" providing for appeal here where the jurisdiction was concurrent with that of the British Columbia Supreme Court jurisdiction.

If such a jurisdiction existed in any case in any court as to make such an order as in question, certainly it was also in the case here in question within the British Columbia Supreme Court's jurisdiction.

It was a power which the judge of the court must be presumed to have exercised not by virtue of anything in way of trying the county court suit, or anything in the way of trying to enforce said judgment therein, as in the case of *Svensson* v. *Bateman*, (1) and in exercising such a power he must have been, instead of leaving the parties to try it out, in a new action attempting to enforce or give a remedy for an alleged wrong which might well have been, and more properly, asserted by suing for the amount involved in the Supreme Court of British Columbia.

I by no means think that this is the correct view of the case presented on the motion to quash, but submit it is logically the alternative to be adopted if the latter part of said section 4 is to override the first, as urged upon us.

If the new motion is so bound up, however, with the case as to come within the latter part of the section, then surely an appeal must lie just as in any other like independent issue arising in the case in which the right of appeal is preserved by the latter part of the section.

In either of the foregoing alternatives by way of testing the power of the learned judge, I think the appeal should not be quashed, but the motion dismissed and the appeal be heard in due course.

(1) 42 Can. S.C.R. 146.

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DUFF J.—I concur with the Chief Justice.

ANGLIN J.—I concur with the Chief Justice.

BRODEUR J.—I am of opinion that the judicial proceeding which has given rise to this appeal is not the original action in the county court but the application made by the respondent to have the appellant ordered to pay the costs awarded on the original action. *Turcotte* v. *Dansereau* (1); *King* v. *Dupuis* (2); *Lefeuntun* v. *Véronneau* (3); *Macfarlane* v. *Leclaire* (4).

This application having been made on the 24th of February, 1921, then the right of appeal is to be determined by the amendment to the "Supreme Court Act" of 1920 (ch. 32 of 10-11 Geo. V, s. 4). The appellants, under the provisions of the latter amendment, have obtained leave; then this appeal is properly before us and should be heard. This is a final judgment appealable to this court under section 37 of the "Supreme Court Act."

The motion to quash should be dismissed.

But as we are equally divided on this question of jurisdiction and as it is obvious that the opinion of three members of the court adverse to its jurisdiction will be necessarily fatal to the appellants' success, it would therefore be futile to hear arguments on the merits.

The appeal then should be dismissed but without costs.

(1) [1896] 26 Can. S.C.R. 578.
(2) [1898] 28 Can. S.C.R. 388.
(3) [1893] 22 Can. S.C.R. 203.
(4) 15 Moore P.C. 181.

MIGNAULT J.—I concur in the opinion of the Chief Justice that the right of appeal in this case must be determined upon the provisions of the Supreme Court Act before its amendments in 1920.

Inasmuch as three members of the court are of the opinion that the order complained of is not a final judgment within section 37 of the Supreme Court Act, it is obvious that the appeal could not succeed and, without expressing any opinion as to the nature of the judgment, I concur in the dismissal of the appeal without costs.

Motion dismissed without costs.

Appeal dismissed without costs.

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*Feb. 10, 13.
*Mar. 29.

THE DOMINION BANK AND THE LONDON & CANADIAN INVESTMENT CO. ..... APPELLANTS;

AND

DAVID G. MARSHALL ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale of land—Public auction—Mistake—Parcel intended to be sold and bought—Not included in particulars—Rights of purchaser.

The receiver of the C. P. Lumber Co. was, by order of the court, authorized to borrow from the appellant bank a certain sum which should be a first charge on the whole assets of the company and the order provided for a sale of those assets in default of repayment. Such default having occurred, the bank sold the property to the Investment company appellant by public auction, the conduct of the sale being in the hands of the bank's solicitor under the supervision of the court. Owing to this solicitor being under the impression that a certain parcel of land did not belong to the Lumber Company, it was omitted from the particulars of sale. The solicitor for the receiver and the bank approved the particulars in the belief that they covered the omitted parcel and the purchasers bought under the same erroneous belief. One condition of the sale provided that "any error of description * * * shall not annul the sale nor shall any compensation be allowed in respect thereof." There was evidence that the omitted parcel had a very substantial value but no evidence was adduced that a greater price might have been obtained for the assets, if the omitted parcel had been included. Upon the discovery of the mistake, the appellants applied for an order by the court that the receiver execute and deliver to the purchaser a conveyance of the said parcel omitted in the particulars of the sale; this application was resisted by the respondent acting as trustee for the bondholders of the Lumber Company.

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

Held that the appellants' application should not be granted; and that, although the purchaser may have been entitled to rescission of the sale on the ground of mistake, the order prayed for should not be granted, as the appellants had failed to shew anything which would raise an equity against the bondholders such as might have enabled the court to direct that the deficiency in the land should be made good by the receiver at the bondholders' expense.

Judgment of the Court of Appeal ([1921] 3 W.W.R. 209) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Morrison J. and dismissing an application by the appellants for an order as above stated.

In an action brought on behalf of bondholders a receiver and manager of the assets of the Canadian Pacific Lumber Company was appointed by order of the Supreme Court of British Columbia and was authorized to borrow from the Dominion Bank a sum not exceeding $310,000, which should become a first charge on the assets of the company. The order provided for a sale of the assets of the company to satisfy the bank's charge in the event of default in re-payment on the date specified. Such default having occurred, a sale of the company's assets took place under the supervision of the court, whose officer approved the advertisement, conditions and particulars of sale. The conduct of the sale was in the hands of the bank's solicitor. The purchasers were the London and Canadian Investment Company, co-appellants with the bank. Owing to the bank's solicitor being under the impression that a certain parcel of land did not belong to the Lumber Company, it was omitted from the particulars of sale. The solicitor for the receiver, who was aware that the

(1) [1921] 3 W.W.R. 209 sub nom. *Marshall* v. *Canadian Pacific Lumber Company.*

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omitted parcel belonged to the Lumber Company, approved the particulars in the belief that they covered the omitted parcel; and the purchasers at the sale bought under the same erroneous belief. For the omitted parcel it is said on behalf of the bondholders that $75,000 can now be obtained, and their trustee resists an application made on behalf of the bank and the purchasers that the receiver should be directed to execute a conveyance of this parcel to the purchasers. The bondholders do not appear to have participated in the sale or to have been in any way responsible for the omission of the parcel in question from the particulars or for the mistaken impression of the purchasers that it had been included in the sale.

Mr. Justice Morrison made the order asked for by the bank and the purchasers; but, on appeal by the trustee for the bondholders, the Court of Appeal set this order aside and dismissed the application, Martin J.A. dissenting. The applicants now seek the restoration of Mr. Justice Morrison's order.

Greer K.C. and *Shepley* for the appellants.

F. Congdon K.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, with which I fully concur, I would dismiss this appeal with costs.

IDINGTON J.—The attempt to include in the sale a parcel of land which is alleged by the receiver to have a very considerable value and which was not only deliberately omitted from the particulars but also by no fair reading of the advertisement could be supposed to have been offered for sale is rather surprising.

The motion made about six months after the vesting order of the court carrying out the result of the sale as it actually took place, to have that additional property given the purchaser is something for which I venture to think no precedent can be found, and especially so in face of the conditions of sale, amongst which was the following:—

12.—The description of the property in the particulars is believed and shall be deemed to be correct, but if any error of description as to quantity or measurements or otherwise be found therein, it shall not annul the sale, nor shall any compensation be allowed in respect thereof.

There was much said in argument here about the intention of the parties concerned to sell the properties of the company in question and it was argued as if that had been advertised, which it was not.

I cannot see that the advertisement suggested any such thing or could convey to the minds of any bidders that such was the intention especially in face of such a condition of sale as I quote above.

The party who was the successful bidder indeed took the trouble to go to the solicitor in charge of the sale to learn from him if the intention was to sell the entire properties of the company and was answered affirmatively that such was the intention.

The solicitor was quite honest in giving such a reply for he laboured then, no doubt as he had in framing the advertisement, under a mistake of fact, relative to some expropriation proceeding which had been taken at one time but later abandoned.

The fault, so far as I can see, if any, was on the part of the bidder whose bid was successful, but who does not seem to have taken any pains to enlighten another bidder, or any one at the sale, of the mistake in the advertisement.

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Idington J.

I do not think such a bidder, or his principals, should profit by any such a course of dealing, or try to shift on to an innocent solicitor the entire burden of blame for what happened.

If the bidder imagined he was getting this property now in question he should have warned both the solicitor and others of the mistake which was being made.

And if he did not, then neither he nor his principal has any right to gather to themselves the property in question.

The case of *In re Thellusson* (1) so much pressed upon us by counsel for appellant, if read aright, I submit, requires the dictum cited therefrom to be applied in this case conversely to his client instead of to the receiver; and the decision therein indicates that the receiver herein pursued the right course when after learning of the mistake as happened, instead of yielding, as he might have done, to please others at the expense of the parties whose rights it was his duty to guard.

In light of the consideration I have given the evidence and the argument presented the foregoing is all I need add to the reasons of Mr. Justice Galliher, speaking for the majority of the court below, in which, subject thereto, I agree.

I am of the opinion that this appeal should be dismissed with costs.

DUFF J.—It does not admit of doubt, I think, that the Supreme Court of British Columbia possessed authority to set aside the sale in question in this appeal; and that on a proper application by the purchaser he would, with the consent of the bank, have been relieved from his purchase on the ground that in the circumstances disclosed a refusal to do so would not have been consistent with fair dealing.

(1) [1919] 2 K. B. 735.

But the present application for an order rectifying the deed raises considerations of a different order.

The plaintiffs in the bondholder's action in whose application the receiver was appointed were entitled to insist upon the terms of the order of the 20th July 1917 (under which the advances were made and by which the charge was created securing those advances) being observed; and that the sale should be proceeded by a proper public notice of the nature of the property offered. They were entitled to require that this term of the order framed for their protection should be carried out. The notice actually given was not intended to indicate the particular property in question as one of the parcels offered and it is hardly argued that it did so. It seems to follow that in the absence of some conduct on the part of the respondents precluding them from insisting upon their rights under the order the appellant is not entitled either technically, or as a matter of substantial justice, to have this parcel conveyed to him.

It is conceivable of course that evidence might have been offered shewing that the selling price could not have been affected by the fact of the parcel in question not being nominated in the advertisement as one of the subjects of the sale. If this were demonstrated and the opposition of the respondents shown to be merely vexatious a different question would have arisen. There is no such evidence nor are there any facts in proof giving rise to an equity precluding the respondents from insisting upon the protection which the order provides for.

The appeal must be dismissed with costs.

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Anglin J.

ANGLIN J.—The appellants have clearly made out a case of mistake on the part of both vendor and purchasers. They may even have established that the receiver was in some measure responsible for that mistake. They have not shewn, however, that a greater price might not have been obtained for the assets of the Lumber Company, had the omitted parcel of land been included in the particulars of sale. That that parcel had a very substantial value admits of no doubt on the material before us. It may well be that the purchasers would have been entitled to rescission on the ground of mistake had they sought that relief. But they appear not to have desired rescission—possibly because they feared that on a re-sale they might not secure such an advantageous purchase. However that may be, what the appellants seek is rectification of their mistake. That can be effected only at the expense of the bondholders, represented by the respondent Marshall. The appellants have utterly failed to shew anything which raises an equity against the bondholders such as might have enabled the court to direct that the deficiency in the land which the purchasers believed they were acquiring should be made good by the receiver at the bondholders' expense.

I would dismiss the appeal with costs.

BRODEUR J.—This is a bondholder's action brought by the respondents under a deed of trust and mortgage made in 1911 in their favour against the Canadian Pacific Lumber Company. A receiver was appointed. The company went into liquidation and, by order of the court, in 1917, the receiver was empowered to borrow money from the Dominion Bank, the appellant, for the purpose of carrying on business;

and it was provided in the order of the court that the receiver should issue certificates which were constituted a first charge upon the whole of the property and assets of the company and that in default of repayment the bank should be at liberty to sell the whole property at public auction.

The loan was made by the bank, certificates were issued. The loan not having been repaid, the property was offered for sale by public auction in one lot. Conditions and particulars of sale were prepared by the solicitors of the receiver and of the Dominion Bank. In the particulars of sale, however, lot 14 was not included because the solicitor for the bank then acting for the government had taken certain expropriation proceedings of this lot some years ago. Being under the impression that this lot was no more the property of the liquidated company and not being aware that these expropriation proceedings had been later on abandoned by the government, he failed to insert this lot, no. 14, in the particulars of sale amongst the assets to be sold.

This omission having been discovered after the date at which the sale was made to the London and Canadian Investment Company, a motion was made to the court for an order directing the receiver to convey the said lot 14 to the purchaser. This order was granted by the Supreme Court but was refused by the Court of Appeal.

There is no doubt that there was an intention on the part of the solicitor who drafted the particulars of the sale to include all the properties belonging to the liquidated company. But as he was under the impression that this lot did no more form part of the

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Brodeur J.

assets, it was not included. We have no means to find out whether the lot in question would have produced a larger price or not. The only evidence we have with regard to its value is that it is considerable.

It may be also, as is asserted by the manager of the purchasing company, that he was under the impression when he made his bid that he was purchasing the property in dispute, but we do not know whether the other interested persons had the same impression. It is a question of error and mistake; and it seems to me that the particulars of the sale are conclusive as to what properties were offered for sale.

The deed might be set aside for error; but I do not think it would be within the power and the duty of the court to give the to purchaser the lot which was not included in these particulars.

The appeal should be dismissed with costs.

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

Appeal dismissed with costs.

Solicitors for the appellants, The Dominion Bank: *Tiffin & Alexander.*

Solicitors for the appellant, The London & Canadian Investment Company: *Wilson, Whealler & Symes.*

Solicitors for the respondent: *Davis & Company.*

GRAND TRUNK PACIFIC COAST STEAMSHIP COMPANY (DEFENDANT)..... APPELANT;

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*Feb. 8, 9.
*Mar. 29.

AND

MARIE SIMPSON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Carrier—Contract of carriage—Passenger—Ticket—Conditions—Exemption from liability—Knowledge of passenger—Reasonable notice to passenger—Evidence for jury.

The respondent paid the appellant passage money for a voyage on their steamer and received a transportation ticket. The document handed to the respondent was at the outset called "this ticket"; the words "subject to the following conditions" were found in the tenth line of a paragraph of small type; there was no heading such as "conditions"; the seventh paragraph stipulated that "the company * * * (was) not * * * liable for * * * "injury to the passenger * * * arising from the * * * "negligence of the company's servants * * * or from other "cause of whatsoever nature"; at the end of a series of eleven distinct conditions, occupying sixty-six lines of small type closely printed, were the following words: "I hereby agree to all the provisions of "the above contract"; and then blank spaces were provided for signatures by the purchaser and a witness. The ticket sold had been destroyed by the appellants, but the jury found that the respondent had not put her signature to it. The respondent also denied knowledge of any conditions relating to the terms of the contract of carriage. The respondent, in debarking from the steamer, was injured and sought damages from the appellant. The above facts having been proved at the trial, the jury found that the respondent knew there was printing on the ticket, but did not know that the printing contained conditions limiting appellant's liability and that the appellant did not do what was reasonably sufficient to give her notice of the conditions; and they found a verdict for her.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault.

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Held, Davies C.J. dissenting, that there was evidence upon which the jury could properly find as they did and that judgment was properly entered for the respondent upon the findings. *Richardson, Spence & Co.* v. *Rowntree* ([1894] A.C. 217) discussed; *Cooke* v. *T. Wilson, Sons & Co.* (85 L.J.K.B. 888) distinguished.

APPEAL from the judgment of the Court of Appeal for British Columbia, affirming the judgment of Macdonald J. with a jury and maintaining the respondent 's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Alfred Bull, for the appellant.—The words "negligence of the company's servants" include any act for which the appellants could be liable in law, as the company could only act through a servant. *Ferguson* v. *Wilson*. (1).

The general words "or from any other cause of whatsoever nature" should not be construed *ejusdem generis* with the particular words preceding them. *Larsen* v. *Sylvester* (2).

There was no evidence to support the jury's findings that the respondent did not know that her ticket contained conditions respecting exemption of liability and that the appellant company did not do what was reasonably sufficient to give the respondent notice of such conditions: *Hood* v. *Anchor Line* (3); *Cooke* v. *T. Wilson Sons & Co.* (4); *Grand Trunk Railway Co.* v. *Robinson* (5); *Sherlock* v. *The Grand Trunk Railway Co.* (6); *Acton* v. *Castle Mail Packets Co.* (7).

(1) 2 Ch. App. 77.
(2) [1908] A.C. 295.
(3) [1918] A.C. 837.
(4) 85 L.J.K.B. 888.
(5) [1915] A.C. 740; 12 D.L.R. 696.
(6) 62 Can. S.C.R. 328.
(7) [1895] 73 Law Times 158.

Geo. F. Henderson K.C. for the respondent.—The mere handing of a ticket containing conditions, with nothing on the ticket to draw attention to its contents, does not constitute what is reasonably sufficient to give the passenger notice of such conditions: *Henderson* v. *Stevenson* (1); *Richardson, Spence & Co.* v. *Rowntree* (2); *Clarke* v. *West Ham Corporation* (3).

THE CHIEF JUSTICE.—(dissenting)—I find myself, after weighing fully the able argument at bar of Mr. Bull for the appellant and, after considering carefully the cases cited by him in support of the appeal, strongly of the opinion that the appeal should be allowed.

The Court of Appeal decided against the now appellant on the ground

> that the fair inference that the jury found by their answers that there was negligence on the part of the company itself, apart from the negligence of its servants, and that it caused the accident or contributed to it.

I have no doubt whatever that this ground for sustaining the judgment against the company cannot be upheld and on this point I find myself in full accord with the rest of my colleagues.

The main question, however, argued fully at bar and on which Mr. Bull relied was that the negative answers of the jury to questions 8 and 9, whether the plaintiff knew that her ticket contained conditions limiting the liability of the defendant company (8), and whether the company did what was reasonably sufficient to give the plaintiff notice of such conditions (9), were contrary to the evidence and must be set aside.

(1) [1874] L.R. 2 H.L. Sc. 470. (2) [1894] A.C. 217.
(3) [1909] 2 K.B. 858.

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The Chief Justice.

In my opinion the appeal turns upon the answers of the jury to question (9), namely, whether the company did what was reasonably sufficient to give the plaintiff notice of such conditions.

The jury found also that the plaintiff did not sign the ticket covering her passage from Prince Rupert to Stewart in British Columbia, and while I should be otherwise personally inclined to hold the contrary, I am not disposed on this point to interfere with this finding of the jury and will deal with the case on the ground I have before mentioned and on the assumption that the ticket was not signed.

I think it clear from all the decided cases cited to us, which I have carefully read and considered, that no arbitrary or definite rule can be or has been laid down governing the question whether the ticket-holder must be held to have known the conditions, if any, on the ticket he purchased. It is purely a question of fact in each case and the findings of the jury will not be interfered with on the fact unless found to be clearly contrary to the evidence.

Much depends upon the question whether the purchaser of a ticket was an ignorant and illiterate person unaccustomed to travel, in which case a heavy onus would be cast upon a company of bringing to his or her notice the limitations of their liability as a carrier of passengers, or, on the contrary, whether the purchaser of the ticket was a person of education, intelligence and experience, in which case on having the ticket put in front of him he ought to have seen that he had what he had applied for, namely a passenger contract, and having seen that ought to have seen that he was entitled to a berth, if that was included, subject to the conditions on the ticket, and having seen that ought to have seen all the rest.

Of course if the ticket handed the passenger was folded up, or enclosed in an envelope, it would, or might, under the facts of the case, limit his duty of seeing the conditions of his contract. Indeed there are many other facts and circumstances which the authorities mention which might dispense with or qualify his strictly conforming to that duty.

But in the absence of any such facts and circumstances as in the case before us, it does seem to me clear from the authorities that an educated and intelligent person accustomed to travel and looking after herself as the plaintiff in this case undoubtedly was, must, on purchasing a ticket as the plaintiff did in this case, with conditions on its face limiting the company's liability for her carriage, be held bound to have known what these conditions were.

The facts were that the plaintiff's journey was in reality from Seattle to Stewart, but was broken at Prince Rupert, and she indentified Exhibit 3 (the form of ticket issued by the company) as similar to that which she had purchased in Seattle covering her passage to Prince Rupert, which ticket she admits she signed. She was unable to say definitely that she did not sign the ticket which she afterwards purchased in Prince Rupert covering her passage to Stewart, but having signed the ticket in Seattle it must follow that she knew not only that the ticket contained conditions, but, moreover, the effect of such conditions and having admitted the similarity of the two it follows that she must have known, whether she signed it or not, that the ticket in question contained conditions. The plaintiff was a woman of education and itelligence; her husband was a lawyer and for some years police magistrate

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of Nanaimo; she had travelled considerably, and during the war travelled from British Columbia to Nairobi, Africa, and back, by herself, and formed a habit of looking at her transportation tickets to ascertain that her destination was correctly stated; she probably did so in respect of her ticket to Stewart; she knew that tickets of that nature usually contained conditions as to loss of baggage; there was no rush, no crowd at the wicket, when she bought her ticket a day or two before the sailing date; she at the same time arranged about her cabin. All this she stated in cross examination and there is no conflict of evidence as to the facts on which the appellant relies.

Now the ticket given the plaintiff was an exact counterpart of Exhibit 3, which was put in evidence, and which we had the opportunity of examining carefully. It is a long piece of greenish coloured paper, about 10 inches long and two inches broad headed thus:

GRAND TRUNK PACIFIC COAST S.S. CO. LTD.

FORM 32.

PRINCE RUPERT, B.C.

TO

DESTINATION NAMED ON FINAL COUPON

It is agreed that this ticket is good only when officially stamped, dated and presented *with coupons attached* for one first class passage * * * *subject to the following conditions:*

then follow the eleven conditions, no. 7 of which contains the limitations of the company's liability relied on. But that was not all. The coupons attached state in large print the place of departure, leaving

blanks for the place of destination to be written in, the date and the number of the stateroom, and what is more important, printed in clear type on its face

including meals and berth when officially stamped and dated, and on *conditions named in the contract.*

So that we have this "large plain piece of paper put before a lady of intelligence" who is going to be a first class passenger on board of this ship, stating not only in its opening sentence,

it is agreed that this ticket is good only when officially stamped, dated and presented *with coupons attached* for one first class continuous passage * * * *subject to the following conditions,*

but having the same notice printed in clear easily read type on the coupon itself "on conditions named in the contract."

To lay it down as law that under these proved facts and circumstances the ticket purchaser, a woman of intelligence and education, who had travelled extensively, could by simply not reading, or saying she had not read, her ticket contract and did not know its conditions, avoid the effect of those conditions and recover damages for injuries she sustained during the voyage arising from the negligence of the defendant company's servants, from which the ticket contract plainly exempted them from liability is, in my humble opinion, contrary to the decisions of the highest courts of law in England which by the very terms of the contract were to govern in this case.

I think it a dangerous rule to lay down and under the facts of the present case I must decline being a party to it.

The cases on which I rely and which I have carefully read, especially that of *Cooke* v. *Wilson & Co.* (1), confirm me in my opinion. This case is singularly

(1) 85 L.J.K.B. 888.

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alike in its facts and almost on all fours with the present appeal. I am quite unable to distinguish it in any material way from the case we are considering.

The other cases are *Hood* v. *Anchor Line* (1) in which Lord Haldane delivering the judgment of the Judicial Committee said:

> When he accepted a document that told him on its face that it contained conditions on which alone he would be permitted to make the journey across the Atlantic aboard steamer, and then proceeded on that journey, I think he must be treated according to the standards of ordinary life applicable to those who make arrangements under analogous circumstances and be held as bound by the document as clearly as if he had signed it.

And *Richardson, Spence & Co.* v. *Rowntree* (2) where a distinction is drawn between a ticket handed to a steerage passenger, a class of people as said by Lord Ashbourne

> of the humblest description, many of whom have little education and some of whom have none.

and such a ticket not folded up handed to a passenger of intelligence and education such as the plaintiff herein.

Under all the circumstances, I conclude that on the question of reasonable notice having been given to the plaintiff, the answer must be in the affirmative.

IDINGTON J.—This action was brought by the respondent to recover damages suffered by her for which it seems quite clear the appellant would be liable unless protected by the terms alleged to be conditions in the contract for transportation from Prince Rupert to Stewart.

The alleged conditions were printed in small type and numbering eleven in all, without any notice calling attention thereto.

(1) [1918] A.C. 837. (2) [1894] A.C. 217.

The appellant evidently had adopted a system of requiring the passenger to sign these conditions and having the signature witnessed as the only means of bringing home to the mind of any intending passenger the terms upon which he or she should be carried.

The usual test of whether or not the carrying company had done all that was reasonably sufficient to give the intending passenger notice of the conditions upon which he or she was to be carried, as exemplified in the cases cited to us cannot be applied to this case for they are non-existent.

Neither notice of the ticket being subject to the conditions thereon printed, or usual warning of any kind, appears in this case to have been adopted.

The appellant must therefor rely upon proof of the signature of the respondent which is expressly negatived by the finding of the jury, as is also knowledge of the conditions.

The further question was put by the learned trial judge to the jury, and answered in the negative:—

> 9. If not, did the defendant company do what was reasonably sufficient to give the plaintiff notice of such conditions? A. No.

The jury, I think, were, under such facts and circumstances as in evidence, fully entitled to take that view. Possibly I might not have reached such a conclusion, but I cannot say they had no evidence entitling them to so find.

The evidence of the respondent's intelligence on the subject of travel and its attendant conditions was not, to my mind, according to her evidence, of the extensive character counsel seemed to urge, if we apply common sense to what she says.

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Idington J.

Holding as I do that this case is quite distinguishable from the cases of *Cooke* v. *Wilson* (1); *Hood* v. *Anchor Line Ltd.* (2) and many others, I am of the opinion that the appellant should not succeed in face of the findings of the jury as applied to this peculiar case, and, therefore, have not considered fully the ground proceeded upon by the Court of Appeal.

If that is not sound reasoning then on the facts in evidence it ought to be made the law that a steamship company should not be permitted to turn out or invite passengers to land on such a dock as the one in question, (publicly claimed by its owner, as it seems to have been, to be in a dilapidated condition) without taking due care.

I think the appeal should be dismissed with costs.

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

ANGLIN J.—The plaintiff in debarking, by invitation of the defendants, from their steamer, on which she was a passenger, on a wharf admittedly in a highly dangerous state of disrepair, was seriously injured. The immediate cause of her injury was stepping into a hole, which she failed to see at the end of the gangway, and slightly to the right, while endeavouring to avoid stepping into another hole to the left. The jury found—and their finding is not open to serious question indeed it was scarcely challenged—that there was negligence *dans locum injuriæ* on the part of the defendants in permitting the plaintiff to land on a wharf known to be dangerous. The duty of a carrier of passengers to provide a reasonably safe place for them to debark admits of no dispute. It is part of the obligation ordinarily undertaken in the contract of carriage.

(1) 85 L.J.K.B. 888. (2) [1918] A.C. 837.

The defendants seek to escape liability by invoking an exemption stipulated in the terms of the special contract upon which they allege the plaintiff travelled. In answer to this defence, the plaintuff urges (*a*) that the defendants cannot raise it because they failed to give the public notice of the conditions excluding their liability prescribed by s. 962 of the "Canada Shipping Act" (R.S.C. 1906, c. 113); (*b*) that upon their true construction these conditions, if binding upon the plaintiff, do not cover the negligence complained of; (*c*) that the plaintiff was not bound by the conditions, because she was unaware of them and adequate means had not been taken by the defendants to bring them to her attention.

(*a*) This reply to the defence was not pleaded, nor, so far as appears, raised at the trial. The question of public notice was not threshed out. Assuming that s. 962 of the "Canada Shipping Act" bears the construction put upon it by counsel for the plaintiff, which is at least debatable, the defendants would probably have reasonable ground to complain if it were now held to preclude them from invoking the conditions on which they rely.

(*b*) The Court of Appeal held that the negligence found was that of the plaintiff company itself as distinguished from that of its servants and that upon its true construction the exemption from liability stipulated by the terms printed on the ticket issued to the plaintiff is confined to negligence attributable to the defendants' servants. With great respect, I gravely question the soundness of the view taken on both points. I incline to think that the failure to select for the placing of the gangway a part of the wharf on which a landing could be made with reasonable safety, if such a spot existed, or, if not, to take other adequate precautions

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to ensure the plaintiff's landing safely was fault ascribable to the company's servants charged with the management of the debarkation of passengers. Upon the construction of the relieving condition itself, while negligence of servants is no doubt specified, the exemption is also in respect of

> injury to the passenger * * * through any other cause of whatsoever nature.

In view of the context there would seem to be difficulty in applying the *ejusdem generis* rule of construction to these comprehensive words so as to give them the restricted effect for which the plaintiff contends.

(*c*) But the jury also found that, while the plaintiff knew there was writing or printing on her ticket, she did not know that it contained conditions limiting the defendant's liability and that they had failed to do what was reasonably sufficient to give her notice of these conditions. On this branch of the case the question to be considered is whether these findings are so clearly against the evidence that they should be set aside as perverse.

As to the finding of ignorance in fact there can be no doubt. The plaintiff expressly denied knowledge, and there is nothing to warrant rejecting her testimony accepted by the jury.

As to the other finding, the jury explicitly found that the plaintiff had not signed the ticket, as the form used contemplated (places being indicated upon it for signatures of the purchaser and of a witness) and the company's agent deposed was the practice. The plaintiff's recollection was that she did not sign—was not asked to do so. The selling agent had no recollection on the point. It would be quite impossible to disturb the finding that the ticket had not been signed.

There is no suggestion that the plaintiff's attention was drawn to the conditions in any other way than by handing her the ticket itself when she bought and paid for it. She deposed that although she knew there was printed matter upon the ticket, she had not read it beyond noting that her destination was correctly written in on the attached coupon. She knew from a former experience that conditions limiting liability in respect of luggage were sometimes imposed, but nothing as to conditions in respect of personal injuries. This idiosyncracy, however, having been unknown to the defendant's ticket agent need not be further considered here, *Marriott* v. *Yeoward* (1). Can it be said upon these facts that the finding of the jury that what took place was not reasonably sufficient to give the plaintiff notice of the conditions was so clearly perverse that we should set it aside, make a finding to the contrary and direct judgment for the defendants?

The case at bar closely resembles the leading case of *Richardson, Spence & Co.* v. *Rowntree* (2). There, as here, the plaintiff was a woman, though probably of a less intelligent class; she was a steerage passenger. The restrictive conditions were printed in small type on the face of the ticket, and without anything, such as the word "NOTICE" in large type, featured in *Hood* v. *Anchor Line* (3), to draw attention to them. The only other possibly distinguishing feature in the *Rowntree Case* (2) is that the ticket was handed to the passenger folded up Here we are not informed

(1) [1909] 2 K.B. 987 at p. 993. (2) [1894] A.C. 217.
(3) [1918] A.C. 837.

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whether the ticket was open or folded up, or enclosed in an envelope, when handed to the plaintiff. From its length and their common knowledge of what is customary the jury not improbably inferred that it was folded up and possibly also that it was placed in an envelope. The judgment of the Court of Appeal in *Rowntree's Case* (1), refusing to set aside the jury's findings, that the plaintiff did not know that the ticket contained conditions relating to the terms of the contract of carriage and that the defendants had not done what was reasonably sufficient to give the plaintiff notice of the conditions, and upholding the judgment entered on them for the plaintiff, was affirmed by the House of Lords without calling upon counsel for the respondent. Their Lordships declined to hold that upon such facts the plaintiff was bound as a matter of law by the conditions. The questions whether the passenger knew of the conditions limiting liability and, if not, whether the means taken to bring them to her attention had been reasonably sufficient, were held to be proper in such a case for submission to the jury. This case was much relied on by counsel for the plaintiff.

Counsel for the defendants on the other hand contended that the case at bar is indistinguishable from the later case of *Cooke v. T. Wilson Sons & Co. Ltd.* (2) in which the Court of Appeal, while recognizing the authoritative character of the decision in *Rowntree's Case*, (1) held that, upon the facts in evidence, the finding of the jury that the defendants had not done what was reasonably sufficient to give the plaintiff notice of the conditions was so clearly perverse that

(1) [1894] A.C. 217.

(2) 85 L.J. K.B. 888.

it should be set aside and that judgment should be entered for the defendants. Roberta Cooke was "a lady of intelligence" —"a first-class passenger"— "a lady of education"—facts

which must have been obvious to the people who handed her the ticket.

The following three circumstances in connection with the ticket itself are dwelt upon by Lord Justice Phillimore, who delivered the principal judgment. The ticket did not describe itself as a "ticket" or "receipt" but was headed "Passenger Contract". In the first line and in very plain letters were the words "Mrs. Cooke is entitled, subject to the conditions hereof". The conditions themselves immediately followed in small but legible type, similar, I take it, to that in the case at bar, but under the heading "Conditions". There appears to have been nothing to indicate that signature by the passenger, to evidence her acceptance of the conditions, was contemplated, as it clearly was in the case at bar. Lord Justice Phillimore points to the several features of the ticket I have mentioned as calculated to draw the attention of the passenger to the fact that she was taking a "passenger contract" for carriage subject to conditions printed on the ticket. Pickford L.J. agreeing states that, the proper question being formulated, the answer to it becomes a question of fact in each particular case and adds:

All I say is that upon the particular facts of this case, in my opinion, the defendants took sufficient and proper means to bring these conditions to the notice of the plaintiff.

Neville J., the other member of the court, said:

If all the cases are to be taken into consideration * * * the degree of notice necessary depends upon the degree of capacity of the recipient.

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I take it the learned judge must have meant—as it was, or should have been, apparent to the defendants' agent when selling the ticket to the passenger. His Lordship also explicitly restricts his holding to

> passenger contracts of the character of the one before him.

While it may be assumed that in the case now before us there was nothing to indicate to the defendants' ticket agent that the plaintiff might not be dealt with as a person endowed with a degree of intelligence not inferior to that of the plaintiff in the *Cooke Case*, (1) the features of the "passenger contract" in that case pointed out in the judgment of Phillimore L.J. as calculated to bring the conditions to the passenger's attention are entirely absent here. The document handed to the present plaintiff is at the outset called "this ticket": the words "subject to the following conditions" are found only in the tenth line of a paragraph of small type: and there is no heading such as "conditions". At the end of a series of eleven distinct conditions, occupying sixty-six lines of small type closely printed, occur the words

> I hereby agree to all the provisions of the above contract and attached coupons.
>
> .....
> *Signature.*
>
> .....
> *Witness.*

The provision thus made for signatures by the purchaser and a witness might well give to the plaintiff, or to any ordinary traveller of her class, the impression that the printed matter above the line indicated for purchaser's signature was not intended to apply to her—did not concern her—since she had not been

(1) 85 L.J. K.B. 888.

asked to affix her signature to it. It is, I think, quite impossible to say that the decision in the *Cooke Case* (1) conclusively establishes that in the case at bar what the defendants did was reasonably sufficient to bring the conditions printed upon the ticket to the notice of the plaintiff as something by which she would be bound.

Another case relied on for the appellant was *Acton* v. *The Castle Mail Packets Co.* (2), where Lord Russell of Killowen quotes with approval from the judgment of Mellish J. in *Parker* v. *South Eastern Railway Co.* (3), the statement that where the agreement is not signed

> there must be evidence independently of the agreement itself to prove that the (plaintiff) has assented to it;

and also the following passage from p. 422:

> I am of the opinion that we cannot lay down as a matter of law either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket from the mere fact that he knew there was writing on the ticket but did not know that the writing contained conditions.

In the *Acton Case* (2) the plaintiff was

> an intelligent man who had gone about the world

and, in the opinion of the Lord Chief Justice, ought to have known that conditions would necessarily be attached to the passage he was engaging.

> In the circumstances of this case (said his Lordship) the plaintiff ought to have assumed, and I think he must have known that (the ticket) probably did contain conditions upon which he was about to be carried.

Sitting as a trial judge without a jury, Lord Russell reached the conclusion that, as

(1) 85 L.J. K.B. 888. (2) 73 L.T. 158.
(3) 2 C.P.D. 416, at p. 421.

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a matter of fact * * * the communication of that document to him was (in the circumstances of this case) reasonable notice to him of the terms and conditions upon which his passage money was received from him and upon which the defendants were willing to enter into a contract to carry him.

The conclusion reached apparently depended almost entirely upon the impression created by the appearance and demeanour of the plaintiff and his business experience upon the mind of the learned trial judge that he must have appreciated the fact that the printing upon the ticket contained conditions to bind him as terms of the contract of carriage.

In *Hood* v. *Anchor Line* (1) another case cited for the appellant, it is made abundantly clear that the question with which we are now dealing is one of fact which must be submitted for determination by the tribunal of fact, the function of the judge, where there is a jury, being simply to see that the proper question is considered by them and the duty of the jury being to determine it, looking at all the circumstances and the situation of the parties. The burden is on the defendant to shew that it has done all that could reasonably be required to bring the limitative conditions to the plaintiff's notice

under the usages of proper conduct in the circumstances.

Emphasis was laid in Hood's case upon two facts:— Above the conditions was printed

NOTICE: This ticket, is issued to and accepted by the passenger subject to the following conditions.

At the foot of the document was printed very plainly in capital letters "PASSENGERS ARE PARTICULARLY REQUESTED TO CAREFULLY READ THE ABOVE CONTRACT" and on the face of the

(1) [1918] A.C. 837.

envelope containing the ticket was again printed, also in capitals "PLEASE READ CONDITIONS OF THE ENCLOSED CONTRACT". The case was tried without a jury and their Lordships of the House of Lords agreed with the conclusion of the trial judge, affirmed by the Court of Sessions, that the company had done all that was reasonably necessary to give notice to the plaintiff of the conditions limiting its liability. Their Lordships again pointed out that the questions under consideration were questions of fact which must in each case be determined according to the circumstances in evidence.

The principles to be applied in determining the question of fact which we are considering are well stated by Pickford J. in *Marriott* v. *Yeoward Brothers* (1).

In dealing with a case such as this it is well to bear in mind the observation of Viscount Haldane in *Kreglinger's Case* (2) that

> when a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except for the principle established or recognized by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance.

The only principles established by the cases to which we have been referred in regard to the question whether the carrier has done what was reasonably sufficient to bring conditions limiting its liability printed upon a ticket to the attention of a purchaser, who does not acknowledge acceptance of them by his signature and has not read them and does not know

(1) [1909] 2 K.B. 987 at p. 992. (2) [1914] A.C. 25, at p. 40.

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them to be such conditions, are that it is always a question of fact to be determined in each particular case according to the particular circumstances of that case and that the burden of proof is on the carrier.

Taking into account all the circumstances in evidence as above detailed, I am not prepared to say that the conclusion of the jury (who had the great advantage of seeing and hearing the plaintiff give her evidence) that the company had failed to discharge the onus of proving that it had done what was reasonably necessary to bring the conditions relied upon to her attention as something by which she was to be bound was so clearly perverse that it should be set aside. Having regard to the facts that the purchaser of the ticket was a woman, presumably of limited business experience and knowledge, that the ticket itself presented nothing calculated to draw her attention to the fact that the printed matter upon its face contained conditions of a contract of carriage by which it was intended that she should be bound (such as the features noted in the *Cooke Case* (1) and the *Hood Case* (2), and to the further fact of the indication on the face of the ticket of the intention of the company that it should be signed by the purchaser as evidence of acceptance of the conditions printed upon it, it seems to me that a jury could reasonably conclude that it was incumbent upon the defendants to do something more than the evidence discloses was done in this case to direct the plaintiff's attention to the conditions.

Indeed when the facts are analysed we have merely the case of a ticket containing printed conditions not at all conspicuous being sold to a woman of ordinary

(1) 85 L.J. K.B. 888. (2) [1918] A.C. 837.

intelligence. In *Cooke's Case* (1), so much relied upon by the appellants, Lord Justice Pickford expressly repudiates the idea

> that in every case it is enough to give a person who can read and write a document which he can read.

I would, for these reasons, dismiss this appeal with costs.

BRODEUR J.—The jury in this case found that the appellant company was guilty of negligence

> in permitting the plaintiff to land on a wharf known to be dangerous and in not providing a step from the end of the gang plank to the wharf.

It is contended, however, on the part of the steamship company that the ticket on which Mrs. Simpson travelled contained a provision that the company would not be liable for the negligence of the company's servants and that the accident of which she was the victim was due to the negligence of its servants. It is contended also that the accident having taken place on a wharf which was common government property it was not liable.

On the latter point I am of opinion that the company's contention is not well founded. The wharf was, it is true, in a dangerous condition, but it was the duty of the company and was part of its obligations arising out of its transportation contract to see that its passengers should be landed in a safe place.

As to the conditions stipulated on the ticket, I may say that the form of the ticket requires that the purchaser should sign and accept those conditions before a witness. The ticket sold in this case was destroyed by the company and could not be produced.

(1) 85 L.J. 888.

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The jury found on somewhat conflicting evidence that Mrs. Simpson never affixed her signature to the document. It was found also by the jury that she was aware that there was something written on the ticket but that she did not know it contained the conditions on which the defendant company relies and that the latter did not do what was reasonably sufficient to give the plaintiff notice of such conditions.

In this connection the defendant company claims that there was no evidence to support the jury's findings.

I am unable to accept such a contention for a great deal of evidence was adduced with regard to the issuing of this ticket and the jury was absolutely justified in making those findings.

The appellant relied very much on the case of *Cooke* v. *Wilson* (1). That case has some features resembling very much the facts we have to deal with in this case, but there is some difference which permits us to distinguish it. The ticket issued in the *Wilson Case* (1) contained in large type the word "contract" which should have immediately drawn the attention of the passenger.

All these cases which have been quoted present different aspects and features and shew that each case should be decided on its own merits.

It is therefore a matter for the jury to determine whether the circumstances shew that the purchaser was aware of the conditions contained in the ticket and whether the carrier has done what was sufficient to give the passenger notice of conditions.

(1) 85 L.J.K.B. 888.

I have come to the conclusion that the verdict of the jury was right and for this reason the appeal should be dismissed with costs.

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

Appeal dismissed with costs.

Solicitors for the appellants: *Tupper & Bull.*

Solicitors for the respondent: *Barnard, Robertson, Heisterman & Tait.*

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*Feb. 22, 23.
*Mar. 29.

EMILE BELANGER (PLAINTIFF) . . APPELLANT;

AND

CANADIAN CONSOLIDATED RUBBER COMPANY (DEFENDANT) . . . . . RESPONDENT.

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

Workmen's Compensation Act—Machine—Absence of guard—Duty of employer—Inexcusable fault—R.S.Q. (1909) art. 7325.

The appellant, while working on a machine by feeding cotton into it between two rollers, had both hands caught and crushed necessitating their amputation. The maximum compensation under the "Workmen's Compensation Act" was admitted by the respondent company: but the appellant claimed a greater compensation under article 7325 R.S.Q. on the ground of "inexcusable fault" of the respondent especially in not having provided the machine with protection devices. The respondent had installed an apparatus of wire for stopping the machine within four seconds. No other safety device was supplied by the manufacturers of the machine. Although the practicability of a certain guard may have been established at the trial, the respondent company, having an expert engineer continuously working at the discovery of new safety devices, had found none suitable for this machine. The provincial government inspector had never given to the respondent any notice to provide a safety guard. A somewhat similar accident had previously happened in the defendant's factory but no evidence was adduced as to the exact cause of that accident.

Held, Idington J. dissenting, that the "inexcusable fault" of the respondent company had not been established.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

Per Idington J. (dissenting).—The appellant was ordered to do a dangerous work, of which he had no experience, without being given any instructions in contravention with the company respondent's own regulations; and, also, there were existing protection devices in use when the Calendar machine, or its principle, was applied to doing other work than the one done in respondent's factory.

Judgment of the Court of King's Bench (Q.R. 32 K.B. 44) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1) reversing the judgment of Surveyer J. and dismissing the appellant's claim for augmentation of the maximum compensation under the "Workmen's Compensation Act."

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

Charlemagne Rodier K.C. for the appellant.—There is an "inexcusable fault" of the respondent company: as the appellant had no experience in the work he was ordered to do; the machine was dangerous; the appellant had received no previous instructions; there were no protection devices; the floor was slippery; there had been a previous similar accident.

A. Chase-Casgrain K.C. for the respondent.

THE CHIEF JUSTICE.—This action is one brought under the "Workmen's Compensation Act" of Quebec. The plaintiff claimed not only the ordinary maximum compensation, which indeed was admitted by the defendant company, but alleging "inexcusable fault" on the part of the company claimed $25,000 damages for the injuries sustained by him. These injuries

(1) Q.R. 32 K.B. 44.

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consisted of the loss of both his hands. They were caught and crushed in the machine which he was working, necessitating their amputation. For three months previous to the accident he had been working at the back of the same machine receiving the cotton as it passed through, but on the occasion of the accident he had been put to work at the front of the machine feeding the cotton into it between two rollers. The machine in question is called a Calendar and is electrically driven. It consists of two rollers of about 24" (inches) in diameter which turn reversely on each other, and cotton in sheets or layers for the purpose of being pressed to an even surface is passed between them. They revolve at a maximum rate of about four revolutions per minute.

The "inexcusable fault" is alleged to have consisted mainly in the fact that the machine was defective in not having been provided with proper safety and protection devices for the workmen employed in running it. Other faults were alleged, but the absence of additional protective devices to those already provided was the main and chief one relied on and the only one in my opinion under which the plaintiff could hope possibly to succeed.

Their Lordships of the Judicial Committee in the appeal of *Montreal Tramways Co.* v. *Savignac* (1), stated as their opinion that

> it was unnecessary and probably undesirable to attempt a definition of inexcusable fault

leaving the question to be determined in each case as it arose.

(1) [1920] A.C. 408.

If the plaintiff had suceeded in shewing that the work in which he was engaged when injured was dangerous work, and that there were other known protective devices for workmen engaged on Calendar machines of which the company could and should have known, and had neglected to provide, the question before us would have assumed an entirely different aspect. But the evidence seems clear that there were no other protective devices known or in use which the company could have or should have provided. As a fact the company had an engineer who was continually working, looking up new devices for safety apparatus. None so far had been found applicable to this machine. The manufacturers who supplied these Calendar machines did not provide any such additional safety device, other than the apparatus of wire for stopping the machine within four seconds. No evidence was given that any safety guard was in use anywhere on machines of the sort in question here. The government inspectors whose duty it is to see that employers were warned to guard dangerous machines when practicable had never given the defendant any notice to provide any additional safety guard on this machine, and I cannot find any evidence establishing that there was anywhere a practicable additional guard in existence or use which should have been known to the defendant company and installed by them.

The work in which the plaintiff was engaged was not specially dangerous work. On the contrary, I have had great difficulty in determining how the plaintiff could have had his hands drawn in between the rollers unless by gross carelessness or neglect on his own part.

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He was a workman who had been working on and about the machine which caused the accident for a period of about three months, although he had not previously to the day of the accident been employed in actually feeding the cotton between the slowly revolving rollers.

Under all the circumstances I cannot find "inexcusable fault" on the part of the company in not having provided an additional guard for the protection of the workmen feeding the cotton between the rollers.

I would therefore dismiss this appeal.

IDINGTON J. (dissenting)—The appellant having served as a shipping clerk for some years was given employment in one of the respondent's manufacturing shops by way of taking away from the rear of a Calendar machine pressed cotton which had passed through between the rollers of said machine.

The said machine consists of two rollers which are placed one above the other and each twenty-five inches in diameter at the rate of four revolutions a minute.

It was stated in argument and not denied and seems borne out by the evidence that a party engaged, as appellant was, when working at the rear of the machine, could neither see nor learn from where he stood when so engaged how the work was done of feeding the cotton into the front of the machine.

Hence the three months he was so engaged were of no service in way of instructing him how to feed the machine and the dangers to be avoided in doing so.

He was only twenty-five years of age when he was suddenly, on returning to work at one P.M. of the 3rd April, 1919, directed by the foreman over him to proceed to the front part of the machine and feed the cotton into it, and he obeyed the order so given.

About half an hour after he had begun doing so his right hand was drawn in between the said rollers and in the effort to extricate it he slipped on the damp floor and so fell that his left hand also was drawn in between the said rollers.

His cries of distress arrested the attention of others and some one of them stopped the machine.

As a result of the accident both his hands had to be amputated and thus he is crippled for life.

He was given no instruction of any kind, or warning or help, as any young inexperienced beginner ought to have had, as is abundantly testified by more than one witness.

There was no guard or protective appliance of any kind in front of the machine. Such devices are in use in many ways and of different kinds when the Calendar machine, or its principle, is applied to doing other work than the particular kind done in respondent's factory. One witness pretends he has seen the like machine at work elsewhere when serving same purposes as in the respondent's shop and that without any guard other than the appliance used to stop the machine, which only proves how reckless some manufacturers can be.

Electric current was the motive force used to operate the machine in question. It could be cut off by pulling a wire at the side of the machine, about three feet or more from where the appellant was standing when engaged at feeding the cotton into the machine.

I am unable to understand people who refer to this as a safeguard or means of protecting the person engaged in feeding the machine. It obviously is not, and when once such a person's hands, or single hand, is drawn in he cannot even stop the machine.

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There had been a similar accident about eight months previously in the use of this machine, whereby the man engaged as appellant was, on the occasion in question herein, had lost part of his hand. Yet no means were actually taken by the respondent to apply any safeguard.

Apparently it is cheaper for people like respondent to pay the occasional small toll extracted from them by the terms of the "Workmen's Compensation Act" than to invent or apply any invention known to safeguard employees.

The appellant sued respondent for damages resulting to him and the learned trial judge held that there was inexcusable fault on the part of respondent leading to this accident and thus the $2,500 limit of the "Workmen's Compensation Act" was no bar to his recovery as if suing at common law. He assessed the damages on that basis at $17,500.

I unhesitatingly agree with his finding that there was inexcusable fault.

I am not so clear as to the finding of inexcusable fault having the necessary legal consequence of damages being recoverable to the full extent that would have been allowable had the "Workmen's Compensation Act" never been passed.

I was tempted to think in the course of the argument here that there might be implied in the following quotation from the "Workmen's Compensation Act",

> the Court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it if it is due to the inexcusable fault of the employer

the graduating of the scale of damages proportionately to the gravity of inexcusableness thus brought in question.

However, though taking several objections in their factum to the measure of damages, counsel for the respondent do not present any such view or indeed any view we have given heed to here for many years past.

Even when the amount exceeded that, we might, if trying the case or in sitting in appeal below have allowed; yet mistakes of that kind should not be entertained here and thereby encourage needless litigation.

Agreeing, as I do, with Mr. Justice Tellier's view of the case, I think that possibly respondent missed a good chance when it failed to act on his suggested reduction.

The measuring of damages such as appellant has to endure by what a young man of twenty-five is earning to my mind is quite fallacious.

And before parting with this case I cannot forbear quoting a sentence taken from the respondent's own regulations, which reads as follows:

> Les employés devront reçevoir de leurs contremaîtres des instructions complètes avant de faire fonctionner aucune machine et ils devront bien comprendre ces instructions.

If the non-observance of this injunction had been properly and consistently acted upon I can hardly imagine respondent's foreman, who placed appellant where he met such disaster as in question herein, would have dared to venture on such a foolhardy step as ordering an ignorant and inexperienced youth to feed such a machine as in question, even if it had been protected or guarded as it was not.

I would allow this appeal with costs throughout and restore the learned trial judge's judgment.

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ANGLIN J.—The material facts sufficiently appear in the judgments delivered in the Court of King's Bench and in the opinion of my brother Mignault, in whose conclusions as well as his appreciation of the presentation of the appellant's case by Mr. Rodier I fully concur.

Ordinary liability for the maximum compensation under the "Workmen's Compensation Act" having been admitted by the defendants, it is only necessary to consider the appellant's claim for augmentation of that amount under Art. 7325 (2) based on his allegation that the accident, in which he was very seriously injured, was due to "inexcusable fault" of his employer.

In *Montreal Tramways Co.* v. *Savignac* (1) their Lordships of the Judicial Committee said:—

> It is unnecessary and probably undesirable to attempt a definition of inexcusable fault.

I shall not essay the formulation of a definition that is probably impracticable.

The only alleged fault on the part of the defendants which could with any degree of reasonableness be pressed as inexcusable was the omission to provide an efficient guard to prevent the hands of the operator being drawn into the Calendar machine at which the plaintiff was injured. The practicability of such a guard is perhaps sufficiently established by the evidence. But no guard was furnished by the manufacturer of the machine and there is no satisfactory evidence that such a guard was in use anywhere on machines intended for the purpose for which the machine in question was used. The Government Inspectors, whose duty it is to see that employers are warned to

(1) [1920] A.C. 408.

guard dangerous machines when practicable, had not notified the defendants to guard this machine. The evidence falls short of establishing that there was a practicable guard for it which was, or should have been, known to the defendants.

An accident, said to have been somewhat similar to that now under consideration, had happened in the defendant's factory some time before and the evidence warrants the inference that it must have been known to them. But the circumstances of this accident are not stated and it does not appear that it was due to a cause which the defendant could or should have provided against. For aught that is shewn this former accident may have been wholly due to carelessness on the part of the workman. Indeed, in the present case it is difficult to conceive how the plaintiff's hand could have been drawn between the rollers unless he was, at least momentarily, inattentive to what was an obvious danger. So obvious was it that it seems to me to be idle to attempt to found a charge of inexcusable fault on the placing of an adult of ordinary intelligence at the work to which the plaintiff was assigned, however limited his experience.

Having regard to all the circumstances the plaintiff in my opinion has failed to establish a case of inexcusable fault on the part of the defendants.

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

MIGNAULT J.—Le savant avocat de l'appelant—qui a plaidé sa cause avec beaucoup de talent et aussi avec une franchise qui lui fait honneur—nous a fait remarquer que les honorables juges qui ont été saisis de cette cause se sont également divisés. Ce qui explique peut-être cette différence d'opinion,

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c'est qu'indubitablement il y a eu faute de la part de l'intimée, mais ce n'est pas là la question à décider. Il s'agit de déterminer si cette faute peut être qualifiée de faute inexcusable aux termes de l'article 7325 S.R.P.Q. (1909), et on peut la croire quasi-délictuelle au sens des articles 1053 et 1054 du code civil, sans en conclure qu'elle soit réellement la faute inexcusable dont parle l'article 7325.

L'expression "faute inexcusable" nous vient de la loi française des accidents du travail. Dans un sens, toute faute est inexcusable par là même qu'elle est faute. Mais le législateur entend ici une faute d'une gravité exceptionnelle, quelque chose de plus qu'une faute même lourde, on dit même quelque chose qui se rapproche de l'intention criminelle (Dalloz, *Répertoire pratique*, vo. Accidents de Travail, no. 226), et dans la discussion du projet de loi au sénat français, on a proposé cette expression comme rendant bien l'idée du législateur que la faute dont il s'agit devait être d'une telle gravité qu'elle fût sans excuse. En effet, on entend généralement par faute inexcusable une faute qui est plus près du dol que de la faute lourde (Baudry-Lacantinerie, *Louage*, no. 2270). Il importe de tenir compte de l'origine de cette expression quand on se demande s'il y a eu, dans une espèce particulière, une faute inexcusable du patron ou de l'ouvrier.

Cela étant dit, on peut se dispenser de définir cette faute. Le conseil privé d'ailleurs n'a pas voulu tenter cette définition dans la cause de *Montreal Tramways Co.* v. *Savignac* (1), et les circonstances varient tellement dans les espèces qui viennent devant les tribunaux qu'aucune formule ne pourrait être imaginée qui conviendrait absolument à chacune de ces espèces.

(1) [1920] A.C. 408.

Le besoin d'une définition se fera moins sentir du reste si on peut indiquer certains éléments que l'on devra trouver dans chaque cas où l'on prétend que l'ouvrier ou le patron a été coupable d'une faute inexcusable. J'accepte les éléments suggérés par M. Sachet (*Accidents du travail*, 6e éd., tôme 2, no 1439), et que l'honorable juge de première instance consigne dans son jugement: 1° volonté d'agir ou d'omettre; 2° connaissance du danger pouvant résulter de l'action ou de l'omission; 3° absence d'une cause justificative ou explicative.

Et j'ajoute qu'en exagérant la faute du patron—il est peu probable qu'on exagère celle de l'ouvrier et peut-être à bon droit—on en arriverait facilement à rendre la majoration de l'indemnité due à l'ouvrier la règle au lieu de l'exception qu'elle doit être sous l'empire de toute loi des accidents du travail. Car cette loi est fondée sur l'idée du risque professionnel (Fuzier-Herman, Répertoire, vo. *Responsabilité civile*, nos. 1459 et suiv.), risque que le patron et l'ouvrier doivent assumer dans la mesure prescrite par le législateur, et ce n'est que lorsque ce risque a été augmenté par une faute inexcusable attribuable à l'un ou à l'autre qu'il convient de diminuer ou d'augmenter l'indemnité normale que comporte l'évaluation, dans les conditions ordinaires, de ce risque professionel.

L'espèce que nous sommes appelés à juger me fournit l'occasion d'appliquer les principes que je viens d'exposer. Bélanger, depuis longtemps à l'emploi de l'intimée dans le département d'expédition des marchandises, n'était que depuis trois mois employé aux machines. Jusqu'au jour de l'accident il recevait, derrière une machine connue sous le nom de "calendar", le coton destiné à être enduit d'une couche de caoutchouc et qui passait entre de grands rouleaux ou cylin-

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dres tournant en sens inverse à une vitesse au maximum de quatre révolutions par minute. Ce jour-là, vers une heure de l'après-midi, l'employé qui faisait fonctionner cette machine, c'est-à-dire qui faisait passer entre les rouleaux une bande de coton large de quatre pieds, ayant manqué tout à coup, le contre-maître le fit remplacer par Bélanger. Ce fut un malheur pour celui-ci, car une demi-heure plus tard, il se faisait prendre d'abord la main droite et ensuite la main gauche entre les rouleaux, avec le résultat qu'on dût lui amputer les deux mains. Il poursuit maintenant sous l'empire de la loi des accidents du travail, réclamant l'augmentation de l'indemnité normale à raison de la faute inexcusable de son patron. L'intimée a payé à l'appelant $2,500, le maximum de l'indennité normale, avec $99.45 pour les frais d'action. Toute la question maintenant est de savoir s'il y a eu faute inexcusable entraînant majoration d'indemnité. La cour de première instance, présidée par l'honorable juge Surveyer, a décidé en faveur de l'ouvrier, jugeant qu'il y avait lieu de fixer l'indemnité comme si l'accident en question était régi par le droit commun, et elle a donné à Bélanger une augmentation d'indemnité de $15,000.00. Sur appel à la cour du Banc du Roi, les honorables juges Martin et Greenshields ont décidé qu'il n'y avait pas eu faute inexcusable du patron, le troisième juge, l'honorable juge Tellier, étant d'un avis contraire, mais le juge Tellier a exprimé l'opinion que l'indemnité devait tout de même être basée sur l'échelle contenue à la loi des accidents du travail, et il n'aurait accordé au demandeur qu'une augmentation de $12,926.84. Il y a donc cette question subsidiaire à résoudre au cas où je serais d'avis que nous avons bien ici un cas de faute inexcusable du patron.

J'ai dit qu'il y a eu indubitablement faute de l'intimée, mais il ne faut pas se laisser influencer par cette faute au point de conclure à l'existence d'une faute inexcusable qui est, je le répète, l'exception sous l'empire de la loi des accidents du travail. Ainsi c'était une faute de mettre à l'ouvrage sur cette machine un ouvrier inexpérimenté dans ce genre de travail, sans lui adjoindre quelqu'un pour veiller à ce qu'il s'y prît de façon à ne point s'exposer au danger, du moins pendant ses premiers essais. C'était encore une faute du patron si le plancher où se tenait Bélanger était glissant comme il le prétend, mais d'autres témoins le nient, ou si le coton qu'il devait faire passer entre les rouleaux présentait des plis qui pouvaient saisir sa main et l'entraîner avec le coton dans ces rouleaux. Mais il ne s'ensuit nullement que cette faute fût inexcusable, et il ne peut résulter que confusion si on ne fait abstraction ici de la théorie de la faute d'après le droit commun, car nous sommes en présence d'une loi qui y fait exception.

Pour savoir si dans l'espèce cette faute était inexcusable, il faut se rappeler encore ce que j'ai appelé les éléments de M. Sachet. Y a-t-il eu en tout cela volonté d'agir ou d'omettre, connaissance du danger pouvant résulter de l'action ou de l'omission, et absence d'une cause justificative ou explicative? Je ne le crois pas, du moins quant aux fautes que j'ai signalées. Il y a eu imprudence, surtout en laissant travailler un ouvrier inexpérimenté, et cette imprudence, tout en étant une faute, n'est pas une faute inexcusable au sens de la loi des accidents du travail.

L'appelant a abandonné à l'audition devant nous la faute qu'il imputait au patron de n'avoir pas pourvu à un appareil pouvant amener l'arrêt de la machine

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en cas d'accident. L'appareil, une broche à la portée de l'ouvrier, s'y trouvait et aurait immobilisé les rouleaux dans l'espace de quatre secondes.

Mais l'appelant insiste et impute à l'intimée une faute qu'il qualifie d'inexcusable, parce qu'elle n'aurait pas placé un appareil protecteur devant la machine pour empêcher que les mains de l'ouvrier n'y fussent entraînées, et cela d'autant plus qu'un accident semblable était arrivé à un ouvrier quelques mois auparavant, signalant ainsi au patron le danger que présentaient ces rouleaux sans appareil protecteur.

Je suis bien prêt à reconnaître que si l'appelant pouvait dire que dans les autres usines on munit ces machines d'appareils protecteurs, ou qu'on peut facilement les en munir sans entraver le travail, et si l'accident antérieur avait été connu du patron et faisait clairement voir le danger de laisser fonctionner ces machines sans ces appareils, on aurait réuni les éléments dont parle M. Sachet, et partant il y aurait faute inexcusable.

Mais la lecture attentive de toute la preuve me convainc qu'il n'est pas d'usage de poser ces appareils protecturs sur des machines semblables. D'autres machines, comme celles qu'on trouve dans les buanderies, en ont, mais pas les rouleaux dont il s'agit ici. Et peut-on facilement les en munir sans entraver le travail? Cela ne me paraît pas démontré. Des témoins disent que les ingénieurs de la compagnie ont mis la question à l'étude sans réussir à trouver l'appareil dont parle l'appelant. Et il faut se garder d'affirmations comme celles que fait M. Guyon, sous-ministre du travail à Québec. Car si M. Guyon pouvait facilement fabriquer un tel appareil, comme il le dit, pourquoi n'en a-t-il pas ordonné l'installation avant l'accident, comme il avait le pouvoir de le faire?

Nous trouvons dans ce cas, comme dans les espèces semblables, des gens qui après l'événement ont bien des suggestions à faire. Le malheur, c'est qu'ils n'aient pas fait ces suggestions en temps utile; et en supposant qu'ils pouvaient eux-mêmes proposer un remède facile et pratique, rien ne démontre que ce remède fût connu de l'intimée avant l'accident.

Reste l'accident arrivé au nommé Hannah quelques mois avant l'accident de Bélanger. J'ai lu attentivement la déposition de Hannah. Je ne trouve pas qu'il fasse voir comment l'accident lui est arrivé. Il a pu très bien être imprudent ou inattentif. Hannah faisait passer par les rouleaux le coton avec une couche de caoutchouc, Bélanger y faisait passer le coton seul. Hannah se plaint de l'appareil pour faire arrêter la machine, et prétend qu'il aurait dû y avoir un homme à côté de lui uniquement pour faire fonctionner cet appareil en cas d'accident. L'appelant ne se plaint plus de l'appareil qui immobilise les rouleaux. Hannah ne signale le besoin d'aucun autre appareil protecteur. En somme, en supposant que l'accident de Hannah et la cause de cet accident aient été connus des officiers de l'intimée, cela n'est pas démontré, il faudrait encore prouver que par cet accident l'intimée a eu connaissance du danger possible et qu'elle avait le moyen de le prévenir par des précautions qu'elle a manqué de prendre. Dire que les rouleaux étaient dangereux pour un homme attentif, c'est une affirmation que le dossier ne permet pas de faire

Je trouve donc qu'il y a eu dans l'espèce une faute, qui, si nous étions sous l'empire du droit commun, donnerait lieu à l'application pleine et entière des articles 1053 et 1054 du code civil. Je ne crois pas cependant que cette faute soit la faute inexcusable dont parle la loi des accidents du travail. Et comme

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il s'agit d'une exception qu'admet cette loi dans l'évaluation de l'indemnité que l'ouvrier a droit d'avoir, il faudrait que je fusse convaincu que nous sommes dans le cas de cette exception pour être en droit d'accorder l'augmentation d'indemnité que réclame l'appelant.

Je ne cite pas des décisions antérieures, car celles qu'on a invoquées sont des arrêts d'espèce, et chaque cause a sa physionomie propre. Les prétentions de l'appelant ont été soutenues avec beaucoup de talent, mais je les crois mal fondées.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Charlemagne Rodier.*

Solicitors for the respondent: *Casgrain, McDougall, Stairs & Casgrain.*

ALEXANDER L. MONTREUIL AND OTHERS (PLAINTIFFS) } APPELLANTS;

AND

THE ONTARIO ASPHALT COMPANY AND THE CALDWELL SAND AND GRAVEL COMPANY (DEFENDANTS)..... } RESPONDENTS.

1921
*Nov. 11.
1922
*Feb. 7.

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

Statute—Application—Lessor and Lessee—Lessee's option to purchase—Improvements by lessee—Mistake as to lessor's title—Action for possession—Retention of land—Belief in ownership—Equitable relief—R.S.O. [1914] c. 109 s. 37.

R.S.O. [1914] ch. 109 sec. 37 provides that a person who makes lasting improvements on land under the belief that it is his own is entitled to a lien thereon for the enhanced value given it by such improvements or may retain it on making compensation to the owner.

Held, Idington and Duff JJ. dissenting, that a lessee of land with an option to purchase at the end of the term is not entitled to the benefit of this statute. As lessee he could not believe the land to be his own and the option does not warrant such a belief before it is exercised.

The lessee in such a case may obtain, as equitable relief, compensation for his improvements to the extent to which they enhanced the value of the land. His mistaken belief that the lessor owned the fee which he could acquire on expiration of the term was such a mistake of title as to bring him within the equitable doctrine applicable.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

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To entitle the lessor to such compensation where the owner has not encouraged nor acquiesced in the expenditure therefor it is necessary that the latter must himself be asking some equitable remedy, but

Held, that in Ontario, in the common law action of ejectment and for mesne profits the compensation so made for improvements may be set off against the allowance for such profits.

Held also, that no compensation can be allowed for improvements made after the lessee was aware that the lessor's title was questionable.

Judgment of the Appellate Division (47 Ont. L.R. 227) which reversed that on the trial (46 Ont. L.R. 136) varied.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment at the trial (2) in favour of the Appellants.

The material facts and the question of law raised on the appeal sufficiently appear from the above head-note.

Armour K.C. and Bartlet K.C. for the appellants. The respondents are not entitled to the benefit of the Act. They could not have believed that the lessor had a title in fee.

The cases of *Gummerson* v. *Bunting* (3) *and Bright* v. *Boyd* (4) have no application. In both cases there was an actual purchase and justification for the belief that the vendor could convey the title.

Nor are they entitled to equitable relief. The belief in ownership is essential to this also. And there is no evidence that lasting improvements were made.

In any event no compensation can be granted for improvements made after respondents became aware of the lessor's want of title.

(1) 47 Ont. L.R. 227.
(2) 46 Ont. L.R. 136.
(3) 18 Gr. 516.
(4) 1 Story 478; 2 Story 605.

Rodd K.C. and Fripp K.C. for the respondents. The appellants are stopped from disputing the claim as they must be held to have acquiesced in the placing of improvements on the land. The judgment of the trial judge should be restored.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, I am of the opinion that the judgment of the Appellate Division appealed from should be varied by striking out sub-paragraph 2 of paragraph 3 and substituting a direction for a reference to ascertain (1) to what amount the plaintiffs are entitled for mesne profits; (2) by what amount the value of the property has been enhanced by reason of permanent improvements effected by the defendants before the 2nd of October, 1908; (3) what balance, (if any) the plaintiffs should recover as their actual damages.

No costs of main appeal.

IDINGTON J. (dissenting)—The result of this appeal and cross-appeal, in my opinion, should turn upon the question of whether or not section 37 of the Conveyancing and Law of Property Act, being chapter 109 of the Revised Statutes of Ontario, should govern the rights of the parties concerned.

That section reads as follows:—

37. Where a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the Court is of opinion or requires that this should be done according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the Court may direct.

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I shall revert presently to the history of that enactment but meantime may be permitted to state the outline of the story out of or in relation to which its relevancy has to be considered.

By a lease of the 2nd February, 1903, the late Luc Montreuil demised to the Ontario Asphalt Block Company certain parcels of land for ten years at an annual rental of one thousand dollars a year, and thereby gave it an option to purchase same on giving six months notice during said period at the price of $22,000.

The said company thereby bound itself not only to pay said yearly rental but also to build a dock to cost not less than $6,000.00, which, if the option not exercised within said period, was to become the property of the said lessor.

The said lessee at once proceeded to erect upon said property a building and factory for the purposes of its business at a cost of eighty thousand dollars, or more, and the said dock at a cost much exceeding said $6,000.00 and added to such equipment, year by year, a great deal in way of improvement.

After this expenditure it was discovered, in October, 1908, in regard to some other property which had been held by said lessor, upon an identical title by which part of that, covered by said lease and agreement, was held by him, that his title was found to be only that of a tenant for life and that the remainder would go to his children.

He made good to other purchasers by inducing appellants to release their claims therein.

Upon learning of this, on the 2nd October, 1908, the respondent Asphalt Company's secretary wrote the said lessor as follows:—

Windsor, Ont., Oct. 2nd, 1908.

Luc Montreuil, Esq.,
Walkerville, Ont.

Dear Mr. Montreuil:—

I understand that some question has arisen with reference to your right to sell the farm property at Walkerville, and it occurs to me that being the case, you should get from your children a confirmation of the lease that you made to The Ontario Asphalt Block Company, Ltd., of the premises they now occupy. In case of your death the children might repudiate the lease and as we have spent a very large sum of money on the building, etc., we would be obliged to hold your estate liable on your covenant for quiet enjoyment, in case any trouble arose, and all this can be avoided now by your getting from the children some documents confirming the lease.

Yours truly,

O. E. Fleming,
Secretary.

And not receiving any reply again wrote him the following:—

Windsor, Ont., Dec. 24th, 1908.

Luc Montreuil, Esq.,
Walkerville, Ont.

Dear Sir.—

It would be very much more satisfactory to us and also to yourself if you would have your children convey to you the property leased by you to the Asphalt Block Company, and under which lease you are bound to convey to them at the expiration of the lease.

We would feel very much more satisfied if you would do this.

Yours truly,

O. E. Fleming,
Treasurer.

The writer of said letters was called as a witness on the trial of this action brought by appellants to eject respondents from the possession of that part of said lands for which the said lessor had failed to get the said deed from appellants, as requested, and in course of his explanatory reason for writing said letters, testified as follows:—

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Mr. Rodd: You had made a large expenditure? A. Yes, and we had not any idea but what when we spent the first dollar on the property that we had purchased under the option we could not afford to spend the money without doing that.

Q. You say that was the intention of the company from the outset? A. Yes.

Q. Why did you take the lease instead of buying out-right at the first? A. Because $1,000 a year is less than 5% on the purchase price of $22,000, and in addition to that $22,000 meant a lot to us in establishing a plant of this sort.

Q. At any rate that was the reason you wrote the letter? A. Yes.

Q. Did you ever get any reply to those letters? A. No, no reply.

Q. You were going to tell me what you had spent up to December 31st, 1912, on the plant? A. $159,126.18, and on the 31st December, 1917, $174,354.78.

HIS LORDSHIP:—And then you went on after the discovery; after 1908 you went on? A. Yes, my Lord, we had to take care of the business; it was a case of necessity.

MR. RODD:—What position would your client have been in if you had not gone on? A. We would not have been able to have taken care of the increase of business; business has to grow or go back; we could not stand still.

This evidence seems to have been overlooked by the court below when quoting part of the evidence given on cross-examination by the same witness, in the judgment appealed from.

Taken together therewith and the other facts in evidence to which I will presently refer, I respectfully submit that it seems to me that the conclusion reached resting upon said cross-examination is far from convincing.

Passing meantime from that to relate what ensued, the respondent Asphalt Block Company continued in possession of said premises, enlarging and improving the factory so built, and in course of so doing making it quite evident that its owners were determined to enforce the option of purchase contained in the said lease. And in due course of time the respondent Asphalt Block Company served the lessor, on the 5th January, 1912, with notice pursuant to the terms of said

option, that it intended to exercise the right to purchase said lands and premises according to the terms in the said lease provided, at the end of the said term of ten years.

The said notice recited the facts of the lease for ten years from the 2nd day of February, 1903; the going into possession; the option given of purchase at the expiration of said term upon giving six months previous notice in writing of its intention to do so.

The said lessor refused to carry out his agreement and the respondent Asphalt Block Company brought an action on the 10th February, 1913, for specific performance which was tried on the 27th of following May. Judgment was given therein directing specific performance of so much of the interest in said lands as the lessor could convey and allowing an abatement of price for what he could not convey, and damages for breach of his contract.

On appeal to the Appellate Division of the Supreme Court of Ontario that judgment was modified as appears in the report of the case (1). And an unsuccessful appeal therefrom to this court was heard in 1916.

I understand counsel agreed in the statement that the reference directed thereby has never been proceeded with.

Luc Montreuil, the said lessee when this case was before the said Appellate Division, as directed by that court, filed an affidavit shewing that he got a grant to himself of part of the lands covered by said lease in 1874 and giving in detail the ages of his children, from which it appears that the present appellants were each at the time of his making the lease in question over twenty-one years of age.

(1) 29 Ont. L.R. 534.

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They are shewn also to have made at his request conveyances of their interests to other purchasers from him of property held upon the same title as in question herein.

They also are shewn to have known of the improvements made by the appellant Asphalt Block Company, now in question, but never objected or in any way protested or warned the said company of their claim to be entitled to the remainder of said property, upon which they rest herein, asserting the right to eject the respondents from that part of the premises now in question.

The lessor and vendor Luc Montreuil, died in January, 1918.

And in the following August, his children, the appellants, brought this action of ejectment.

The Asphalt Block Company, respondent, in reply set up the salient facts which I have set forth above and rely thereon, by way of counter claim, upon estoppel and seek a declaration to that effect, and next a declaration

> that this defendant upon making proper compensation is entitled to retain the lands in question or in the alternative a lien thereon in respect of the improvements made under mistake of title as claimed in paragraph thirteen hereof.

The appellants joined issue thereon and the case went to trial before the late Chief Justice Falconbridge who gave effect to the latter contention. And in doing so of course rested entirely upon the section I have quoted above.

The First Appellate Division quoting, as already stated, the cross-examination of the secretary of the Asphalt Block Company, overlooking his examination in chief and, I respectfully submit, also overlooking the weight to be given the actual facts of such a large

expenditure as made upon lasting improvements and all implied therein, and which testify, in my appreciation of fact, much more forcibly than the mere words, of doubtful import, upon which the Appellate Court relied, to the existence of the realities required by the statute, of belief in the efficacy of an option as a means or method of ownership.

Such is, I submit, the attitude which the court should hold in trying to solve the question of fact as to belief in ownership.

And when we come to consider what the quality of ownership may be upon which such a belief may be reasonably founded, certainly we are not to bind him seeking relief under the statute in question to prove an actual absolute ownership or its equivalent, for then the statute would be rendered meaningless.

We may, first recalling that in our English law there is no such thing as any absolute ownership of land except in the Crown, properly turn to the many varying meanings which the word "owner" may present.

We find in Bouvier's Law Dictionary the following:—

> *Owner.*—He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.

Surely a man having an option to purchase can well believe himself such a person as therein and thus defined.

Clearly a man possessed of such an option as the opinion expressed in *London and South Western Ry. Co.* v. *Gomm*, (1) demonstrates, has an interest in land and the extent thereof may be demonstrated by the acts of the optionee evidencing this intention to exercise, long before the actual notice of acceptance as foundation for an assertion of belief in his ownership.

(1) [1882] 20 Ch. D. 562.

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The right of dominion over the land in respect of which he has such an option of absolute purchase is as absolute as any man may desire and the only question remaining, I submit, is whether or not at the time when he acts on his alleged belief, that is, under all the circumstances, an honest belief, in other words, an honest determination to exercise the option.

There are also cases cited in Stroud's Judicial Dictionary in which, though turning (in some of the cases cited) possibly on legislative interpretation, yet in the mode of reasoning adopted in disposing of same, are worthy of note.

The judgments in the cases of *Ramsden* v. *Dyson*, (1) and *Plimmer* v. *Mayor, etc., of Wellington*, (2) may also be advantageously referred to for an elucidation of the principles upon which the courts of equity act in protecting the parties making improvements under the belief that they have such an interest in the property or right to acquire same, as entitles them to rely thereon in making substantial improvements.

Surely one is, in such a case as presented herein, in just as good a position as the vendee paying a mere nominal deposit and that test seems to me to be important and ought to be observed as a guide, for such was the chief basis of the recognized law; and springing from that the doctrine so grew as to cover other like cases. Possibly prevention of fraud was the earlier basis.

The sole reason for the statement of the first part of the statute in question as it appeared in 36 Vict. c. 22, s. 1, was doubtless to render clear and of universal application by the imperative requirement of a statutory law, a doctrine developed in courts of equity and not so uniformly observed even there as was desirable, and seemed even to startle learned judges in common law courts.

(1) [1866] L.R.I.H.L. 129. (2) [1884] 9 App. Cas. 699.

For example, though the doctrine had been enunciated and applied by the Chancellor of Upper Canada in the case of *Bevis* v. *Boulton*, (1) his successor, only four years later, in the case of *Kilborn* v. *Workman*, (2), refused to apply it, and nine years thereafter in the case of *Gummerson* v. *Banting* (3), after reviewing many of the then leading cases in point, applied the doctrine.

In doing so it may be observed that he referred to the said *Kilborn* v. *Workman* (2) and excused its non-application there by referring to the case of *McKinnon* v. *Burrows*, and mentioning that a later case in England had shown he was in error. The only *McKinnon* v. *Burrows* case I can find is a common law action in (4)

Clearly there was an error in failing to observe the English decision in the case of *Bunny* v. *Hopkinson*, (5) perhaps excusable if regard is had to the changed conditions from then to now. And, I submit, that the right therein recognized was no higher than the right of him possessed of an option upon which he might reasonably act and assert as a basis of honest belief in ownership as above defined.

My own impression is that there was another case in Ontario which in a more remarkable degree brought to public attention the want of uniformity in applying the law and led to the enactment of the first part of the clause now in question. I cannot find it reported, and my memory does not serve me to recall the name thereof.

(1) [1858] 7 Gr. 39.
(2) [1862] 9 Gr. 255.
(3) [1871] 18 Gr. 516.
(4) 3 U.C.Q.B. (O.S.) 114.
(5) [1859] 27 Beav. 565.

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Illustrative, however, of the state of, even the judicial mind, in the common law courts, then being constrained to apply some equitable doctrines and procedure, I find the new enactment referred to as follows in the case of *Carrick* v. *Smith* (1), at page 399:—

> 36 Vic. ch. 22, O., declares that: "In every case in which any person has made or may make lasting improvements on any land under the belief that the land was his own, he or his assignee shall be entitled to a lien upon the same, to the extent of the amount by which the value of such land is enhanced by such improvement." This is a very extensive protection, and perhaps it may be called very advanced legislation to give a lien *in every case* to a person who has made improvements, ments, even *lasting* improvements, on any land, *under the belief* that the land was his own.

I think these several decisions and judicial expression show how much need there was for an enactment of the kind now in question not so much as an advancement in legislation, as the need of having the law well understood and of universal application.

It was much needed. It was introduced, I believe, by the late Hon. Edward Blake, a master of law and language, well knowing what he was about, and was aptly entitled

> An Act for the protection of persons improving Land under a Mistake of Title.

The case of *Gummerson* v. *Banting* (2), cited above, is relied upon in the judgment appealed from to give herein the measure of relief which, in principle, was on all fours with the said enactment passed a couple of years after said decision. I am unable to distinguish the doctrine applied in the said decision, from the principle sought to be enforced by the enactment as it first stood.

(1) 34 U.C.Q.B. 389. (2) 18 Gr. 516.

And all that was done thereafter was to add thereto by an enactment passed on the eve of the 1877 Revision of the Statutes of Ontario, which reads as follows:—

> or shall be entitled or may be required to retain the land if the Court is of the opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the Court may direct.

If justice is to be done in many cases in applying either the doctrine in *Gummerson* v. *Banting*, (1) or the statute of 1872, which in principle are, I think, identical, this addition was necessary, otherwise, innocent men might suffer unduly.

The later enactment confers on the courts the power to avoid and avert such possible injustice.

I think we have presented in this case a state of actual facts which call for such a legislative enactment, and that its efficacy should not be rendered futile or entirely nullified by reason of a witness hesitating under pressure of cross-examination to give the true and obvious meaning of what respondents claim and that too when at the very outset he had declared what he meant.

I think the late Chief Justice Falconbridge was absolutely right and that his judgment should be restored.

The appeal should, I therefore hold, be dismissed with costs and the cross-appeal so far as seeking that alternative should be allowed with costs save so far as same increased by the contention that there never was a mere life estate but an estate tail or otherwise.

I have not perhaps examined the lastly mentioned question as thoroughly as it may deserve. It seems, however, untenable and to have been abandoned since argument.

(1) 18 Gr. 516.

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DUFF J. (dissenting).—The enactment to be considered, (sec. 37 R.S.O. ch. 109) is in these words:

> 37. Where a person makes lasting improvements on lands under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by the improvements or shall be entitled as may be required to retain the land if the Court is of opinion or requires that this should be done according as may under all the circumstances of the case be most just making compensation for the land, if retained, as the Court may direct.

It should first be noticed that the draftsman of this enactment has carefully avoided technical legal nomenclature. "Under the belief that the land is his own" does not contain a single word (except the word "land") having a definite legal meaning. The word "owner" itself is indeed a word of very flexible signification. *Lister* v. *Lobley* (1); *Phyn* v. *Kenyon*, (2) *United States of America* v. *99 Diamonds* (3). The appellant company, that is to say the officers of the appellant company, believed that company was entitled to possession under a lease for a defined period under which the company had the right to make improvements and to remove them at the expiration of the term; and under it also the company was entitled to receive a conveyance of the fee simple from the lessor (who, it was believed, was the owner of the title in fee simple subject to the lease) upon the payment of a fixed sum of money and upon notice by the company exercising its option not later than a prescribed date. Treating the assumptions upon which all the parties were proceeding as facts, the company, it having been decided that the option should be exercised and the necessary moneys being available,

(1) [1837] 7 A. & E. 124 at pp. 127-9.

(2) [1905] 42 Scotch L.R. 382 at p. 384.

(3) 2 L.R.A. N.S. 185 at p. 193.

had not only the necessary means within its hands but had all the necessary legal rights vested in it to acquire at its sole discretion the full title in fee simple. In a practical business sense the company was in control of the property. It could sell, investing the purchaser with not indeed a title in fee simple in possession, but the absolute right to acquire such a title on the payment of a specified sum of money. It had possession with full power to use the property for all the purposes of its business and particularly for the purpose of making the improvements over which the dispute arises. It may be open to argument whether or not the company, so long as its option was not exercised, could by legal process prevent the lessor from transferring his title, but by exercising the option, that is to say, by binding itself to take the property on the stipulated terms, such a right would immediately become vested in it. A lessee invested with such a measure of control occupies a position which I think is not in any practicable way distinguishable (discarding of course the technical legal point of view) from that of a mortgagor in possession of property held by him subject to a mortgage securing a debt equal almost to the pecuniary value of the property and still less from a purchaser who has bound himself to buy but has paid only a small sum on account of the purchase money. In all these cases the person in possession has, subject to one condition, the payment of a sum of money, the same power of control over the property as that possessed by the owner in fee simple. If he makes improvements under the belief that his rights are in fact what they appear to be he does so in the belief that he possesses powers of control that will enable him to make full use of the improvements so long as his rights remain vested in him and

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which at the same time will enable him to transfer his powers and rights to another and on such transfer to obtain in the ordinary course the enhanced value of the property due to the improvements.

I repeat, the language of the enactment is not lawyers' language, and construing the language according to the usage and understanding of men who are not lawyers I think the appellant company has brought itself within the condition expressed in the words above quoted.

I am unable to agree that anything in Mr. Fleming's evidence creates any obstacle in the way of giving effect to this view. Mr. Fleming, a member of the bar, was being pressed on cross-examination to give an answer which would involve an expression of opinion on a question of law, namely, the construction of the statute now under consideration. He gave the only answer that could be given, that is to say could properly be given if he was to answer the question at all; and in effect his answer is that he believed that the rights which the lease purported to give to the company were in fact vested in the company.

This is sufficient to dispose of the appeal. In view of the ground upon which, however, the majority of the court has proceeded I think it is important to make an observation or two upon the rule respecting the measure of damages in an action to recover mesne profits. In the American courts a rule has been adopted (the effect of which is stated in a well known text book Sedgewick on Damages, sec. 915) that the action for mesne profits is a liberal and equitable action and one which will allow of every kind of equitable defence and in particular that improvements made by the occupant may be the subject of set off. This is based upon reasoning derived in part from the rules of the civil law. But the reasoning is also

based upon the supposed effect of earlier English decisions. The case principally relied upon in support of it, see *Putnam* v. *Ritchie,* (1) *Jackson* v. *Loomis* (2), is *Coulter's Case* (3) in which a set off was allowed of rent payable under a rent charge and the decision is explicitly put upon the ground that the disseisor might have recovered what he had paid in an action and the set off was allowed for the purpose of avoiding circuity of proceedings.

The American authorities appear also to proceed to some extent upon the analogy of the ancient real actions in which Mr. Sedgewick says, the set off was always allowed. Sec. 915. It would be profitless to follow the American authorities into this discussion. At common law damages were not recoverable in the real actions generally. They were recoverable in the assize, because it was regarded as a mixed action and by the Statute of Gloucester, VI Ed. I, this procedure was made applicable and this right given to the plaintiffs in real actions generally; Booth, Real Actions. But in ejectment which was a development of the old action of trespass *de ejectione firmae* damages, that is to say, damages in the nature of reparation for deprivation of possession or compensation for use and occupation were not recoverable prior to the statute of Geo. IV (I Geo. IV, c. 87 sec. 2); for this relief the plaintiff was obliged to resort to a supplementary action in trespass—trespass for mesne profits. And the law governing the measure of damages in such an action was well settled. It is stated in these terms in Mr. Justice Lush's book on Practice, vol. 2 p. 1012:—

(1) 6 Paige Ch. R. 390 at p. 401. (2) 4 Cowen 168 at p. 171.
(3) 5 Co. 30a.

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The measure of damages is the yearly value of the land, subject to such deductions for ground rent, taxes &c., as were chargeable thereon, and as the defendant necessarily paid, and the costs of such proceedings as were necessarily taken in order to obtain possession, and in case of judgment by default, the costs of ejectment to be taxed as between party and party. If any special damage had been sustained this also may be recovered if specially laid in the declaration.

To the same effect it is given in Selwyn's Nisi Prius at p. 685, in Roscoe's Nisi Prius at p. 947 in Tidd's practice vol. 2 p. 889 and in Cole on Ejectment at pp. 642 & 643. Under the head of special damage a jury might take into consideration the plaintiff's trouble and inconvenience by reason of being kept out of possession and the costs of ejectment. The "yearly value of the land" is calculated as in an action for use and occupation, Cole, 643. The rule is and has long been settled that the measure of damages in such an action is the value of the mesne profits calculated as mentioned subject to deductions of the character mentioned plus special damage if any be alleged and proved and it is a claim for such damages so measured which by the statute of Geo. IV and the Common Law Procedure Act (1852 sec. 218) the landlord might at his option add to a claim in ejectment against an overholding tenant and which under the Judicature Act of 1875 might and under the existing practice may now be joined to a claim to recover possession of land. In Ontario the statute of Geo. IV was adopted and re-enacted in 1856; it was reproduced in the C.S.U.C. ch. 27 sec. 60 and remained the law in Ontario until the passing of the Ontario Judicature Act of 1881 when the English rule of 1875 above referred to was reproduced as marginal rule 116, the rule which is now in force.

The claim for mesne profits authorized by the Upper Canada statute of 1856 and by the Ontaro rule just

mentioned of 1881 was a claim the plaintiff was entitled to assert prior to the statute of Geo. IV in England and prior to the statute of 19 Vict. in Upper Canada in an action of trespass for mesne profits and it is such a claim and only such a claim that the plaintiff is now under the English Judicature Act and under the practice in Ontario entitled to join to an action for the possession of land.

It can I think be conclusively shewn that in passing upon such a claim whether under the existing procedure or under the old procedure the courts in England have never admitted the right of the defendant by the law of England to a set off for the cost of improvements except of course in a case in which (under the existing procedure) an equitable right arises, for example, from the conduct of the owner in encouraging the defendant to make such improvements relying upon a supposed title or right of possession. That is made quite clear by reference to the well known text books referred to above as well as by the decision of the Court of Exchequer in *Cawdor* v. *Lewis* (1), which is a decisive authority upon the point.

I call attention to the law in this point because it is important in view of the course which has been taken in respect of the appeal, to make it quite clear that whatever be the law in Ontario the rule in other provinces where the law of England prevails in relation to these matters is definitely settled.

As regards the rule in Ontario, no point having been raised as touching the common law right of set off either in the court below or in this court and not having had the benefit of any argument upon it I should have required something much more convincing than

(1) 1 Y. & C. Ex. 427.

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anything I have seen to induce me to concur in laying down a rule for the guidance of the Ontario courts on this subject which diverges in a very marked way from the law governing the rights of the parties in the common law action of trespass for mesne profits as uniformly laid down in all the recognized books on procedure and as accepted and administered by the courts in England. The legislature of Canada in making provision for the joining of a claim for mesne profits in a landlord's action of ejectment reproduced the statute of Geo. IV *ipsissimis verbis* and in 1881 in providing for joining such a claim in all actions to recover possession of land the legislature of Ontario reproduced the English rule on the subject also *ipsissimis verbis*. *Prima facie* the claim thus dealt with by the legislature was the claim known to lawyers by the designation trespass for mesne profits and governed by long established rules, (rules as I have said expounded in all the recognized books of practice) governing the disposition of such a claim by the English courts. *Prima facie* that seems to be so and the presumption that it is so could only be displaced by shewing a continuity of decision and a settled practice in accordance with such decisions which it would be the duty of this court to respect as establishing a divergence between the Ontario and the English law. I find no evidence of any such course of decision. Two cases have been cited in which the court *en banc* refused to interfere with the verdict of a jury although the jury had evidently taken into account the improvements made by a trespasser in passing upon the question of damages but I cannot find any evidence that these decisions have been regarded as laying down any definite rule which has since been followed. They are not referred to in the

latest books on practice, they are not cited in Mr. Justice Maclennan's book on the Judicature Act or in Holmested & Langton's book. They are referred to in one or two subsequent cases in an incidental way but in a manner which goes to indicate a considerable doubt as to the precise effect of them. Mr. Justice Osler, whose knowledge of practice must have been exact, says in *McCarthy* v. *Arbuckle* (1) at p. 415 that these decisions apply only where the possession is not tortious meaning apparently that they are limited to cases where the plaintiff's conduct has been such as virtually to amount to a licence.

An observation or two upon the grounds upon which the court below has proceeded. The view taken appears to be that the decision of the Court of Chancery in Ontario in *Gummerson* v. *Banting* (2) and of Mr. Justice Story in *Bright* v. *Boyd* (3) constitute a sufficient weight of authority to establish the proposition that according to the law of Ontario a person in possession of land under an honest belief that he has a title to it who expends money upon it in such a way as to enhance its value has apart from statute a charge upon the land to the extent of such enhancement. I do not think that principle is part of the law of Ontario except to the extent to which as a principle of law it is supported by the statute already discussed. It is the opinion of Mr. Justice Osler as expressed in *McCarthy* v. *Arbuckle* (1) that the object of the statute was to enable a person expending money in such circumstances to assert in a substantive action against

(1) 31 U.C. C.P. 405. (2) 18 Gr. 516.
(3) 2 Story 605.

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the true owner his right to a lien to the same extent to which he could have done so in answer to an equitable claim by the true owner to recover the land. If Mr. Justice Osler's view be the right view of the statute then, of course, no difficulty arises; it is quite clear that where the owner was obliged to resort to the Court of Chancery for the purpose of asserting his title against a person in possession who in good faith had expended money in effecting improvements increasing the value of the land, the court would require the plaintiff as a condition of equitable relief to make such compensation as might in the circumstances be just. The principle is well settled and it is unnecessary to elaborate it. It is sufficient to refer to *Murray* v. *Palmer* (1) at p. 490 and to Sudgen, Vendor and Purchaser (9th ed.) at p. 266. *Bright* v. *Boyd* (2) was such a case.

On the other hand the law is clear that where the plaintiff seeks the enforcement of his strictly legal rights and consequently does not require the aid of a court of equity this principle has no application. If the aid of a court of equity is not required then to cite from the work just mentioned "and a person can recover the estate at law, equity, unless there be fraud, cannot, it is conceived, relieve the purchaser on account of money laid out in repairs and improvements, but must dismiss a bill for that purpose with costs".

ANGLIN J.—In 1903 Luc Montreuil, believing himself to be the owner thereof in fee under his father's will, leased to the defendants for ten years the land in question, together with an adjoining water lot of which he was in fact owner in fee under a Crown grant

(1) 2 Sch. and L. 474. (2) 2 Story 605.

to himself. The lease contained an option to purchase for $22,000 the entire property leased, exercisable at the end of the term on giving six months' previous notice; it also provided, in the event of the option not being exercised, for a renewal for ten years on like terms in other respects, but without the option to purchase; and it reserved to the lessees the right to remove all buildings and plant to be erected by them on the demised premises, except a dock, which they covenanted to build at a cost of not less than $6,000. It was expressly provided that, if the option were not exercised, this dock should become the property of the lessors on the expiry of the term or of any renewal thereof.

The defendants took possession under the lease and before October, 1908, expended on the dock and on buildings $80,000, or possibly a somewhat larger sum. How much of that expenditure was made on the part of the demised lands here in question does not appear.

In October, 1908, doubt first arose as to the extent of Luc Montreuil's interest. In litigation commenced then or shortly afterwards between him and the late Hiram Walker, over a piece of property held by the same title as that here in question, it was determined, in October, 1911, that under his father's will, Luc Montreuil was not an owner in fee but merely a life tenant (1) the remainder in fee having been devised to his children. Up to that time the evidence makes it abundantly clear that the children of Luc Montreuil (the present plaintiffs) had believed that their father owned in fee the lands devised to him. They appear to have acquired knowledge of their possible

(1) 3 Ont. W.N. 166; 20 Ont. W. R. 259..

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interest in remainder about the same time and probably in much the same way that their father's lessees learned of it. No investigation of Luc Montreuil's title had been made on behalf of the defendants either when they took their lease or before they began their large expenditures on the property.

With knowledge of the doubt cast upon the title of their lessor, the defendants made further large expenditures on the leased premises and in January, 1912, gave notice to Luc Montreuil of their intention to exercise the option to purchase. Montreuil having refused to convey an action for specific performance ensued in which his limited title to the land now in question was recognized. Specific performance of the option as to the other demised land held under Crown grant was ordered and, as to the land now being dealt with, the defendant was required to convey his life interest therein and the plaintiffs (the present defendants) were allowed an abatement in the purchase money (the amount thereof to be fixed on a reference)in respect of the interest in remainder which Luc Montreuil could not convey. (1)

Luc Montreuil died in January, 1918. The defendants continued to hold possession of the entire property. The present action was begun in August, 1918, by the children of Luc Montreuil, the devisees in remainder under the will of their grandfather. By their statement of claim they demand (1) possession of the said (devised) lands; (2) mesne profits; and (3) their costs of the action."

The statement of defence sets forth the terms of the lease and option, the exercise of the latter, the expenditure made by the defendants in improvements and the

(1) 29 Ont. L.R. 534; 52 Can. S.C.R. 541.

refusal of Luc Montreuil to convey to them. It alleges that the present plaintiffs were aware of the terms of the lease, that all or some of them took part in the negotiations leading to the making of it, and that they all stood by without protest while the improvements were being made and that they are therefore estopped from denying the defendants' right to hold the lands or alternatively are liable to them in damages. The R.S.O., ch. 109 (s. 37) is also pleaded and under it the relief is claimed either of the defendants being allowed to retain the land, making compensation to the plaintiffs for their interest therein, or of their being awarded compensation for the amount by which the value of the land has been enhanced by their improvements.

The late Chief Justice of the King's Bench, who tried the action, held that the case fell within the purview of the statute pleaded and gave judgment allowing the defendants to retain the land and referring it to the master to ascertain what compensation should be made by them to the plaintiffs (1).

On appeal by the plaintiffs the Appellate Divisional Court held that the case did not fall within the statute because the defendants never believed that the land was their own; but, following *Bright* v. *Boyd* (2) and *Gummerson* v. *Banting* (3), also held that, while the plaintiffs should recover the land, the defendants were entitled to equitable relief for the amount by which lasting improvements, made by them while under the impression that Luc Montreuil was owner in fee, had enhanced its value. (4)

(1) 46 Ont. L.R. 136.
(2) 1 Story R. 478; 2 Story R. 605.
(3) 18 Gr. 516.
(4) 47 Ont. L.R. 227.

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From this judgment the plaintiffs appeal asserting a right to recover the land unconditionally. The defendants cross-appeal claiming to have the judgment of the learned trial judge restored; they also sought to reopen the question of the extent of Luc Montreuil's interest, contending that it was an estate tail.

By notice given since the appeals were heard, the last mentioned contention has been abandoned in view of the futility of pressing it in the absence of any conveyance sufficient to bar the entail. The case must therefore be dealt with on the basis that Luc Montreuil had merely a life estate.

The statutory provision invoked by the defendants reads as follows:—

> 37. Where a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the Court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the Court may direct.

The part of this section which precedes the semicolon was originally enacted in 1873 by 36 Vict., ch. 22; the part following the semicolon was added in 1877 by 40 Vict. ch. 7, in preparation for the revision of that year in which the complete section appears as section 4 of chapter 95.

This statute gives the court the extraordinary power of depriving a lawful owner of his property against his will, although for a compensation. *McCoy* v. *Grandy* (1). The conditions on which a jurisdiction so much in derogation of common law right is conferred must be strictly construed and fully satisfied. *Hughes* v. *Chester & Holyhead Ry. Co.* (2);

(1) 3 Ohio St. Rep. 463, 468-9. (2) 31 L.J. Ch. 97, 109.

Wright v. *Mattison* (1); *Osterman* v. *Baldwin* (2); *Rigor* v. *Frye* (3); *Wheeler* v. *Merriman* (4); *Hollingsworth* v. *Funkhouser* (5); *Van Valkenburg* v. *Ruby* (6). *White* v. *Stokes* (7), closely resembles the case at bar, although the wording of the statute, as in the other American cases, is somewhat different.

Did the defendants when making their improvements believe that the land in question was their own? Unless they did they cannot invoke the statute just quoted. They had a lease with an option to purchase. They had neither legal nor equitable ownership. They no doubt believed that their lessor owned the fee of the property and that they could acquire it by an exercise of the option. But even if they intended to exercise the option the belief that Luc Montreuil actually owned the land excluded belief that it was theirs. Until they actually gave notice of intention to exercise the option, assuming its validity, they had merely a right of election either to acquire the land or not to do so. It is impossible to conceive that they could have believed under these circumstances that the land was their own. They might never have acquired its ownership. *Young* v. *Denike* (8), relied on by the late Chief Justice of the King's Bench, was a case of contract for sale under which, if the vendor had title, the purchaser would have become the equitable owner. Belief of the purchaser that the land was his own by equitable title was apparently regarded as sufficient to bring the case within the statute, although this is not mentioned in the judgment. No such belief could exist here.

(1) 18 How. 50.
(2) 6 Wall. 116.
(3) 62 Ill., 507.
(4) 30 Minn. 372, 376.
(5) 85 Va. 448, 454.
(6) 68 Tex. 139, 143.
(7) 67 Ark. 184.
(8) 2 Ont. L.R. 723.

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Moreover the provisions of the lease for its renewal, and that the dock to be built on the premises should belong to the lessor and that all other buildings erected by the lessees might be removed in the event of the option not being exercised certainly do not indicate that when the defendants leased the premises they had definitely determined that they would eventually purchase them. But, whenever the definite intention to purchase may have been formed, until the option was in fact exercised, whatever may have been their interest in the land (*London and S.W. Ry. Co.* v. *Gomm* (1); *Davidson* v. *Norstrant* (2)) they could not have believed it to be their own. The portion of the evidence given by Mr. Fleming, the secretary-treasurer and legal advisor of the defendant company quoted by the learned Chief Justice of Ontario, read with the rest of his testimony, is conclusive that they had in fact no such belief.

> Q. Did you believe you owned it then?
> A. No, we could not own it. The only right we had was under the lease.

It is therefore, I think, quite clear, as held by the Appellate Divisional Court, that the defendants are not entitled to the benefit of the statute they invoke and that their cross-appeal fails.

Are they entitled, as equitable relief, to the allowance in respect of lasting improvements which they have been accorded in that court?

I should perhaps first consider the two objections chiefly pressed by Mr. Armour, (a) that because they merely held an option and did not believe themselves to be actual purchasers or owners of the property the defendants do not fall within the class of persons

(1) 20 Ch. D. 562. (2) 61 Can. S.C.R. 493, 509.

entitled to equitable relief in respect of improvements made in mistake of title; (b) that no actual enhancement in value was proved at the trial and the defendant's plea for compensation should therefore have been rejected.

(a) I think effect should not be given to this objection. The evidence of Mr. Fleming makes it reasonably clear that when the expenditure for improvements was made the defendants had determined to exercise their option to purchase. They made improvements in the full belief that they could on the expiry of their lease acquire title to the land from their lessor. In this they were mistaken, and that mistake in my opinion was such a mistake of title as brings them within the equitable doctrine which they invoke. The cases are numerous in which an expectation of acquiring title has been held sufficient to support a claim for an allowance in respect of improvements made while it was reasonably entertained. *Plimmer* v. *Wellington* (1); *Biehn* v. *Biehn* (2); *Unity Joint Stock Banking Assoc.* v. *King* (3). But see *Smith* v. *Smith* (4). Nor does the fact that they were undoubtedly careless in making such expenditure without a proper investigation of their lessor's title disentitle them to such relief. So long as the mistake was *bona fide* the fact that it may have been due in part to carelessness does not debar the defendants from redress.

(b) As to the second point, it is within the power of the Ontario courts under section 64 (1) of the Judicature Act to try one or more of the issues in any case and to refer any other issue or issues to a master for inquiry and report. That apparently has been

(1) 9 App. Cas. 699, 710.
(2) 18 Gr. 497.
(3) [1858] 25 Beav. 72.
(4) 29 O. R. 309; 26 Ont. App. R. 397.

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done here by the Appellate Divisional Court as the form of the inquiry directed—"what, *if any*, lasting improvements were made" and "the amount, *if any*, by which the value of the said lands was enchanced"—indicates. A passage from the judgment of Kay J. in *Shepard* v. *Jones*, (1) at page 472, is relied upon by the appellants. There were in that case, however, other grounds as well as lack of proof of actual enhancement assigned by the learned judge for the refusal to order an inquiry as to improvements. Reference may also be made to the direction for inquiry formulated the by Privy Council in *Henderson* v. *Astwood*, (2) at page 164, viz.,

> an inquiry whether *any* and what sum ought to be allowed * * * in respect of lasting improvements.

In the present case however there was evidence of enhancement in value given at the trial. Thus Mr. Fleming on cross-examination would place an additional value of $1,200 or $1,000 on the land in consequence of a shed standing upon it. Mr. Warden states that the land is really only good for manufacturing purposes and that for such purposes the Grand Trunk spur built upon it gives it additional value. In his opinion the buildings on the land make it worth $1,500 more than it would be without them. In the course of the trial the learned trial judge expressed the opinion that it was a self-evident proposition that this land, if intended for manufacturing purposes, would be benefited by the railway siding. In the view taken by him that the case fell within the Ontario statute and that the defendants were entitled to retain the land no actual determination that there had been enhancement in value was necessary. But upon the evidence in the

(1) [1882] 21 Ch. D. 469. (2) [1894] A.C. 150.

record there might well be an adjudication that there had in fact been some enhancement in value. How much is quite another question.

If the defendants' right to equitable relief rests only on the authority of the decisions in *Bright* v. *Boyd* (1) and *Gummerson* v. *Banting* (2), cited by the learned Chief Justice of Ontario, I should, with respect, regard it as not established. In so far as those cases maintain the proposition that, "without any contract or encouragement or standing-by" on the part of the true owner and although he has not sought the aid or intervention of a court of equity and there is no trust or other matter cognizable only in equity (see *Bevis* v. *Boulton* (3)), he may be compelled at the suit of a person who has made improvements under mistake of title to compensate him to the extent to which the value of the land has been thereby enhanced, they would seem to carry the law farther than is warranted by English equity jurisprudence. (*Beaty* v. *Shaw* (4). In the civil law the broad doctrine enunciated in *Gummersons' Case* (2) no doubt obtains and the decision of Mr. Justice Story in *Bright* v. *Boyd* (1) in the United States Circuit Court, would rather seem to have involved an extension of the English equity doctrine by introducing into it the principles of the civil law. The distinction between the two systems is clearly pointed out in that learned judge's work on Equity Jurisprudence, (14 ed. vol. 2, pars. 1089 and 1090), citing the case of *Putnam* v. *Ritchie* (5) where Chancellor Walworth of New York had expressed an opinion as to the state of the law contrary to the view acted upon by Mr. Justice Story. See also vol. 3, par. 1654.

(1) 1 Story's R. 478; 2 Story's R. 605.
(2) 18 Gr. 516.
(3) 7 Gr. 39.
(4) 14 Ont. App. R. 600, 605, 607, 609.
(5) 6 Paige, 390, 403-5.

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Whatever authority the *Gummerson Case* (1) may have had was practically destroyed by the observations made upon it in the Court of Appeal in *Beaty* v. *Shaw* (2). Hagarty C. J. O. there said, speaking of the judgment of Spragge C. in *Gummerson's Case*:(1)

> The learned Chancellor appears to me to state the rule of equity too broadly.

Mr. Justice Burton added that

> It took the profession a good deal by surprise and was supposed to carry the law in reference to allowance for improvements, where there was no privity between the parties, no fraud, no standing by and suffering the improvements to be made, much farther than any previous decision either here or in England; and the passage of the 36 Vict. c. 22 (O) very shortly afterwards, probably prevented the point being further considered in a Court of Appeal.

Again the same learned judge said:

> The case of *Gummerson* v. *Banting* (1) was a peculiarly hard case, one of those cases which it is proverbially said are apt to excite the sympathies of a Judge, and lead to the making of doubtful law.

The equitable jurisdiction to provide for compensation in respect of improvements made under mistake of title is old and well known. *Edlin* v. *Battaly* (3) and *Clavering's Case*, mentioned in *Jackson* v. *Cator* (4) at page 689, may be referred to. The bases of the jurisdiction, however, and the circumstances under which it will be exercised are sometimes not so well remembered or appreciated. It may conduce to a clearer understanding of the ground on, and of the extent to, which I would vary the judgment in appeal if I should briefly examine them at the risk of appearing to make a pedantic parade of learning, some of which is, no doubt, quite elementary.

(1) 18 Gr. 516.
(2) 14 Ont. AR. 600, 605, 607, 609.
(3) (27 Car. II.) 2 Levinz, 152.
(4) 5 Ves. 688.

Apart from the old and very meagre report of *Edlin* v. *Battaly*, (1) where a compromise was eventually reached, I have found no English decision, old or modern, that goes so far as either *Gummerson* v. *Banting* (2) or *Bright* v. *Boyd*. (3) In England the equitable jurisdiction to relieve a person who has made improvements under mistake of title by requiring compensation to be made him for enhancement in value seems to have been rested either on the power of the court of equity to compel the legal owner, when seeking its aid as a plaintiff, to do equity, or on the existence of a situation creating such a personal equity against the legal owner, when defendant, as would make his insistence on his legal right without submitting to compensation a constructive fraud. It is only in cases of the latter class that a person seeking the relief of compensation can do so as an *actor*. Sugden on Vendors and Purchasers, (14th ed.) ch. 23, s. 1, nos. 29 and 31.

When the legal owner seeks the aid of a court of equity however, that court will compel him to compensate the defendant for enhancement in value through lasting improvements made by the latter under mistake of title, although no conduct on the part of the plaintiff, active or passive, can be relied upon as giving rise to such a personal equity against him. *Neesom* v. *Clarkson*, (4) is usually cited as authority for this proposition. It can scarcely be said to be satisfactory, for two reasons: first, because, as stated in a foot note, the right of the defendants to an account of the moneys expended on lasting improvements was conceded at the original hearing (2 Hare,

(1) (27 Car. II.) 2 Levinz, 152.
(2) 18 Gr. 516
(3) 1 Story's R. 478; 2 Story's R. 605
(4) [1845] 4 Hare 97.

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163) without argument and was not in question on the rehearing; and secondly, because, in delivering his judgment, Vice-Chancellor Wigram expresses the view that a defendant should not be granted this relief unless the equity which he claims is one that he himself might have enforced by bill. More satisfactory authority is to be found in *Mill* v. *Hill*, (1) which in some respects closely resembles the case at bar. The life tenant under an equitable settlement, which he suppressed, had conveyed to the defendant what purported to be an estate in fee. On his death the remainder man, who was entirely innocent in the matter instead of bringing action at common law in ejectment, as in the case at bar, filed a bill in equity to set aside the deed to the defendant. As a condition of being given relief he was required to submit to a decree for compensation for permanent improvements made by the defendant to the extent to which the value of the land was thereby enhanced. The defendant was, it is true, treated as a trustee for the plaintiff. Reference may also be made to *Attorney-General* v. *Baliol College* (2); *Cooper* v. *Phibbs* (3); and *Davey* v. *Durrant* (4). *Carroll* v. *Robertson* (5) is an instance of this jurisdiction being exercised in the Court of Chancery of Upper Canada. See too *Munsie* v. *Lindsay* (6).

On the other hand where the legal owner has not by invoking its aid submitted himself to equitable jurisdiction, a clear case of encouragement of, or acquiescence in, the expenditure made under mistake of title must be made out by the person seeking com-

(1) [1852] 3 H. L. Cas. 828, 869.
(2) 9 Mod. 407, at pages 411-12.
(3) [1869] L.R. 2 H.L. 149, 167.
(4) [1857] 1 De G. & J. 535.
(5) 15 Grant, 173.
(6) 1 O.R. 164.

pensation in equity in respect of it. 3 Story's Equity (14th ed.) par. 1645. Fry. J. in *Willmott* v. *Barber* (1), at page 105, thus states the essential elements of such a case in terms which have become classic.

It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendants land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his right. If he does not, there nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.

As put by Lord Eldon in *Dann* v. *Spurrier* (2)

This Court will not permit a man knowingly, though but passively to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement * * * . Still it must be put upon the party to prove that case by strong and cogent evidence, leaving no reasonable doubt that he acted upon that sort of encouragement. * * * It must be shewn that, with the knowledge of the person under whom he claims, he conceived he had that larger interest, and was putting himself to considerable expense, unreasonable compared with the smaller interest; and which the other party observed, and must have supposed incurred under the idea, that he intended to give that larger interest, or to refrain from disturbing the other in the enjoyment.

(1) [1880] 15 Ch. D. 96. (2) 7 Ves. 231.

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Cotton L. J. in *Falcke* v. *Scottish Imperial Ins. Co.* (1) at page 243, emphasizes two of the requirements of such a case:—

> But in order to make this doctrine applicable there must be not only knowledge on the part of the person having the real title that the man whom he sees so acting believes he has a title and acts in consequence of that belief, but also a knowledge that the title on the faith of which he is acting is a bad one.

Again in *Proctor* v. *Bennis* (2) at page 760, the same learned judge said:

> It is necessary that the person who alleges this lying-by should have been acting in ingorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title.

Ramsden v. *Dyson* (3) and *Plimmer* v. *Mayor of Wellington* (4) are well known instances of the exercise of this jurisdiction.

And when the case is clear and the circumstances are such that complete justice cannot otherwise be done the court does not stop at ordering compensation by the owner but will give the relief provided for by the addition to the Ontario statute of 1873 made in 1877, and, preventing his asserting his legal right to recover the property, allow the person whose expenditure he had encouraged to retain it making such compensation to the owner as may be fair. *East India Co.* v. *Vincent* (5); *Duke of Beaufort* v. *Patrick* (6); *Atty. Gen. for the Prince of Wales* v. *Collom* (7); *Davis* v. *Snyder* (8); Story's Equity (14th ed) vol. 1, no. 517.

(1) [1886] 34 Ch. D. 234.
(2) [1887] 36 Ch. D. 740.
(3) L.R. 1 H.L. 129.
(4) 9 App. Cas. 699, 710.
(5) 2 Atk. 83.
(6) [1853] 17 Beav. 60, 74-5.
(7) [1916] 2 K.B. 193, 203.
(8) 1 Grant 134.

It can scarcely be necessary to state that for outlay after they became aware that their lessors' title was questionable (October, 1908) the defendants can have no equity for compensation, even though steps to establish the adverse claim were deferred. *Russell* v. *Romanes* (1); *Master of Clare Hall* v. *Harding* (2); *Rennie* v. *Young* (3). Relief in such a case may possibly be given under very exceptional circumstances. *Corbett* v. *Corbett* (4).

In addition to the authorities already cited reference may be had to Smith's Principles of Equity (5 ed.) page 211; Snell's Principles of Equity (18 ed.) page 338; Pomeroy's Equity Jurisprudence, vol. III., par. 1241 and note; Ruling Case Law, vol. 14, vbo. Improvements, s. 6.

In the case at bar the evidence conclusively establishes that there was no sort of active encouragement by any of the plaintiffs of the defendants' belief in the ownership of the fee by Luc Montreuil. It is also made abundantly clear that prior to October, 1908, the present plaintiffs were quite as ignorant as were the defendants themselves that Luc Montreuil was not the owner of the lands in fee. All alike believed him to be so and that the present plaintiffs had no interest in the property. There was therefore neither knowledge by them of their own right nor of the defendants' mistaken belief of their right. The plaintiffs could not have known that

> the title on the faith of which (the defendants were) acting was a bad one.

The defendants are therefore driven to invoke the other head of equitable jurisdiction, viz., that the plaintiffs are actively seeking the aid of equity.

(1) 3 Ont. App. R. 635.
(2) [1848] 6 Hare, 273.
(3) [1858] 2 DeG. & J. 136.
(4) 12 Ont. L.R. 268.

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They are not helped by the fact that the Supreme Court of Ontario, in which they sued, is a court of equity as well as of law. The Judicature Act did not confer any new right of relief. Equitable relief may be granted by that court under section 16 (R.S.O. ch. 56) only where, and to the same extent as, the former Court of Chancery ought to have given such relief in a suit in that court. In order that the defendants should have an equitable right to the relief they seek, no case of constructive fraud having been made, it must still appear that the plaintiffs have invoked the equitable jurisdiction of the court.

The action brought by the plaintiffs is in fact purely a common law action for ejectment and mesne profits. Although before the time of Henry VII. an action in which damages for disseisin, of which the measure was the mesne profits, were awarded, when ejectment in a fictitious form with a nominal plaintiff came into use for the recovery of the term, or possession of the land, that only was recoverable in it, with nominal damages, but not with mesne profits, *Goodtitle* v. *Tombs* (1), which then became the subject of a supplemental but distinct action in trespass, in which it was necessary to shew a prior recovery of the possession in ejectment. *Aslin* v. *Parkin* (2). Obviously the nominal damages given in ejectment did not afford a subject for set-off of compensation for improvements. Since the 19 Vict. ch. 43, sec. 267, however, (see now Ont. Con. R. no. 69) mesne profits may be recovered in ejectment (though not specifically demanded, at least where the plaintiff is a landlord suing his overholding tenant, *Smith* v. *Tett* (3) and without the plaintiff having obtained possession. *Dunlop* v. *Macedo* (4).

(1) [1770] 3 Wilson K.B. 118, 120.
(2) [1758] 2 Burr. 665.
(3) [1854] 9 Ex. 307.
(4) [1891] 8 Times L.R. 43.

What is sought in the present action is not an accounting for the rents and profits of the plaintiffs' lands while in the defendants' possession. Such an accounting would seem to involve an exercise of equitable jurisdiction and the correlative right of the defendants to an equitable allowance for enhanced value due to their improvements would thereupon ensue. Story's Equity Jurisprudence (14 ed.) section 1089. When they obtained the decree for specific performance, the defendants became tenants of the property *pur autre vie*. After the death of the *cestui que vie* their occupation was that of trespassers and they became liable to the owners for damages accruing during the continuance of their wrongful possession. The plaintiffs claim for mesne profits is nothing else than a demand for those damages.

Where a plaintiff sued at common law for mesne profits I have found no case in England where a set-off for improvements was allowed; and, upon the defendant shewing that he had an equitable claim in respect of improvements, a plaintiff's action at law for mesne profits was, in at least one instance, stayed "because in an action for mesne profits no set-off is allowed." *Earl Cawdor* v. *Lewis* (1). See also Mayne on Damages (9 ed.) 476. But see too *Putnam* v. *Ritchie* (2) at page 404. Mr. Sedgewick, however, in his valuable treatise on Damages (9 ed.) vol. 3, sec. 915, says:

> The action for mesne profits is everywhere held to be a liberal and equitable action, and one which will allow of every equitable kind of defence. Among the most important considerations that a defendant can urge, in answer to the claim for the rents and profits received by him, is that which the common law has, to a certain extent, adopted

(1) 1 Y. & C. (Ex.) 427, 433-4. (2) 6 Paige 390.

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from the civil law, and which grows out of permanent improvements made by him upon the premises during his occupancy. The civil law treats the occupant in good faith with lenity. The reasoning of the civilians has so far obtained in many of our tribunals, that a *bona fide* occupant of lands is allowed to mitigate the damages in the action brought by the rightful owner by offsetting the value of his permanent improvements made in good faith, to the extent of the rents and profits claimed.

In a case noted in Viner's Abridgment, vbo. "Discount", no. 3, recoupment of damages was allowed by the assize "because the land was sown and the house well amended"; and in *Coulter's Case* (1), it was held that

> the disseissor shall recoupe all in damages which he hath expended in amending of the house.

See too Brooke's Abr., vbo. "Damages", no. 7, fol. 202. Citing these authorities Mr. Sedgewick in his work on Damages adds (ibid.) that

> in our own ancient real actions the improvements of the tenant appear always to have been the subject of set-off or recoupment. The set-off however cannot go beyond the value of the rents and profits; the defendant is never allowed to recover a balance, unless * * * the recovery * * * is allowed by statute. This principle, however, properly applies only to the case of a *bona fide* possessor, or one without notice.

This doctrine was approved in the United States Supreme Court in *Green* v. *Biddle* (2).

Under the Ontario statute (R.S.O. ch. 109, sec. 37), when it applies, the dispossessed occupant is given a lien enforceable at common law for the enhanced value created by his improvements and the court is empowered, and indeed required, after setting-off mesne profits, if any, to award him judgment for the balance. *McCarthy* v. *Arbuckle* (3). No existing right of redress either at common law or in equity was affected.

(1) 5 Co. 30 (b). (2) [1823] 8 Wheaton, 1, 81-2.
(3) 31 U.C.C.P. 405, 409.

As early as 1818 statutory provision was made in Upper Canada (59 Geo. III., ch. 14, sec. 2) for compensation to defendants in ejectment for improvements made by them in consequence of erroneous surveys, whether made before or after the passing of the Act *Gallagher* v. *McConnel* (1). The statutory right remained confined to such cases until 1873. But the common law courts of Upper Canada, influenced no doubt by the consideration shewn in the civil law for the occupant in good faith, in actions brought for mesne profits held that evidence of substantial improvements made by the defendant was admissible in mitigation of the plaintiffs' damages. Thus in *Lindsay* v. *McFarling* (2) where such evidence had been rejected by the trial judge, the Court of King's Bench directed a new trial, the Chief Justice saying:—

> I think this evidence proper to have gone to the jury; it would most probably have materially affected the verdict,

Again, in *Patterson* v. *Reardon* (3) in an action for mesne profits the jury gave a verdict for nominal damages only, evidence having been given at the trial that the defendant had made substantial improvements on the lot from which he had been ejected. The court followed *Lindsay* v. *McFarling* (2) and refused to hold the verdict perverse. In *McCarthy* v. *Arbuckle* (4) at page 411, Wilson C. J., citing *Green* v. *Biddle* (5) and Sedgewick on Damages (ubi. sup.) says:

> In the former case (i.e. that of a possessor in good faith) the defendant in an action for mesne profits was allowed to set-off the value of his improvements.

This right of the defendant in an action to recover mesne profits is also recognized by Burton J. A. in *Beaty* v. *Shaw* (6) at page 609.

(1) 6 O.S. 347.
(2) [1829] Draper's K.B. Rep. 6.
(3) [1850] 7 U.C.Q.B. 326.
(4) 31 U.C.C.P. 405.
(5) 8 Wheaton 1.
(6) 14 Ont. App. R. 600.

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The action at bar was tried by a judge sitting without a jury. Under the modern Ontario practice the master may, in such a case, where the power conferred by section 64 (1) of the Judicature Act (R.S.O. ch. 56) is exercised, be required to perform some of the functions of a jury. I think he may and should be called upon to do so here. There is no reason why he should not inquire and report, (1) to what amount the plaintiffs are entitled for mesne profits, of which apart from special circumstances, a fair occupation rent for the land is the usual measure (*Commissioners Niagara Falls Park* v. *Colt* (1); but see *Munsie v. Lindsay*, (2); (2) what amount, if any, should be allowed as compensation to the defendants for enhancement in value of the property by reason of permanent improvements thereon effected by them prior to the 2nd of October, 1908; and (3), making the necessary set-off, what balance, if any, the plaintiffs should be allowed to recover as their actual damages. The defendants have no right in this common law action to any allowance in respect of improvements made after the 2nd of October, 1908, any more than they would have had if entitled to equitable relief. I cannot understand why in the judgment appealed from an inquiry was directed as to such subsequent improvements. It was apparently by inadvertence, as the learned Chief Justice of Ontario had distinctly indicated that as to such subsequent expenditures there could be no equity. Moreover, whatever might have been the case in granting equitable relief, the right of recovery here in respect of improvements being entertained merely in mitigation of damages cannot exceed the amount which the plaintiffs may be found entitled to under their claim for mesne profits. The purpose of allowing the set-

(1) 22 Ont. App. R. 1. (2) 11 O. R. 520.

off is to restrict the plaintiff's recovery to the actual damages they have sustained. I would therefore modify the judgment pronounced by the Appellate Divisional Court by striking therefrom sub-paragraph 2 of paragraph 3 and substituting a direction for a reference in the terms above indicated.

While the cross-appeal should clearly be dismissed with costs, the proper disposition of the costs of the main appeal is not so obvious. The appellants have established that the respondents are not entitled to the equitable relief accorded them in the Appellate Division. On the other hand the direction for a reference to fix the compensation which the respondents should be allowed in respect of improvements should be maintained in a modified form and as relief at common law, to which they did not assert a right, although their pleadings contain averments of the facts essential to support such an allowance. On the evidence now before us it may well be that the difference in the monetary result will be comparatively slight. On the whole, I think at least approximate justice will be done if no order is made as to the costs of the main appeal.

MIGNAULT J.—I concur with my brother Anglin J.

Appeal dismissed without costs.

Cross appeal dismissed with costs.

Solicitors for the appellants: *Bartlet, Bartlet, Urquhart & Barnes.*

Solicitors for the respondent Ontario Asphalt Block Company: *Rodd, Wigle & McHugh.*

Solicitors for the respondent Caldwell Sand and Gravel Company: *Fleming, Drake & Foster.*

1920
Nov. 25.
Dec. 17.

THE OTTAWA ELECTRIC RAILWAY COMPANY (DEFENDANT)... } APPELLANT;

AND

FLORENCE MAY BOOTH AND OTHERS (PLAINTIFFS)..... } RESPONDENTS

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

Negligence—Street railway—Contributory negligence—Jury trial—Judge's charge.

B, travelling on a street car on reaching the street where he wished to stop being in a hurry left the car while it was moving and went around it at the rear to cross the other track. Walking quickly with his head down he ran into a car travelling in the other direction and received injuries which caused his death. The latter car was going at excessive speed and its gong was not rung as the company's rules require. On the trial of an action by B's widow for damages the judge directed the jury that "stop look and listen" before crossing a railway track was not a prescribed rule of conduct in Canada; that they should find whether or not the excessive speed and non-sounding of the gong caused the accident which killed B.; and also whether or not B., when the gong could not be heard, acted as a reasonable and prudent man would in attempting to cross without ascertaining that it was safe to do so. A verdict was rendered against the company.

Held, Davies C. J. dissenting, that there was no misdirection in the charge of the trial Judge that called for an order for a new trial.

Per Davies C. J. The jury should have been told that whether the gong was sounded or not it was the duty of B. to look and listen before attempting to cross.

PRESENT:—Sir Louis Davies C. J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario maintaining the verdict at the trial in favour of the plaintiff.

The facts are sufficiently stated in the head-note.

D. L. McCarthy K. C. for the appellant.

Fripp K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—This is an appeal from the judgment of the first Appellate Division of Ontario dismissing an appeal from the judgment of the Chief Justice of the Exchequer Division, entered on the findings of the jury, awarding damages to the amount of $11,600 to the widow and children of Werner L. Booth for his death which the jury found to have been caused by the negligence of the defendants.

We have not the advantage of having any reasons given by the Appellate Division for the judgment appealed from, though the amount of $11,600 found by the jury and for which judgment was entered by the trial judge was reduced to $10,000.

I understood from Mr. McCarthy, counsel for the appellants, that the same points in support of the appeal were taken and argued by him in the appeal court as were taken and argued before us.

There is a double track of the defendant's railway on Elgin Street, Ottawa, on which the cars of the defendants ran north and south, but no tracks on Slater Street which crosses it.

The facts and circumstances of the accident, as I gather them from the statements of counsel and from the trial judge's charge and the evidence are substantially these.

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The deceased was a clerk in the Militia Department which then occupied a building on the south side of Slater Street, about 150 feet east of Elgin Street, and, on the morning of the day in question for the purpose of reaching his office, two blocks distant, he, in company with two fellow clerks, William J. Peary and Theo. D. Deblois—boarded a south bound Elgin Street car at the corner of Queen Street, all three having transferred from a Queen Street car.

It was then 8.12 or 8.13 a.m. and Booth and his fellow clerks were due at their office at 8.15 a.m., and there was a penalty attached to their being late. Consequently all three were "hurrying".

Street cars in Ottawa stop at the opposite or far side of the street intersections and as the car approached Slater Street one of them signalled for it to stop and as it was slowing up preparatory to stopping but before it had been brought to a stop, that is while it was still moving, Booth and his companions alighted. Booth left the car a second or two before the others and had proceeded about three feet when the other two alighted. After leaving the car Booth "ran", according to some witnesses, "trotted" according to another witness, or "walked briskly" according to another witness, but whether he "ran", "trotted" or "walked briskly" he certainly, according to all, went rapidly with his head down or bent forward around the rear end of the car which he had left, towards the east and almost immediately came in contact with a north bound car on the east track, his head striking the car and sustained the injuries from which he subsequently died.

When Booth alighted from the south bound car, it and the north bound car were "practically", that is almost, overlapping, and both cars were moving.

Both cars are of the same type, being 30 feet in length with vestibules at either end and crosswise seats, and the bodies of both overhang the rail twenty inches, so that when both cars are overlapping, the devil-strip being 4 feet, eight inches wide, there is a space of only sixteen inches between them. When, therefore, after leaving the south bound car, Booth moved rapidly around the rear end of it with his head down or bent forward, he came almost immediately in contact with the north bound car, that is to say, he had to travel only some 7 or 8 or, at the most, 9 feet, that is the width of the western track (four feet eight inches) plus the width of the devil strip (four feet eight inches) less the overhang of the north bound car (20 inches) and of this distance he had travelled some 3 feet before his companions left the car.

There was no congestion of traffic at the street intersection at the time of the accident. There was neither vehicle nor pedestrian on the crossing. No one got on the south bound car and no one left it but Booth and his two companions and as these alighted while the car was in motion it went on over the crossing without stopping. No one got off the north bound car and as there was no one awaiting at the crossing to get on, it also passed over the crossing without stopping. As the morning was fine, there was nothing, therefore, in the condition of the weather, the traffic, the street, the tracks or the cars in any way contributing to the accident.

By Rule 5 of the schedule to chapter 76, 57 Victoria (Ontario), by which statute the operations of the defendants are governed, each car is required to be supplied with a gong which is to be sounded when the car approaches to within fifty feet of a crossing, but there is no requirement that the gong shall be

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sounded continuously until the crossing is passed. By Rule 99, however, of the Company's Rules and Regulations for the government of its employees, given in evidence on behalf of the plaintiffs, the motorman is directed to sound the gong on approaching a street crossing at least twenty-five yards therefrom, and to continue such sounding until the crossing is passed as a warning to the public who may be walking or driving on, or dangerously close to, the company's tracks.

The jury found the defendants guilty of negligence causing the accident, and that such negligence consisted in

> omittance of sounding gong and car travelling at excessive speed at crossing,

and no negligence on the part of deceased causing or contributing to the accident.

The findings of the jury as to the negligence of the defendants which caused the accident are not and could not be called in question on this appeal.

What is contended for, and it seems to me the only contention that can be successfully advanced here, is that the learned trial judge misdirected the jury on the point of the deceased's duty (when crossing around the rear end of the car he had left and before attempting to cross the devil-strip, as it is called, between the two tracks), to look and see whether any north bound car was coming along on that track.

The learned trial judge on this point charged the jury as follows:—

> Then you come to question number three, as to the deceased man's conduct. If a man is walking along the street and he sees a street car coming in a way that is negligent, it is his duty to avoid, if he can, the consequence of that negligence. The duty of the deceased was to exercise care when seeking to cross the easterly track; he should be

reasonably on the lookout but the law has never said, and it is not the law, that you are bound to stop, look and listen before crossing a track upon which there may be a train or a car. You must exercise reasonable care, and what would be "care" under one set of conditions, might not be "care" under another; so the test always is, where damage is sought to be recovered because of negligence in a railway accident, whether the plaintiff, under the circumstances of that particular case, was reasonably careful, was he acting as a man of ordinary prudence.

If the gong was not ringing, then what negligence was the deceased guilty of? If the gong was not ringing was that circumstance sufficient to tell him he might with safety cross those tracks; that there was no car coming? Is that the meaning to be attached to the non-ringing of the gong at a place where it ought to be rung? If the non-ringing of the gong, when it ought to be rung, is an invitation to cross, an intimation he might safely cross, then what negligence would the man be guilty of if, under those circumstances, he chooses to step across the tracks?

I mention these matters for your consideration. You must determine questions of fact, and you have to ask yourselves, what would a reasonable man do under the circumstances what interpretation would he place upon the fact that a warning was not given—if that was the case? I am not saying there was not a warning given; but if there was no warning, what interpretation would a reasonable man place upon that circumstance?

At the close of the judge's charge, the defendants' counsel took exception to that part of it relating to the deceased's negligence, saying:—

I submit your Lordship told the jury that if the gong was ringing and the man attempted to pass across the east track he was acting imprudently. I submit your Lordship should have told the jury, whether the gong was ringing or not, if he attempted to cross the east track at that point without care, without looking or listening, he was acting imprudently.

The answer of the learned judge was:—

Gentlemen of the Jury; Mr. McVeity wishes me to tell you that whether the gong was ringing or not, it was the duty of the deceased to have exercised care in crossing the east bound track. The question of exercising care is a question of fact and you must say, assuming the gong was not rung, whether the deceased was acting reasonably in doing what he did. It is not a question of law whether he acted reasonably, it is a question of fact, and for you to determine. I cannot set up a standard, and the court cannot set up a standard of facts which become so rigid as to determine the law; it remains a question of fact always whether the party exercised reasonable care or did not.

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The Chief Justice.

I respectfully submit that, under the circumstances, the general charge that, assuming the gong was not rung, the jury must find whether the deceased was acting reasonably in doing what he did without directing them specifically on the question of his duty to look and see whether there was a car approaching from the south along the eastern track was misleading, and the more especially as he had already told them "that the law *has never said* and *it is not the law* that you are bound to stop

look and listen before crossing a track on which there may be a train or a car.

It is true the American rule, adopted in several of the States of the Union, requiring a person about to cross a railroad or car track to stop, look and listen, has not, to my knowledge, been directly formulated or adopted by our courts, but that part of it requiring a person so situated to look and see whether a train or car is approaching has been adopted.

Now in view of the deceased's knowledge that the cars of the company ran up the line he was about to cross every few minutes, I submit that the judge should have told the jury it was the duty of the deceased, after crossing around the rear end of his south bound car, not to attempt crossing the track of the north bound cars without looking to see if a car was approaching.

If there were any facts or circumstances which might excuse the deceased from discharging that duty, they might possibly be left to the jury under proper direction to determine. Here there were no such facts suggested.

I respectfully submit that this court has already decided the very point in the case of the *Wabash*

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Railroad Co. v. *Misener* (1). In that case, in delivering the opinion of the majority of the court, I stated what we thought the law was, as follows:—

> I do not desire, even by implication, to cast a doubt upon the reasonable and salutary rule so frequently laid down by this court as to the duty which the law imposes upon persons travelling along a highway while passing or attempting to pass over a level railway crossing ing. They must act as reasonable and sentient beings and, unless excused by special circumstances, must look before attempting to cross to see whether they can do so with safety. If they choose blindly, recklessly or foolishly to run into danger, they must surely take the consequences.

I would not, of course, have quoted and relied upon an opinion of my own unless it had the approval of my colleagues, and in that case my opinion was expressly concurred in by my colleagues Idington and Duff JJ., constituting a majority of the court, which is my only reason for quoting it.

If that is a correct statement of the law respecting the duty of persons travelling a highway while passing or attempting to pass over a level railway crossing, how much stronger is the reason for applying that law to such a case as we have before us here where there are double tracks of a street railway, only a few feet apart, with cars passing each other north and south every few minutes and a passenger, with full knowledge of these facts, alighting from one car and passing around its rear either "ran" or "trotted" or "walked briskly" across the devil-strip, whichever pace the jury accepted as his, in the attempt to cross the adjoining track without looking to see if a car was approaching.

It has been suggested that the often cited case of *Slattery* v. *Dublin, &c., Ry. Co.* decided by the House of Lords, (2) is in point and governs this case. I

(1) 38 Can. S.C.R. 94.

(2) 3 App. Cas. 1155.

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respectfully submit it does nothing of the kind. As Lord Cairns, the Lord Chancellor, who voted with the majority in dismissing the railway company's appeal, so clearly pointed out in his judgment at page 1162 and again at page 1165 of the report, the only question before their Lordships in that appeal was

> whether the verdict should be entered for the defendants, the appellants, in the action.

There was no question before their Lordships as to whether the verdict was against the evidence or the weight of evidence or of misdirection by the trial judge, or of a new trial being granted. His Lordship at page 1166 says:—

> If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. This would be an example of what was spoken of in this House in the case of *The Metropolitan Railway Company*, v. *Jackson* (1) an *incuria* but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, on his own destruction.

That statement of his Lordship appears to me peculiarly applicable to the case now before us, and I think it clear from what he says on page 1165 of the report that, if the question of whether the verdict was against the evidence or the weight of evidence was open in the House of Lords, he would

> without hesitation be of opinion that a verdict more directly against evidence he had seldom seen.

(1) 3 App. Cas. 193.

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I do not think this *Slattery Case* (1) at all adverse to the appellants in the appeal at bar, but rather the contrary, as if it had been open to their Lordships to grant a new trial the Lord Chancellor would have undisputably voted for granting it.

If I am right, as I think I am, in my statement of the law as to the duty of a person attempting to cross one of the double tracks of car lines of the defendants, appellants, under the circumstances in which the deceased attempted to do, to look before crossing whether a car was approaching, then the defendants' right to have the jury specifically instructed on the point is clear, and the appeal should be allowed and a new trial granted.

IDINGTON J.—I think the learned trial judge's charge was quite sufficient to enable the jury to understand their duties in regard to the question of contributory negligence, as well as all else in the case, even before counsel for the defence took the exception he did.

And then the learned trial judge repeated concisely all that need, as matter of law, be said on such a subject. I do not think that there is any reasonable ground for complaint or any need for a new trial.

I would, therefore, dismiss the appeal with costs.

DUFF J.—This appeal should be dismissed with costs. No doubt there is evidence pointing with little uncertainty to the conclusion that the unfortunate victim of the accident out of which the litigation arose did pass behind the car from which he alighted and went towards the parallel track where the car was advancing by which he was struck without looking

(1) 3 App. Cas. 1155.

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ahead of him or taking any precaution to meet the risk of collision with vehicles on that side. It was a question for the jury whether that was or was not negligence which was the *causa causans* of the accident; on the other hand it was for the jury in passing upon that question to consider whether or not the gong was rung and whether or not the north bound car was, having regard to the circumstances and the locality, moving at an excessive speed. I am inclined to think that the concrete question on which the jury ought to have been asked to concentrate their attention was whether if they found the issue of reckless want of precaution on the part of the victim in favour of the company, and the issues touching the ringing of the gong and the speed of the car in favour of the plaintiff, the real cause of the plaintiff's injury was the recklessness of the victim, or the negligence of the company in respect of speed and failure to give warning. Whether or not, in other words, notwithstanding the recklessness of the victim he would probably have been roused to attention if the motorman had exercised proper prudence in respect of speed and given due warning by sounding the gong. The trial judge seems rather to have directed the attention of the jury to a somewhat different question, namely, whether the victim was misled by the fact that the gong was not sounded into thinking that the line on that side was clear. That was no doubt a proper point for the jury to consider but I am inclined to think, having regard to the evidence as a whole, it was not the precise point of fact on which the jury ought to have considered the case to turn. That question was, I think, to adopt the language of Lord Cairns in *Slattery's Case* (1) at page 1167, whether

(1) 3 App. Cas. 1155.

the failure to sound the gong coupled with the excessive speed of the car on the one hand or, on the other hand, the want of reasonable care on the part of the deceased, was the *causa causans* of the accident.

These considerations, however, do not afford a sufficient ground for allowing the appeal. There was no misdirection, that is to say, there was no misstatement of the law; on the contrary the trial judge's statement of the law was accurate, and the trial judge was not asked to suggest to the jury that they should consider the case from the point of view of the above observations. The counsel for the company evidently preferred to have the jury consider the case from the point of view suggested in the charge of the trial judge.

ANGLIN J.—W. L. Booth, the husband of the adult, and father of the infant plaintiffs, died as the result of injuries sustained by his being struck by a tramcar of the appellant company. At a second trial of this action, brought under the Fatal Accidents Act (R.S.O. c. 157) the plaintiffs recovered a verdict for $10,000 for the damages resulting to them and $1,600 to cover cost of nursing, medical attendance and hospital expenses. By a unanimous judgment a divisional court of the Appellate Division upheld this verdict as to the award of $10,000, but disallowed the item of $1,600 because not covered by the statute.

The defendants now appeal from this judgment. Mr. McCarthy, representing them, very frankly conceded that he could not hope successfully to attack the findings of negligence against his clients—excessive speed of a tramcar and omission to sound its gong when approaching a crossing—but he contended that

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the proximate cause of the injuries to the late W. L. Booth which resulted in his death was not any fault of theirs but his own recklessness and he also strongly urged that there had been misdirection on the issue of contributory negligence raised by the defence.

On alighting from a south bound car at the corner of Elgin and Slater Streets, in the City of Ottawa, Booth crossed immediately behind it and was struck by a north bound car, which the jury found was travelling at an excessive speed and without sounding the gong as prescribed by the company's rules. Failure to take reasonable precautions before stepping on to the eastern or north bound track after passing behind the street car was the negligence charged by the defendants against the deceased.

The misdirection alleged by counsel for the appellant consists in the omission of the learned Chief Justice of the Exchequer Division, who presided at the trial, to instruct the jury that if the deceased failed to look and listen before attempting to cross the eastern tracks he was negligent.

The learned judge had told the jury that

> it is not the law that you are bound to stop, look and listen before crossing a track on which there may be a train or car.

Counsel for the plaintiffs suggests that this observation was elicited by some statement to the contrary made by counsel for the defendants in addressing the jury—and that was not improbably the case. The learned judge immediately added

> You must exercise reasonable care, and what would be care under one set of conditions, might not be care under another; so the test always is, where damage is sought to be recovered because of negligence in a railway accident, whether the plaintiff, under the circumstances of that particular case, was reasonably careful, was he acting as a man of ordinary prudence.

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Afterwards he practically told the jury that if the gong of the north bound car was ringing and, presumably, was heard by him, there would be no excuse for the deceased doing what he did, but added that they should ask themselves whether the omission to ring the gong, if they should find it had not been sounded, might be regarded by the deceased as an intimation that he might safely cross; and he concluded this part of his charge with these words—

> I mention these matters for your consideration. You must determine questions of fact, and you have to ask yourselves, what would a reasonable man do under the circumstances; what interpretation would he place upon the fact that a warning was not given—if that was the case? I am not saying there was not a warning given; but if there was no warning, what interpretation would a reasonable man place upon that circumstance?

Counsel for the defendant took the following exception to the charge:

> I submit your Lordship should have told the jury, whether the gong was ringing or not if he attempted to cross the east track at that point without care, without looking or listening, he was acting imprudently.

The learned Chief Justice thereupon added this observation—

> Gentlemen of the Jury; Mr. McVeity wishes me to tell you whether the gong was ringing or not, it was the duty of the deceased to have exercised care in crossing the east-bound track. The question of exercising care is a question of fact and you must say, assuming the gong was not rung, whether the deceased was acting resasonably in doing what he did. It is not a question of law whether he acted reasonably, it is a question of fact, and for you to determine. I cannot set up a standard, and the court cannot set up a standard of facts which become so rigid as to determine the law; it remains a question of fact always whether the party exercised reasonable care or did not.

Counsel for the appellants urges that the refusal to state explicitly that it was the duty of the deceased to

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look and listen as the standard of care which the circumstances imposed upon him was misdirection in view of the explicit statement that it was not the law that a person about to cross a track on which there may be an approaching train or car is bound to stop, look and listen and the distinction which was drawn between the case where the gong is sounded and that where it is not rung.

There is no authority for the proposition that a duty to look and listen before crossing a railway or tramway track exists under all circumstances. No doubt ordinary prudence would dictate such a precaution unless there were something exceptional to warrant a belief that it was unnecessary or to excuse its not being taken. But the direction of the learned Chief Justice was strictly in accord with the law. The only standard is "reasonable care, having regard to all the circumstances." If under the circumstances the duty of taking reasonable care involved looking and listening before attempting to cross, the existence of that obligation was necessarily implied in the direction given. For aught that we know the jury may have found that the deceased did in fact both look and listen so far as reasonable care required him to do so and that he nevertheless was not negligent in attempting to cross possibly because he failed to realize the excessive speed at which the north bound car was approaching. *Toronto Rly. Co.* v *King* (1) at page 269. We should not assume the contrary. Neither should it be taken for granted that he did not in fact both look and listen.

The whole duty of the deceased was involved in the statement that he was bound to exercise reasonable

(1) [1908] A. C. 260.

care having regard to all the circumstances. There was, in my opinion, no misdirection—and certainly none of which it can be predicated that

some substantial wrong or miscarriage has been thereby occasioned.

the condition of granting a new trial for misdirection imposed by section 28 (1) of the Ontario Judicature Act.

Whether the deceased was or was not negligent under the circumstances is eminently a question for the jury. While, if trying the case upon the printed evidence now before us, I should strongly incline to think that contributory negligence had been established and should probably on that ground have dismissed the action, I am not prepared to hold that on the undisputed facts contributory negligence of the deceased is so clear that no reasonable jury could refuse to find it proven—that the verdict negativing it unanimously accepted by the learned judges of the Appellate Divisional Court is so perverse and contributory negligence so indisputably shown that the trial judge erred in failing to take the case from the jury and dismiss the action. That conclusion would be involved in directing judgment for the defendants *non obstante veredicto* either on the ground of contributory negligence or on the ground that the only possible conclusion from the evidence as a whole is that the sole proximate cause of the injuries sustained by W. L. Booth, which resulted in his death, was his own recklessness.

BRODEUR J.—The main ground of appeal which was argued is that there was misdirection by the trial judge in his charge. It is claimed that he has not properly expressed the law nor declared that a person crossing a street car line is obliged to stop, look and listen.

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The trial judge in his charge stated in most emphatic terms that this rule—stop, look and listen—was not the law of the country, and he said that when damages are claimed because of negligence in a railway accident the true rule is that a person must exercise reasonable care and what would be care under one set of conditions might not be care under another; so the test always is whether the plaintiff, under the circumstances of that case, was acting as a man of ordinary prudence.

In the present case the plaintiff was alighting from a south bound car on Elgin Street, in Ottawa, and having passed behind this car he tried to cross over the other track on which a car was running by which he was struck.

It is also claimed on the part of the company that the man was negligent because he should have looked and listened.

On the other hand, it was stated that the failure to sound the gong on the part of the railway company was the real cause of the accident.

After the jury was charged, objection was made and it was stated that the jury should have been told that whether the gong was rung or not if the victim attempted to cross the track at that point without care, without looking or listening, he was negligent. His Lordship, the trial judge, in view of this objection, took up the question again and stated to the jury

> the question of exercising care is a question of fact and you must say, assuming the gong was not rung, whether the deceased was acting reasonably in doing what he did.

It seems to me that after such a charge it cannot be contended that there was misdirection.

As to the question of contributory negligence that is a question of fact which the jury had a right to decide as they did.

The appeal should be dismissed with costs.

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MIGNAULT J.—The argument of Mr. McCarthy for the appellant was chiefly directed to show that there had been misdirection by the learned trial judge in his charge to the jury, but he also argued that the verdict that the deceased was not guilty of contributory negligence was one which the jury could not reasonably find and should be disregarded and the plaintiff's action dismissed.

The alleged misdirection was in reference to the duty of reasonable care incumbent upon the deceased when, after alighting from the south-bound tramcar on the west side of Elgin Street, Ottawa, at its intersection with Slater Street, he attempted to cross the tracks on the east side of the street in order to continue east on Slater Street to the building occupied by the Militia Department, and was struck by a car of the appellant going north. The jury found as a fact that the gong of the north bound car had not been sounded as the car approached Slater Street and that it was travelling at an excessive speed at the crossing. The learned trial judge gave in his charge the following instruction to the jury as to the duty of the deceased to exercise reasonable care:

> Then you come to question number three, as to the deceased man's conduct. If a man is walking upon the street and he sees a street car coming in a way that is negligent, it is his duty to avoid, if he can, the consequence of that negligence. The duty of the deceased was to exercise care when seeking to cross the easterly track; he should be reasonably on the lookout but the law has never said, and it is not the law, that your are bound to stop, look and listen before crossing a track upon which there may be a train or a car. You must exercise reasonable care, and what would be "care" under one set of conditions, might not be "care" under another; so the test always is, where damage is sought to be recovered because of negligence in a railway accident, whether the plaintiff, under the circumstances of that particular case, was reasonably careful, was he acting as a man of ordinary prudence?

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And further on the learned judge said:

Now as to the alleged negligence of the deceased man. Was it negligence on his part to have stepped into a point of possible danger, under the circumstances of this case? What would a reasonable man have done under the circumstances that you may find to have existed at that time? Suppose that the bell was ringing; was Booth exercising reasonable care, under the circumstances, in stepping in front of that car, or running against it, or however it happened. It would seem to have been a highly dangerous and imprudent act, if the gong was ringing, and if he heard it, or ought to have heard it; it would be running a terrible risk on his part with the sound of the gong so near at hand for him to go beyond the protection of the car that was moving away and step across the devil-strip in front of the approaching north-bound car. If that gong was ringing what excuse had he for putting himself in that place of danger; doing what led to his death?

If the gong was not ringing, then what negligence was the deceased guilty of? If the gong was not ringing was that circumstance sufficient to tell him he might with safety cross those tracks; that there was no car coming? Is that the meaning to be attached to the non-ringing of the gong at a place where it ought to be rung? If the non-ringing of the gong, when it ought to be rung, is an invitation to cross, an intimattion he might safely cross, then what negligence would the man be guilty of if, under those circumstances, he chooses to step across the tracks?

Counsel for the defendant, after the charge, objected that the learned judge should have told the jury that whether the gong was ringing or not, if the deceased attempted to cross the east track at that point without care, without looking or listening, he was acting imprudently, and the learned trial judge again addressed the jury as follows:

Gentleman of the Jury. Mr. McVeity wishes me to tell you whether the gong was ringing or not, it was the duty of the deceased to have exercised care in crossing the east-bound track. The question of exercising care is a question of fact and you must say, assuming the gong was not rung, whether the deceased was acting reasonably in doing what he did. It is not a question of law whether he acted reasonably, it is a question of fact, and for you to determine. I cannot set up a standard, and the court cannot set up a standard of facts which become so rigid as to determine the law; it remains a question of fact always whether the party exercised reasonable care or did not.

Taking all these passages of the learned trial judge's charge, together with the one I will quote further on, I am of opinion that the jury was not misdirected. The trial judge told them that the deceased was bound to exercise reasonable care, that what would be care under one set of conditions might not be care under another, that the question was whether the deceased, under the circumstances of this particular case, was reasonably careful, or was acting as a man of ordinary prudence would have done.

In *Toronto Railway Co.* v. *King* (1), a case where a man driving across a street in front of an approaching tramcar was struck and killed, their Lordships of the Judicial Committee were of the opinion that the deceased was not clearly guilty of that "folly and recklessness" causing his death to which Lord Cairns referred in *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (2) at page 1166, and they add, page 269, the following observations which are very pertinent to the present case:

> It is suggested that the deceased must have seen, or ought to have seen, the tramcar, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets. To cross in front of an approaching train, as was done by the deceased in Slattery's Case (3 App. Cas. 1155, at page 1166), is one thing; to cross in front of a tramcar bound to be driven under regulations such as those above quoted, at such a place as the junction to these two streets, is quite another thing.

(1) [1908] A. C. 260. (2) 3 App. Cas. 1155.

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Mr. McCarthy referred us to the decision of the Judicial Committee in *Grand Trunk Railway Co.* v. *McAlpine*, (1) where their Lordships found that the trial judge had misdirected the jury as to the duty to exercise care incumbent on persons crossing a railway track, and their Lordships (speaking by Lord Atkinson as in the case of *Toronto Railway Co.* v *King* (2) observed that the trial judge had not pointed out to the jury that it was necessary, in order that the plaintiff should recover, that the omission to whistle or to give the warning or both combined, and not the folly and recklessness of the plaintiff himself, caused the accident, and they add, page 846:—

> For all that appears, the omission to whistle might not have contributed in any way to the happening of the accident. The jury, instructed as they were, may well have been under the impression that the two alleged breaches by the company of its statutory duties—the two faults of which the jury found them guilty—rendered them liable whether or not those faults caused to any extent the injury to the plaintiff or the contrary.

Here the learned trial judge, after his charge, acceding to an objection made by counsel on behalf of the defendant that if the jury found the defendant guilty of negligence they should consider whether that negligence has caused the accident, stated to the jury as follows:

> Gentlemen of the Jury: Mr. McVeity is quite right in the point he has taken. I thought I made it pretty clear but no doubt omitted to do so. Speaking of acts of negligence, I have all along had it in my mind, and referred to acts of negligence which caused this accident. The defendants are only liable for such negligent acts as caused the accident; so when I say if you find that the defendants omitted to ring the gong, or the north-bound car was going at too high a speed, you will only answer "Yes" to question number one if you think that either of those acts of negligence caused the accident.

(1) [1913] A.C. 838. (2) [1908] A.C. 260.

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I must therefore conclude that the learned trial judge's charge to the jury, measured by the test laid down by the Judicial Committee in both these cases, was a proper one and in effect left to the jury to decide, and it was eminently a question for them to determine, whether it was the negligence of the defendant or the folly and recklessness of the deceased which brought about the accident.

On the question whether the jury could reasonably find that the deceased was not guilty of any negligence which caused or contributed to the accident, while if I had to decide that question on my view of the evidence I would experience very great difficulty in arriving at the same conclusions as the jury, still this was a question for the jury to decide, and having held that they were properly directed by the learned trial judge, I cannot say that their finding is so perverse and unreasonable that it should be disregarded and judgment entered for the defendant.

I think therefore that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Taylor McVeity.*

Solicitors for the respondents: *Fripp & Magee.*

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Oct. 11.
1922
Feb. 7.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND THE MINISTER OF LANDS (DEFENDANTS)..... } APPELLANTS;

AND

BROOKS-BIDLAKE & WHITTALL, LIMITED (PLAINTIFFS) } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA

Constitutional law—License to cut timber—Condition not to employ Chinese or Japanese—Validity—Injunction.

The respondents were the assignees of a timber license issued by the Deputy Minister of Lands of British Columbia, in which was inserted the following provision: "this license is issued and accepted "upon the understanding that no Chinese or Japanese shall be "employed in connection therewith." The respondents applied to the courts for an injunction restraining the appellants from attempting to enforce such a provision, on the ground that the statute enabling the department to insert it in the license was *ultra vires*.

Held that the injunction could not be granted.

Per Davies C. J. and Anglin and Mignault JJ.—The respondents have no ground for complaint; if the condition is good, they have no grievance; if it is bad, the license itself is void and the respondents have therefore no status as licencees.

Per Idington J.—The legislation of the province is *intra vires*.

Per Duff J.—According to section 50 of the "Land Act" and to section 57, s.s. 3*a*, as amended by c. 28, s. 6 of the B.C. Statutes of 1910, the Minister of Lands had no authority to renew the license in February, 1921, unless performance of the condition precedent (above quoted) had been waived; performance of the condition during the year ending in February, 1922, had not been waived; thus the respondents' license had already lapsed or would have lapsed on the 11th of February, 1922, and accordingly the respondents' application must fail.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND THE MINISTER OF LANDS v. BROOKS-BIDLAKE AND WHITTALL, LIMITED.

APPEAL *per saltum* from a judgment of the Supreme Court of British Columbia granting a motion for an injunction restraining the appellants from attempting to enforce a provision contained in a timber license issued to respondents.

The respondents are the assignees of a timber license issued on the 11th of February, 1912 and renewed yearly by the deputy minister of Lands of British Columbia, in which was inserted by virtue of a resolution of the oegislature, the following provision; "this "license is issued and accepted upon the understanding "that no Chinese or Japanese shall be employed in "connection therewith". The respondents applied to the Supreme Court of British Columbia for an injunction against the appellants restraining them from taking any steps to cancel the license by reason the non-observance of the above quoted provision.

Judgment was rendered by Murphy J. granting the application, relying upon an opinion expressed by the Court of Appeal for British Columbia (1) on the submission of a question to that court under the "Constitutional Questions Determination Act" of the province. The Court of Appeal had held that such a provision in the liencses was invalid: (a) as contrary to the principle determined in the case of *Union Colliery Company* v. *Bryden* (2); (b) as being in contravention of the "Japanese Treaty Act, 1913".

J. A. Ritchie K.C. for the appellants,

Sir Chas. H. Tupper K.C. and *Charles Wilson K.C.* for the respondents,

E. L. Newcombe K.C. for the Attorney-General for Canada.

(1) [1920] 3 W. W. R. 937. (2) [1899] A. C. 580.

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND THE MINISTER OF LANDS v. BROOKS-BIDLAKE AND WHITTALL, LIMITED.

The Chief Justice.

THE CHIEF JUSTICE.—For the reasons stated by my brother Mignault, I am of the opinion that this appeal should be allowed without costs and also that the respondent's action should be dismissed without costs.

IDINGTON J.—The respondent is the assignee of a special timber license issued by the deputy Minister of Lands on behalf of the Government of British Columbia in the following from:

No. 6138 3957–12

(Coat of Arms)

The Government of The Province of British Columbia Land Act and Amendments.

TIMBER LICENCE.

In consideration of One Hundred and Sixty Dollars, now paid, being one annual renewal fee and the additional fee provided for in subsection (3*a*) of section 57 of the "Land Act" as enacted by section 6 of chapter 28 of 1910, and of other moneys to be paid under the said Acts and subject to the provisions thereof, I, Robert A. Renwick, deputy Minister of Lands, license Melville Tait to cut, fell, and carry away timber upon all that particular tract of land described in original licence No. 1812, Renewed by Nos. 3314, 5025, 6877, 12767, 25200, 420997, 5948, 14351.

The duration of this licence is for one year from the 11th Feb., 1912 renewable from year to year as provided by said subsection (3*a*) of section 57.

The licence does not authorize the entry upon an Indian reserve or settlement, and is issued and accepted subject to such prior rights or other persons as may exist by law and on the understanding that the government shall not be held responsible for or in connection with any conflict which may arise with other claimants of the same ground, and that under no circumstances will licence fees be refunded.

N.B.—This licence is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith.

ROBT. A. RENWICK,
Deputy Minister of Lands."

The lands in question on which the timber to be cut grows, belong to the said province of British Columbia by virtue of section 109 of the B.N.A. Act, 1867, which reads as follows:—

> 109. All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

Such is the result of the steps taken in 1871 by virtue of section 148 of said Act to constitute the union of said province with the other provinces of Canada under said Act.

The province of British Columbia may have had theretofore another title to said lands but whether higher or not need not concern us for the language just quoted seems to me for our present purpose to define as comprehensive and absolute an ownership as necessary to enable those duly empowered to act, and, acting on behalf of the province, to make whatever bargain they may deem proper.

Of course under our system of responsible government that power of bargaining is again limited by the declared will of the legislature of the province.

That legislature declared on the 15th April, 1902, its will by the following resolution:—

> That in all contracts, leases and concessions of whatsoever kind entered into, issued, or made by the government or on behalf of the government, provision be made that no Chinese or Japanese shall be employed in connection therewith.

That was followed in June, 1902, by an order in council which made the declaration that the said

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resolution was applicable to many kinds of contracts enumerated therein and of those, "special timber licences" such as that set forth above were named.

Hence the stipulation, contained in the said licence above quoted and now in question, was adopted by the executive of British Columbia's Government.

Its obligation binding respondent, the licensee, to the due observance thereof formed part of the consideration for the said licence.

The rights in question thereunder in any of the relevant yearly renewals are founded upon the contract of 1912.

Notwithstanding the last mentioned fact or any of those considerations arising out of the ownership of the lands in question and the right of an owner to deal with the lands belonging to him or it, as to such owner may seem fit, the respondent applied to the Supreme Court of British Columbia for an injunction against the appellants restraining them from taking any steps to cancel the said licence by reason of the non-observance of the above quoted provisions in said licence against the employment of Chinese or Japanese, and the same was granted accordingly.

The learned judge granting same seems to have done so, without any argument, and in the course of the opening statement by counsel for respondent, relying upon an opinion expressed by the Court of Appeal for British Columbia on the submission of a question to the said court under the "Constitutional Questions Determination Act" of the province.

In order to get here, on their way to the court above, as speedily as possible the parties concerned consented to an appeal here, direct from the judgment granting said injunction, to this court.

The reliance for said opinion of the Court of Appeal upon the case of *Union Colliery Co.* v. *Bryden* (1), seems to me, with great respect, to be misplaced.

The principle there involved was the right of mine owners to employ aliens or native Chinese or others despite the efforts of the government to regulate or prohibit the doing so. And it was held in said case to be *ultra vires* the powers of a provincial legislature to direct a general discrimination such as attempted and there in question.

This licensing of the right to cut timber on lands belonging to the province is entirely another question and depends on the right of an owner to impose limitations or conditions upon any grant made by virtue of such absolute ownership.

Surely the private owner of lands on which there is timber can, so long as owning it, refuse to employ either Chinese or Japanese or any other class he sees fit, to cut same and also impose the like terms by way of condition of enjoyment on any one claiming under him by way of licence, lease or chopping contract of any kind.

And I cannot see why the duly constituted authorities of a province empowered by the legislature to so act cannot do likewise.

Suppose for safety's sake the legislature directed the exclusion of men in the habit of smoking from being employed in any way relative to the cutting of timber, could said enactment be held *ultra vires?*

The question involved, of the right to do so or as involved herein is in principle much more like that involved in *Cunningham* v. *Tomey Homma* (2), than in the *Bryden Case* (1).

(1) [1899] A. C. 580.

(2) [1903] A. C. 151.

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There the discrimination was made as to the right to vote over which the local legislature had exclusive authority to give or to withold as it saw fit.

I do not think that power was any more sacred than the absolute right over property expressly defined as belonging to the province.

Again I am unable to understand upon what principle an injunction can be maintained to deprive one of the parties to a contract from asserting its rights thereunder, against the other thereby attempting to get rid of its obligation which formed an important part of the consideration inducing the contract.

Surely there can be no doubt that a contract which was founded upon the obligation to execute it by means of a restricted field of labour, cannot be held, economically speaking, to be the same contract, when the field of labour and cheap labour (as is sounded sometimes in our ears, open to receive common knowledge) is introduced to the advantage of the licensee.

That suggests another consideration, if provincial autonomy is to be disregarded, and it is that of the duty to administer its affairs in the most economical way possible and derive the best possible revenue from its timber resources.

That, however, is the business of the people of the province. And to take away from them the benefit thereof and bestow it upon someone else such as respondent does not seem to me a fair and equitable ground upon which to found an injunction such as in question herein.

And none of these considerations are met by the claim that the Act of the Dominion Parliament enforcing the Japanese treaty renders the contract illegal.

Assuming for a moment that it has such effect as contended by respondent, then it renders the consideration for such a contract illegal and hence the whole void.

How can such a contract founded upon an illegal consideration be held good in part and void as to that other?

I cannot think any injunction met by such objections can be maintained.

On the general principles relative to the foundation for such an injunction as granted below, I think there are so many errors, for the foregoing reasons, that it cannot be upheld and should be dissolved.

The decisions in the cases of *St. Catherines Milling Co.* v. *The Queen* (1); *Smylie* v. *The Queen* (2); and *Montreal Street Rly.* v. *City of Montreal* (3), seem to me in point in regard to some of the grounds I have taken.

And as to the enactment pretending to enforce the Japanese treaty, I do not find therein anything which necessarily involves the questions raised herein.

The only section of said treaty which has the slightest resemblance to anything that might bear upon what is herein involved is the third sub-section of Art. I thereof, which is as follows:—

> They shall in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation.

This certainly never was intended to deprive the owners of property, whether private citizens or provinces, of their inherent rights as such, much less to destroy a contract made before the Act in question.

(1) [1888] 14 App. Cas. 46. (2) [1900] 27 Ont. App. R. 172.
(3) [1906] A.C. 100

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Another observation must be made and it is that this injunction professes to deal with the Chinese as if upon the same footing as the Japanese, though the treaty is only one with Japan and does not touch the question of the employment of Chinese specified in the provision of the contract and in the requirements of the injunction.

What right exists to deal with the Chinese in this case? Yet, if the licence has become void or liable to be cancelled on any single ground, why should the appellants be enjoined from proceeding to do so?

I think this appeal should be allowed with costs throughout.

We heard the deputy Minister of Justice on behalf of his department, but, as I understood him, the Minister of Justice did not wish to intervene.

I may be permitted to suggest once more that all the fundamental facts presented herein do not seem to present a case for raising the neat point of how far, if at all, the Dominion Statute of 1913, known as the "Japanese Treaty Act," can be held to invade the rights of a province in its property or of its private citizens; that a provincial enactment similar to that in the R.S. Ont., C. 55, and its counterpart in section 67 of the "Supreme Court Act," could be made applicable to produce more satisfactory results than can be hoped for herein in the way of definite determination of what is desired.

DUFF J.—The respondents are the assignees of a special timber licence issued in the year 1912 under the provisions of the "Crown Lands Act" of British Columbia which, by the terms of it, was on specified conditions renewable from year to year for a period

which, it may be assumed for the purposes of this appeal, has not yet expired. One of the provisions of the licence is in these words:

> This licence is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith.

Admittedly this provision was not complied with and after some correspondence with the Attorney General proceedings were taken by the respondents in the Supreme Court of British Columbia claiming a declaration that they are entitled to employ Chinese and Japanese on the lands held by them under special timber licences; and Murphy J., before whom the proceedings came, held, following a previous judgment of the British Columbia Court of Appeal, that the stipulation was illegal and unenforceable and accordingly gave judgment against the Attorney General.

The general questions raised in the factums and on the argument have been fully discussed in the judgments on the reference in relation to the British Columbia Statute of 1921 (1), and these subjects require little further consideration on the present appeal; but the question now raised differs from that considered on the reference in this, that the Statute of 1921 does not, for the purpose of determining the actual rights of the parties in litigation, that is to say for the purpose of determining the rights of the respondents under their timber licence, come into play at all.

The provision which is the subject of discussion was inserted in the special timber licence in compliance with an order in council passed by the government of British Columbia in June, 1902, pursuant to a resolution of the legislature passed in April of the same year to the following effect:—

(1) 63 Can. S.C.R. 293.

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That in all contracts, leases, and concessions of whatsoever kind entered into, issued, or made by the government, or on behalf of the government, provision be made that no Chinese or Japanese shall be employed in connection therewith.

The order in council declared that the resolution applied to special timber licences granted under section 50 of the "Crown Lands Act," a class to which the respondents' licence admittedly belongs, and provided that a clause conforming to the instructions given by the resolution should be inserted in such instruments.

Section 50 of the Lands Act authorizes the Chief Commissioner of Lands and Works to grant special timber licences subject to

such conditions, regulations and instructions as may from time to time be established by the Lieutenant Governor in Council

and by an amendment adding a sub-section (3a) to section 57 of the Act passed in the year 1910 (sec. 6 of c. 28 of the statutes of that year) it was provided that such licences should be "renewable from year to year" so long as there should be an adequate quantity of merchantable timber upon the land

if the terms and conditions of the licence and provisions * * * and any regulation passed by Order in Council respecting or affecting the same have been complied with.

The licence itself in terms provided

the duration of the licence is for one year from the 11th February, 1912, renewable from year to year as provided by * * * sub.-sec. 3a of sec. 57

of the "Lands Act." The stipulation touching the employment of Chinese and Japanese is one of the terms and conditions of the licence within the meaning of the amendment of 1910 and it is also a provision of

the regulation established by order in council within the meaning of that amendment. The observance of this stipulation is, therefore, by virtue of the provisions of the statute as well as by virtue of the terms of the contract as expressed in the instrument evidencing the licence in any one year, a condition precedent to the right of a licensee to have his licence renewed for the following year.

It follows that the Commissioner of Crown Lands had no authority to renew the licence in February, 1921, unless performance of the condition precedent had been waived and the existence of the authority to waive such a statutory condition precedent may be open to doubt. However that may be, it is quite clear that performance of the condition during the year ending in February, 1922, has not been waived and the declaration claimed by the respondent is one which cannot properly be pronounced.

This requires perhaps a little elucidation. The rule of law is that a grant subject to a condition precedent which is (or becomes before the performance of it) illegal or impossible, conveys no interest, "no state or interest can grow thereupon" Coke on Littleton 206a; Comyn's Digest, Conditions, D3; differing in this respect from a condition subsequent which because the interest passes by the grant and is vested in the grantee is inoperative to devest that interest if it be impossible in fact or in law. The Act of 1913 giving the force of law to the Japanese treaty plainly did not make it an illegal thing to abstain from employing Japanese nor did it, I think, prohibit agreements between private persons to abstain from engaging the services of such persons; and it may, however, be a debatable question whether a provincial government in exacting, in the exercise of its discretion, a stipulation

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such as that under discussion, is doing anything repugnant to the covenants of the treaty which guarantee to Japanese subjects equality with other aliens in the eye of the law.

I shall assume however, conformably to the contention of the respondents, that the order in council of 1912 laying down a general rule amounting to a regulation established by the Lieutenant Governor in Council under section 50 of the "Lands Act" is an ordinance which could not remain in operation consistently with the due observance of the treaty stipulations; and that in this respect the legislation of 1913 operated upon existing as well as upon future grants. It does not follow that the respondents are entitled to the annual renewal of their licence. Even if, as the respondents contend, such is the effect of the legislation of 1913, still, on the principle above mentioned, which, I think, applies, the respondents' licence has already lapsed or must lapse at the end of the current year, that is to say on the 11th February, 1922; and the respondents' claim for a declaration in the terms of the writ must accordingly fail.

In the special circumstances of the case I think there should be no costs.

ANGLIN J.—Although appended as a note or annexed to the plaintiff's lease, the condition against the employment of Orientals I regard as one of its essential terms—as part of the consideration for which it was given.

The lessees sue for an injunction to restrain the lessors from cancelling the lease for non-observance of this condition, on the ground that it was illegal and therefore void.

If the condition was good, the plaintiffs have no grievance; if it was bad, the licence I think fails as a whole, with the result that the plaintiffs have no status as licencees.

On this ground, apart from other considerations, in my opinion this suit brought for an injunction against the Attorney General and the Minister of Lands for British Columbia cannot be maintained.

MIGNAULT J.—This is an appeal *per saltum* by consent from the judgment of the Supreme Court of British Columbia granting an injunction demanded by the respondent. The trial judge felt himself bound by a judgment of the Court of Appeal of that Province on a reference by the Lieutenant Governor in Council deciding that a clause in timber licences prohibiting the employment of Chinese and Japanese was *ultra vires*. It was therefore thought advisable to appeal direct to this court.

By the indorsement on the respondent's writ it is stated that it claims a declaration that it is entitled to employ Chinese and Japanese upon the hereditaments held by it under special timber licences containing this condition:—

> N.B. This licence is issued and accepted upon the understanding that no Chinese or Japanese shall be employed in connection therewith.

The respondent prayed for an injunction restraining the appellants from interfering with it in its enjoyment of its special timber licences upon the ground that, in the course of working its special timber licences, it had employed and was continuing to employ Chinese and Japanese as labourers.

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In my opinion, if the condition of the special timber licence prohibiting the employment of Chinese and Japanese is void as being *ultra vires*, the licence itself, granted on this express condition taken *ex hypothesi* to be bad, is itself void.

I would apply a familiar rule relating to contracts.

> Where there is one promise made upon several considerations, some of which are bad and some good, the promise would seem to be void, for you cannot say whether the legal or illegal portion of the consideration most affected the mind of the promissor and induced his promise.

(Anson, Law of Contract, 15th ed., p. 255).

The timber licence here was issued in consideration of $160.00 and of other monies to be paid under the provisions of the "Land Act," and it contained, undoubtedly as part of the consideration, the condition that I have cited.

If this condition be bad, the license is also bad; if it be valid, the respondent has no ground for complaint. In other words, the government granted and the respondent accepted the license upon the express understanding that no Chinese or Japanese should be employed in connection therewith. To treat this condition at if it had not been inserted in the licence, would be to substitute an unconditional licence for one which the Government granted conditionally. If the condition be bad, the licence itself, and not the mere condition must fail.,

I think that what I have said is supported by the *ratio decidendi* of the Judicial Committee in *Grand Trunk Pacific Ry. Co.* v. *Fort William Land Investment Co.* (1). There the Railway Committee had made an

(1) [1912] A.C. 224.

order subject to a condition which it was without jurisdiction to insert in the order, and their Lordships decided that

> the order itself, and not the mere condition, must fail.

Here the demand of the respondent was clearly not maintainable, for, if, as it alleged, the condition of non-employment of Chinese and Japanese was illegal, the timber licence it had obtained was void, and if the condition was a valid one, its action was unfounded. Under these circumstances the constitutional question need not be discussed.

I would allow the appeal without costs and dismiss the respondent's action also without costs.

Appeal allowed without costs.

Solicitor for the appellants: *J. W. Dixie.*

Solicitor for the respondents: *A. Whealler.*

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Feb. 13, 14.
March 29.

LANSTON MONOTYPE MACHINE COMPANY (PLAINTIFF)..... APPELLANT;

AND

NORTHERN PUBLISHING COMPANY (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Sale of goods—Conditional sale—Subsequent purchaser—"Purchaser in good faith"—"Act respecting lien notes"—R.S. Sask. (1909) *c.* 14, *s.* 1.

The appellant company sold to the Phoenix Publishing Company two machines subject to the condition that the title of the property would remain with the appellant until full payment of the purchase price, with the right to re-take possession on default of payment. Later, the Phoenix Company assigned for valuable consideration to A. B. representing the respondent company "all (its) rights, title and interest" in these two machines. The agreement of sale was not registered; but A. B. was aware of the above mentioned conditional sale. Default having been made on the payment of the purchase price, an action was brought by the appellant to recover from the respondent possession of the two machines.

Held, Brodeur and Mignault JJ. dissenting, that A. B. acquired title to the two machines subject to satisfying the appellant's "lien" thereon and was not "a purchaser in good faith" within section 1 of ch. 145 of the Revised Statutes of Saskatchewan, and that the respondent was therefore not entitled to rely on the protection of that section.

Judgment of the Court of Appeal ([1921] 2 W.W.R. 971) reversed, Brodeur and Mignault JJ. dissenting.

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*PRESENT.—Sir Louis Davies, C.J., and Idington, Duff, Anglin, Brodeur and Mignault JJ.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment of Brown C.J. at the trial (2) and dismissing the appellants' action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Shapley and Huycke for the appellant.

Gregory K.C. and Hodges for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, in which I fully concur, I would allow this appeal with costs throughout.

IDINGTON J.—The question raised herein by this appeal is whether or not the respondent can be held to have been a purchaser of the property in question in good faith, for valuable consideration as against the appellant.

The answer depends upon the construction to be given section 2, sub-section (1) of the "Conditional Sales Act" of Saskatchewan, which reads as follows:

> 2 (1) Whenever on a sale or bailment of goods of the value of $15 or over it is agreed, provided or conditioned that the right of property or right of possession in whole or in part shall remain in the seller or bailor notwithstanding that the actual possession of the goods passes to the buyer or bailee the seller or bailor shall not be permitted to set up any such right of property or right of possession as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration or as against judgments, executions or attachments against the purchaser or bailee unless such sale or bailment with such agreement, proviso or condition is in writing signed by the bailee or his agent and registered as hereinafter provided. Such writing shall contain such a description of the goods the subject of the bailment that the same may be readily and easily known and distinguished.

(1) [1921] 2 W.W.R. 971. (2) [1920] 3 W.W.R. 892.

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The respondent, through its agent who transacted all the relevant parts of the business of the respondent, had actual notice of the appellant having agreed to sell the machine in question, and accessories thereto, to the Phœnix Publishing Company, Limited, subject to appellant's right to re-take possession on default of payment of the price, or any part thereof, or other breach of the conditions of intended sale.

That company, subject to such conditions, sold the rights it had in the machine to one A.B., who, in turn, sold to the Northern Publishing Company, Limited.

The Phœnix Publishing Company, Limited, having got into financial difficulties in the course of their business as publishers of a newspaper and printing business akin thereto, said A.B., acting as solicitor for others, investigated the financial and other conditions of the company with the object of buying for his clients the entire business and assets of said company. In the course of doing so he was given a list of the machines it was possessed of and of much other property acquired on course of said business.

In that list of machines there were set forth the respective liens against each, and its accessories, including a lien of $4,500.00 on the machine in question in favour of appellant.

The learned trial judge refers thereto, and to the resultant bargain, as follows:—

> The evidence in this case discloses the fact that when Mr. A. B. first visited Saskatoon in May and consulted with the parties representing the Phœnix Publishing Co. that he was given a statement indicating the liabilities of the Phœnix Publishing Co. and more particularly indicating the parties who had liens against the plant or any parts of it, including the lien of the plaintiff company. It is also clear from the evidence that at that time the purchase price of $15,000.00 for the plant was named, the price that was subsequently entered in the formal agreement and paid. So that I think it is a fair inference to

make that in fixing the price of $15,000.00 for this plant, the vendors, the Phœnix Publishing Co. or the parties representing them, took into consideration all the liens which were detailed in the statement, including the plaintiff's lien. So that to some extent, at least, the lien was a factor in the deal.

Mr. Justice Lamont, in his judgment in the Court of Appeal, says:—

"On June 17th, 1918, A. B., acting for the persons who subsequently became incorporated as the defendant company, purchased certain assets of the Phœnix Publishing Company for $15,000. These assets were valued at $40,000, but against them there were liens amounting to $23,355."

A. B., by way of verifying this basis of the bargain he was trying to make, and did make, searched the office where liens might be registered and found the appellant had not registered any lien.

It seems to me quite clear that when the bargain was made between him and the company on the above basis he was not buying the actual goods of any of those lien holders, free from the several respective liens thereon, but the interest of the company therein subject thereto, and that he thoroughly understood the nature and purpose of the following resolution, and especially the reference therein to liens, passed by the shareholders of the company:—

Resolved that resolution of the directors with respect to the sale of the plant, equipment, accessories and franchises of the Phœnix Publishing Company, Limited, to A. B. be and is hereby confirmed, provided that the said A. B. make arrangements *re* liens held on the plant, including the Hoe press, papers held in trust for the John Martin Paper Company, as shall be satisfactory to the directors, and such arrangements regarding wages and rent, as shall be mutually satisfactory to the employees, the landlord and the directors and that the directors be and are hereby authorized to conclude the sale of the equipment, plant, accessories and franchises, etc., of the company, except current accounts for advertising purposes.

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He was at the meeting "in and out" as he expresses it, and received a copy of that resolution.

Indeed the respondent company was promoted, and its incorporation obtained, by him, and he was one of the provisional directors and later its president, when the deal now in question was carried out.

The special reference to the lien on the Hoe Press, in said resolution, arose by reason of some of those concerned in the Phœnix Company having become personally liable.

The following evidence of Mr. Lynd is illuminating as he was president of the Phœnix Company at the time in question:

Q. Had that been discussed with Mr. A. B. at that time?

A. As I said, the question of liens was discussed, but there was no definite understanding arrived at with regard to the liens.

Q. What arrangements was Mr. A. B. to make regarding the liens?

Mr. Mackenzie: He said there was none arrived at.

A. As I understood it at the time, Mr. A. B. was to make his own arrangements regarding the liens with the exception of the Hoe press, which he actually agreed to take care of.

Q. What do you mean by "his own arrangements?"

A. My understanding of it at that time was if he got the machinery he would pay the liens, or make arrangements to settle them in some way, and if he didn't, he would try to make some arrangements with the parties who held them. That was my understanding.

Q. If he kept the machines he would pay the liens?

A. Or make settlement with the lien holders.

* * *

Q. What were the assets of the Phœnix Publishing Co. at that time?

A. We estimated that the whole thing was worth, outside of the mailing list, which at that time was not worth very much, we estimated the plant to be worth $40,000.

Q. And did the Northern Publishing Co. assume any of the general accounts at all, any of the general liabilities?

A. No, I don't think so. I don't think they assumed any liabilities.

Q. If the assets were worth $40,000, can you tell us why the sale was made for $15,000?

A. The question of liens was taken into consideration, the liens on the plant.

Q. What liens?

A. As far as the Phœnix Publishing Co. were concerned they took into consideration all the liens that were on the plant at arriving at the figures.

* * *

Q. Mr. A. B. says that the only arrangement was that the directors were to be relieved from liability.

A. I think it went a little further. I think the Hoe press was to be taken care of, so that the directors would be relieved from liability.

Q. And what about the other liens?

A. We made no specific arrangement with him regarding them, but my understanding was he would decide himself, or the persons for whom he was acting, would decide whether they would keep the rest of the plant, because there was some question as to whether they needed it at that time.

His Lordship: There was nothing as to relieving your company from liability?

A. No, my lord. We were not relieved in any way.

Q. Were you as a director, or you, with other directors, asked to recoup the Northern Publishing Co. for any moneys paid on these liens?

A. No. Not so far as I was concerned.

* * *

His Lordship: Would it be correct to put it this way that as far as the liens were concerned, you had given Mr. A. B. full notice of the liens so that there was no come-back to your company?

A. He knew about the liens.

His Lordship: But he was to take his chances—

A. That was my understanding of it. If he wanted the machinery he would take care of the liens, and make settlement in some way, and if not, he would try and arrange to send it back. That was my understanding.

His Lordship: And if he could get the machinery without having to pay for it so much the better?

A. We didn't discuss that. As a matter of fact the Lanston Monotype were about the best creditors the Phœnix Co. ever had, and it was my impression when the Northern Publishing Co. refused to pay they were not quite keeping faith with us.

In the result that followed all the liens except that of the appellant were recognized and dealt with in the spirit which this evidence indicates was expected.

I repeat it seems to me abundantly clear that the purchase by respondent was made on the basis of $40,000 being about the fair value of that being sold, and if all the lien holders could be settled with on a fair basis the purchase price might have been fixed at that sum.

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Evidently some of the properties owned were possibly in value not quite up to the respective amount of the liens thereof. Hence that phase of the bargain was left open and when it came to a formal assignment the consideration was named therein as $15,000.00.

I am quite unable to believe that such sum was intended to cover the actual value of the plant, or any part thereof, subject to liens, as if free from liens; but on the contrary that it was the sum named for the residue of what passed thereby and the possible interest of the Phœnix Company in all the plant covered by liens.

And if so I fail to see wherein this case can fall within any of the several cases relied upon which trace back to the case of *Moffatt* v. *Coulson* (1).

In that case the learned Chief Justice of that court in his opinion laid down as a test the following:

> I think he should be so held for there seems to me no reason to doubt upon the evidence that he paid in good faith, in this sense that he paid a *fair consideration for the horse which is in question* and did not buy him collusively in order to assist the mortgagors in placing him.

The words I have italicized in order to call attention to the gist of what was in the mind of the Chief Justice as a test, are not fitted to anything analogous thereto in what we find in above quoted evidence in this case by way of fact to pass upon.

Evidently in that and each of the cases following it and relied upon there was something in way of a basis of valuable consideration in that sense so given, whereas herein if respondent is to have its way it gets a four thousand five hundred dollar machine and its accessories for nothing but the fair value of the chances of defrauding the appellant by invoking the

(1) [1859] 19 U.C.Q.B. 341.

words of the statute which do not fit the facts and the law as laid down in the case upon which *Ferrie* v. *Meikle* (1), seems to have been supposed to be founded.

Even if the mode of thought of that far off day in administering the common law is applicable, I hold in this case that on the facts the respondent has failed to establish a case within the meaning thereof and hence the appeal should be allowed.

Indeed all that the assignment by the Phœnix Company pretends to convey is the interest of that company in the goods in question and despite the recital I think, reading the instrument as a whole, that is all that was intended to be conveyed and hence no foundation for respondent's pretensions herein.

This case does not at all need a decision upon the many varying views that may be presented of the above quoted statute for there is not enough of common honesty at the basis of the pretensions set up on the facts to bring the claim so made as within the term "good faith."

I, however, lest from the foregoing I should be thought to be agreeing in the law as presented by the court below, do not hesitate to say that I cannot agree with the view of the law as expressed in the decision of the case of *Ferrie* v. *Meikle* (1).

I am of the opinion that in any jurisdiction where the common law and equity doctrines are to be administered by the same court, and when in case of conflict the equitable doctrines are to prevail, that ever since *Le Neve* v. *Le Neve* (2), the doctrine therein and in the numerous decisions since and founded thereon must be applied in construing a statute such as that in question herein.

(1) [1915] 8 Sask. L.R. 161. (2) [1748] 3 Atk. 647; 26 E.R. 1172.

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Apply that to this and the facts herein, and then the respondent's contention seems hopeless.

I am, however, confining my opinion to the case of actual notice which is not to be confounded with constructive notice.

The discarding of the former seems so like fraud as to be beyond good faith but the application of constructive notice does not seem to me as necessarily so, within the range of the ordinary intelligence of mankind.

Yet I am not to be taken as in any way discarding or treating with contempt the doctrine of constructive notice. I merely desire to indicate that difference between actual and constructive notice which exists or might exist in applying such a statute as that before us.

I think this appeal should be allowed with costs throughout and judgment given as prayed for by the appellant.

DUFF J.—By a contract dated the 11th March, 1915, the appellant company agreed with the Phœnix Publishing Company, Ltd., of Saskatoon

> to sell for the sum of $4,120.80 to the Phœnix Publishing Company, Ltd., * * * two of its casting machines

and certain accessories. The Phœnix Company agreed to buy the property specified, to pay the purchase price in specified instalments for which promissory notes were to be given. The contract further provided that a mortgage should be given to secure the deferred payments and until a mortgage was given, (an event which never happened), or the purchase money was fully paid, the title of the property was

to remain with the appellant company who, in case of default, was to have the right to take immediate possession. It was further agreed that the Phœnix Company

> shall not assign this contract nor underlet or subhire the said property without the written consent

of the appellant company. On the 17th of June, 1918, the Phœnix Company executed a deed to which the other party was Mr. A. B., by which the company professed to assign "all the right, title and interest" in and to certain goods and chattels including the property which was the subject of the previous purchase from the appellant company. This document contained covenants for the title and covenants for further assurance.

Default was made in respect of the payments of the purchase money due under the contract between the appellant company and the Phœnix Company. The respondent company which had received possession of the goods from the Phœnix Company sets up a title to retain them notwithstanding the terms of the last mentioned contract by reason of the provisions of sec. 1 of ch. 145 of the R. S. Sask. of 1909 as a purchaser of the property "in good faith for valuable consideration."

The Court of Appeal held, being constrained as it thought by a judgment of the full court of Saskatchewan delivered in *Ferrie* v. *Meikle* (1), that the respondent company was a purchaser in good faith within the meaning of the statute and consequently that its rights were not affected by the agreement between the appellant company and the Phœnix Company. The learned judges who concurred in this judgment would

(1) 8 Sask. L.R. 161.

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have been disposed, as appears from the reasons of Mr. Justice Lamont, to take the view that when a purchaser relies upon this provision of the statute it is in every case a question of fact to be decided upon the circumstances in evidence whether or not the purchaser did in fact act in good faith and that if he failed to establish honesty in fact then his plea under the statute must fail. They gave judgment in favour of the respondent company in deference, however, to the opinion expressed in a previous decision that in order to exclude a purchaser from the benefit of the statute it must appear that the sale was a collusive one in the sense that it was simulated with the object of protecting the possessor of the property from proceedings by the holder of the lien. I shall give my reasons presently for thinking that the view upon which I conclude the Court of Appeal would have acted if the question had been *res nova* is preferable to that to which it felt itself constrained to give effect because of the previous decision. Before proceeding to that question it is convenient to point out that there are excellent reasons for rejecting the hypothesis that the gentlemen concerned in the transaction in question were actuated by any dishonest intention—an hypothesis which one is naturally slow to adopt.

I am disposed to take the view that the parties never really intended to do anything more than to place the respondent company in the shoes of the Phœnix Company in relation to its agreement with the appellant company; in other words that the transfer was subject to the appellant company's rights. The bill of sale does in truth, as I have said, contain covenants for title and further assurance; but the learned trial judge has found as a fact that the arrangement between the parties was that the Phœnix

Company was not to be responsible as upon a warranty of title in the event of the appellant company enforcing its rights. It is quite true that the learned judge also finds that the respondent company was to be under no obligation to indemnify the Phœnix Company in respect of the appellant company's claim. This was probably regarded as a matter of no consequence; the Phœnix Company being destitute of assets, would be a most unlikely object of legal pursuit.

I gather that if the question had arisen as between the parties to the bill of sale the learned trial judge would have rectified the instrument; but that is of no importance because as between the appellant company and the respondent company for the purpose of determining any question arising under the statute touching the respondent company's status as a *bona fide* purchaser we are concerned only with the actual agreement, that is to say, with the intention of the parties and for that purpose we are entitled and bound to look at all the facts including oral expressions as well as writings. I am disposed to think that in essence the transaction was a transfer subject to the appellant company's rights under its agreement; and in that view it is quite clear that the statute has no application, the respondent company being a purchaser only of such rights as the Phœnix Company was entitled to transfer under its agreement with the appellant company, was not a purchaser of the property within the meaning of the statute. As against the appellant company, the Phœnix Company has possession and a right to retain possession until disturbed by the appellant company under the terms of the agreement and the right to acquire a title upon satisfying the conditions of the agreement. It could no doubt and did transfer the actual possession of the

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goods but its right of possession under the agreement (like all other rights under it) it was disabled by the terms of the agreement itself from transferring. The respondent company could not even become a bailee consistently with the provisions of the Phœnix Company's contract.

On this hypothesis then the defence invoked by the respondent company patently fails. The alternative hypothesis is that the respondent company intended to buy and the Phœnix Company intended to sell upon the terms set forth in the bill of sale, that is to say that the parties intended that the respondent company should be placed in possession of the property as owner free from the claim of the appellant company. In considering that hypothesis the finding of the trial judge becomes important that the claim of the appellant company against the Phœnix Company was taken into account in fixing the price. It is important also to note that the effect of the transaction as a whole between the Phœnix Company and the appellant company was to denude the Phœnix Company of its assets. The purpose and intent of the transaction therefore upon this hypothesis was (notwithstanding the fact that the Phœnix Company had no title but only a bare possession coupled with a right of possession which it was not entitled to transfer) for a consideration altogether disproportionate to the value of the property, to place the respondent company in possession as owner. The respondent relied upon the statute no doubt and the judicial interpretation of the statute for protection against the appellant company's claim. Such conduct on part of the Phœnix Company would be an unlawful act in the sense that it would be a breach of contract and also in the sense that it would be a tort; and as the thing was done behind the back of the appellant company it was, if this hypo-

thesis furnishes the true interpretation of that conduct, a flagrant breach of faith and the participation of the respondent company in these things was essential to effectuate the intention of the parties. It is quite true that the respondent company's agent declares that he had never seen the Phœnix Company's agreement with the appellant company. The fact that he failed to examine the agreement could not lend a more favourable colour to what occurred.

Can it be said that a litigant having purchased goods under such circumstances has brought himself within the statutory description of "purchaser in good faith for valuable consideration"? If these words are to receive the interpretation which would everywhere be ascribed to them according to common usage, the answer is of course in the negative. Is there any good ground then for giving some colour to the meaning of these very plain words which, in such circumstances, would enable a purchaser to establish successfully in a court of law that although he knowingly participated in a dishonest dealing he was still in respect of that dealing a person who has acted in good faith within the meaning of this enactment?

I think the earlier decision of the Court of Saskatchewan cannot be sustained. It rests upon a Manitoba decision, *Roff* v. *Krecker* (1), placing a construction upon a certain provision of a Chattel Mortgage Act in force in Manitoba which in turn rested upon two decisions, one a decision of the Upper Canada Court of Queen's Bench, *Moffatt* v. *Colson* (2), the other a decision, or I should rather say some language of Lord Justice James in *Vane* v. *Vane* (3). With great respect I am unable to agree that either the

(1) [1892] 8 Man. R. 230. (2) 19 U.C.Q.B. 341.
(3) [1872] 8 Ch. App. 383 at p. 399.

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Upper Canada decision or the language of Lord Justice James has any relevancy whatever to the question now before us which concerns the meaning of certain words in a "Conditional Sales Act" in force in Saskatchewan. The courts in both cases and indeed the same may be said of the Manitoba decision as well, were concerned with the construction of language found in contexts entirely different and the two earlier pronouncements upon which the Manitoba court proceeded are explicitly based upon considerations quite foreign to the interpretation of those words in the context in which they now appear. The judgment of Robinson C.J. in *Moffatt* v. *Colson* (1) shews that the purchaser was in fact acting in good faith in the sense that he paid full value for the property he bought; that he had no actual knowledge of the chattel mortgage which the mortgagee was seeking to enforce against him, but only a vague intimation from a third person that the stock he was buying was mortgaged stock; and in fact the description in the mortgage was quite insufficient to indentify the stock purchased as part of the property comprised in it and it was held in these circumstances that the mortagee must fail. The only relevant observation is the observation of the learned Chief Justice that the transaction was a transaction in good faith in the sense that it was not entered into collusively with the object of protecting the mortgagor but that it was a purchase for fair consideration. Virtually in that case it was found that there was in fact no dishonesty on the part of the purchaser. In *Vane* v. *Vane* (2) the question which Lord Justice James was considering at p. 399 in the observations relied upon in the Manitoba decision was the meaning of the phrase *bona fide* in this collocation:

(1) 19 U.C.Q.B. 341. (2) 8 Ch. App. 383.

bona fide purchaser for valuable consideration who at the time of the purchase did not know and had no reason to believe that such a fraud had been committed,

and his observations have reference solely to that question. They can afford no guidance to the construction of the words we are now called upon to construe.

It may very well be argued that both the Manitoba decisions and the Upper Canada decision can be adduced in support of a contention that for the purpose of applying the phrase purchaser in good faith when found in a modern statute one is not to govern one's self by the rules established in the Court of Chancery in relation to notice and the effect of notice. I do not in the least dissent from that; indeed, I think it is most important in construing modern statutes where questions arise as to the application of such expressions, to remember that good faith is a matter of fact and the existence or non-existence of it must be decided as a question of fact. It should be observed further that the Manitoba decision was a decision upon not a conditional sales Act but upon a statute dealing with a different subject; and it is always dangerous, as Sir George Jessel in *Hack* v. *London Provident Building Society* (1) pointed out, to construe the words of one statute by reference to the interpretation which has been placed upon words bearing a general similarity to them in another statute dealing with a different subject matter. It would, I think, be an insupportable presumption that the legislature of Saskatchewan in enacting the "Conditional Sales Act" was taking into account the judicial deliverances we have just been discussing.

(1) [1883] 23 Ch. D. 103, at p. 112.

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One further point remains. In 1897 a change took place in the phraseology of the "Conditional Sales Act" of the North West Territories. I think this change is not without significance, I think it lends point to the observation made above with regard to the equitable doctrine of notice. The legislature has substituted the condition of the existence of good faith for the condition of want of notice, but I am unable to see that this alteration throws any light upon the question we are now called upon to decide.

The appeal should be allowed.

ANGLIN J.—With profound respect for the learned trial judge and the Court of Appeal for Saskatchewan, I am disposed to think that when the true nature of the transaction which took place between the Phœnix Publishing Company and A. B., representing the Northern Publishing Co., is appreciated, the latter company is not entitled to the protection of s. 1 of c. 145 of the Revised Statutes of Saskatchewan, 1909, as "a purchaser in good faith for valuable consideration" of the goods in question in this action, against the assertion of a "right of property" therein made by the plaintiff company. The plaintiff's "right of property" is for convenience spoken of in the record as its lien.

That A. B. bought from the Phœnix Publishing Company as a trustee for the persons who were then incorporating the Northern Publishing Company and with the intent of acquiring the property for that company admits of no doubt. The Northern Publishing Company can have no higher right to the protection of the statute invoked than was acquired by A. B.

The learned trial judge found that, while A. B. gave no undertaking to pay off liens on the Phoenix Company's plant (other than that on the Hoe Press)

he took the plant subject to the chance whether the liens, including that of the plaintiff, (of the claims for which he was fully apprised) would or could be asserted in respect of it and without any right to be protected against them by the Phœnix Company. But in my opinion the evidence goes much farther. From the testimony of Mr. Lynn, the President of the Phœnix Company, who is accredited by the learned trial judge, I extract these passages:

Q. Was there any arrangement made between the Phœnix Publishing Co. regarding liens on the plant?

A. No. I would not say there was any arrangement made with him, but the question of liens was discussed.

Q. Yes?

A. I know this, that it was mentioned at that time that if Mr. A. B.—if they—if Mr. A. B. didn't want to take the machinery he would not have to pay for it, and there was no real arrangement made only in regard to the Hoe Press. The liens were mentioned all right.

Q. There was a minute of the shareholders. Just read that.

A. I might say prior to this that the directors had already met and gone over it with Mr. A. B., and we called a meeting of the shareholders for the purpose of having our action before the shareholders insisting that this provision should be put in there.

Q. What provision?

A. Provided that the said A. B. make arrangements *re* liens held on the plant, including the Hoe Press, papers held in trust for the John Martin Paper Company, as shall be satisfactory to the directors.

Q. Had that been discussed with Mr. A. B. at that time?

A. As I said, the question of liens was discussed, but there was no definite understanding arrived at with regard to the liens.

Q. What arrangement was Mr. A. B. to make regarding the liens?

Mr. Mackenzie: He said there was none arrived at.

A. As I understood it at the time, Mr. A. B. was to make his own arrangements regarding the liens with the exception of the Hoe Press, which he actually agreed to take care of.

Q. What do you mean by "his own arrangements?"

A. My understanding of it at that time was if he got the machinery he would pay the liens or make arrangements to settle them in some way, and if he didn't, he would try to make some arrangements with the parties who held them. That was my understanding.

Q. If he kept the machines he would pay the liens?

A. Or make settlement with the lien holders.

* * *

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Q. If the assets were worth $40,000, can you tell us why the sale was made for $15,000?

A. The question of liens was taken into consideration, the liens on the plant

Q. What liens?

A. As far as the Phœnix Publishing Company were concerned, they took into consideration all the liens that were on the plant in arriving at the figures.

* * *

Q. And what about the other liens?

A. We made no specific arrangement with him regarding them, but my understanding was he would decide himself, or the persons for whom he was acting would decide, whether they would keep the rest of the plant, because there was some question as to whether they needed it at that time.

His Lordship: There was nothing as to relieving your company from liability?

A. No, my lord. We were not relieved in any way.

* * *

Q. In any event, as far as the liens were concerned, he was to deal with the lien holders and do the best he could?

A. Well, yes.

Q. And you say there was no arrangement outside of the written agreement?

A. Between the Phœnix Publishing Co. and A.B.?

Q. Yes.

A No. No definite arrangement.

Q. No arrangement?

A. No.

His Lordship: Except as to the Hoe machine?

A. Yes. And I may say further, that the shareholders understood that the lien was assumed. Whether Mr. A. B. was there or not I do not know. I know the directors got the impression that any machinery that was kept by the company by him would be taken care of.

Q. That was the expectation?

A. I think it was more than that. That was the understanding we got of it."

In A.B.'s evidence I find this corroboration:—

"Q. You knew when you entered into that agreement you had to pay all these liens in order to get the rest of the plant, didn't you?

A. There was a question if we would need the rest of it.

Q. Then you would not get it?

A. We would not need it.

Q. And the vendors would get back their plant, wouldn't they?

A. I presume so.

Q. You were buying the whole plant, including the plant subject to liens, for $15,000?

A. We bought everything that was included in that schedule for $15,000, and I was particularly instructed that we were not to assume any of those liens, and I had a partial understanding with regard to the Hoe press.

Q And, notwithstanding that, your company paid liens to the extent of $15,000?

A. It might have been that another plant would be necessary.

Q. Did you ever request the Phœnix Company or did your company request the Phœnix Co. to refund any part of that $15,000?

A. I didn't.

Q. Do you know if your company did? That is, the defendant company?

A. Not that I know of."

Moreover in the bill of sale itself from the Phœnix Company to A. B. although the recital and the covenants are consistent with an absolute sale of the entire plant, the operative words of sale and transfer are restricted to

all the right, title and interest of the bargainor in and to all the goods, etc.

Whatever might be the situation in a controversy between the parties to this bill of sale, I am satisfied that as between the litigants now before us we should ascertain and be guided by the true nature of the transaction between the Phœnix Company and A. B. as disclosed by the whole of the evidence.

While I have little doubt that A. B. when taking the transfer from the Phœnix Company had the intention of cutting out the unrecorded claim of the plaintiff by invoking the statute, I incline to think he failed to put himself in a position to effectuate that purpose.

Had the transaction in fact been an absolute sale of the goods here in question to A. B. I should have felt called upon to consider very seriously whether what he did was not such an attempt to use the

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statute to accomplish a fraud on the plaintiff as this court, which is a court of equity, should strain its resources to frustrate. But the real bargain between A. B. and the Phoenix Company as to the plant in possession of the latter covered by liens (other than the Hoe Press as to which he agreed to protect his vendor) was that he would be at liberty to take it or not, in whole or in part, as he should find expedient; that in respect of whatever he took he would pay off, or otherwise arrange with, the lien-holders; and that what he did not take in that way, as he himself says, the vendors (*i.e.*, the lien-holders) would get back. That being his position as to the goods now in question he was in my opinion not a purchaser of them in good faith for valuable consideration in any sense which would entitle him to the protection of s. 1 of c. 145 of the Revised Statutes of Saskatchewan.

I would therefore allow this appeal with costs throughout and direct judgment for the plaintiff for possession of the goods described in the statement of claim. There should also be judgment for $5 as nominal damages for wrongful detention thereof unless the plaintiff prefers to take a reference to ascertain what actual damages it has sustained. Should it do so, the costs of the reference and further directions should be reserved to be disposed of by the Supreme Court of Saskatchewan.

BRODEUR J. (dissenting).—If it were not for the decisions which have been quoted, I would have been of the view that the Northern Publishing Company and A. B. could not prevent the Lanston Monotype Company from taking possession of the goods in question.

But the construction put on the statute by the courts in Ontario, in Manitoba and in England gives to the words "buyer in good faith for valuable consideration" a meaning which precludes me from giving to these words the construction which otherwise I would have put on them. The purchasers knew that the appellant company had a lien on these goods when they bought them from the Phœnix Company. They had notice that the Phœnix Company did not own them. However the jurisprudence seems to be well established that a purchaser in good faith means a real purchaser as distinguished from a collusive one, that the knowledge of an unregistered lien would not constitute the purchaser in bad faith. *Moffatt* v. *Coulson* (1); *Vane* v. *Vane* (2); *Roff* v. *Krecher* (3); *Ferry* v. *Meikle* (4).

I may add that this construction should not affect the well settled doctrine and jurisprudence in Quebec concerning art. 2251 of the Civil Code. *Dessert* v. *Robidoux* (5); *Les commissaires d'Ecoles de St. Alexis* v. *Price* (6); *Renouf* v. *Coté* (7).

For these reasons the appeal should be dismissed with costs.

MIGNAULT J. (dissenting)—The question here is whether a conditional sale of certain chattels with retention of ownership, which was not registered as required by chapter 145 of the Revised Statutes of Saskatchewan, 1909, can be set up against the respondent, the purchaser of these chattels.

(1) 19 U.C. Q.B. 341.
(2) 8 Ch. App. 383.
(3) 8 Man. R. 230.
(4) 8 Sask. L.R. 161.
(5) [1890] 16 Q.L.R. 118.
(6) [1895] 1 Rev. de Jur. 122.
(7) [1900] 7 Rev. de Jur. 415.

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Only a brief reference to the facts is necessary. The appellant, in 1911, sold the chattels in question, a monotype machine and accessories, to one Aiken, publisher of the Phœnix newspaper in Saskatoon. Aiken disposed of these chattels (some of which had been changed by the appellant) to the Phœnix Publishing Company, Limited, which subsequently, in March, 1915, entered into a contract of purchase with the appellant, reserving to the latter the title to the property until the purchase price was fully paid. This contract of conditional sale was never registered.

In May, 1918, some parties interested in the Phœnix newspaper sought to purchase the plant and assets of the Phœnix company, and, at their request, Mr. A. B. went to Saskatoon and negotiated the proposed sale with the directors of the Phœnix Company. He obtained a statement of the assets and liabilities of the company, shewing the liens affecting its property. There were five liens, comprising that of the appellant, figured at $4,500. Of these liens, three were registered, those of R. Hoe and Co., (for which certain directors of the Phoenix Company were personally liable), of Canadian Linotype Co. and of Miller and Richard. The lien of Hettle Drennan Co. for $2,800.00 was apparently not registered, but Mr. A. B. says this firm was in possession and had to be settled with to get their goods. The appellant's lien, as I have said, was not registered.

A resolution was adopted by the shareholders of the Phœnix Company authorizing the directors to sell to Mr. A. B. its plant, equipment, accessories and franchises,

provided that the said A. B. make arrangements *re* liens held on the plant, including the Hoe Press.

The sale price was $15,000.00. Later a formal agreement of sale was signed by the parties, no mention being made therein of any liens. It appears to have been understood that Mr. A. B. would look after the claim of R. Hoe and Co. for the Hoe press, and free the directors from any personal liability. As to the other liens, the learned trial judge found, and I fully agree with him after carefully reading the testimony, that, while it seemed to be understood that A. B. and those for whom he purchased were to take care of the Hoe press lien and to protect the directors against any possible action that might arise out of it, there was no such understanding as to the rest of the liens. The learned trial judge added that the purchasers took the plant and assumed any chance of the possibility of the lien holders asserting their liens.

This purchase was made by Mr. A. B. on behalf of the respondent company which was immediately constituted under the Saskatchewan Company legislation, Mr. A. B. becoming its first president. A formal transfer of the plant was made to it by Mr. A. B. After taking possession, the respondent, beside the purchase price, paid approximatively $15,000.00 in discharging liens on the plant, but the appellant's claim was not settled.

The question now is whether the appellant is entitled to assert its non-registered lien against the respondent. Section 1 of chapter 145, of the revised statutes of Saskatchewan, provides as follows:

> Whenever on a sale or bailment of goods of the value of $15 or over it is agreed, provided or conditioned that the right of property or right of possession in whole or in part shall remain in the seller or bailor notwithstanding that the actual possession of the goods passes to the buyer or bailee the seller or bailor shall not be permitted to set up any such right of property or right of possession as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration or as against judgments, execu-

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tions or attachments against the purchaser or bailee unless such sale or bailment with such agreement, proviso or condition is in writing signed by the bailee or his agent and registered as hereinafter provided. Such writing shall contain such a description of the goods the subject of the bailment that the same may be readily and easily known and distinguished.

By section 2 of the same statute, it is provided that the agreement of sale shall be registered in the office of the registration clerk for chattel mortgages where the buyer or bailee resides within thirty days from the time of actual delivery of the goods.

Under section 1 the question is whether A. B. or the respondent company was a purchaser in good faith for valuable consideration. The learned trial judge, had he not considered himself bound by the authorities to which I will refer, would have thought not, and this view was shared by Mr. Justice Lamont in the Court of Appeal. I do not however think that either the learned trial judge or Mr. Justice Lamont considered that Mr. A. B. had acted fraudulently, and from my reading of the evidence I am quite clear that no case of fraud was made out, and none was alleged, the statement of claim merely asserting unlawful detention. The whole point is whether A. B., having purchased these goods with notice of the appellant's lien, was a purchaser in good faith for valuable consideration, and both courts have considered that nothing in the facts of this case would take the matter out of the operation of the rule laid down in the cases to which I will refer. There is no doubt that A. B. and the respondent gave a valuable consideration for the sale, to wit the $15,000.00 which was paid in cash.

As long ago as 1860, the Ontario Court of Queen's Bench held in *Moffat* v. *Coulson* (1) that a chattel mortgage not containing a sufficient description of

(1) 19 U.C.Q.B. 341.

the goods is void as against subsequent purchasers in good faith, and that notice of such a mortgage to the purchaser will not affect his right. This decision is relied on because, in the Upper Canada statute there under consideration (20 Vict., Can., ch. 3), the words

subsequent purchasers or mortgagees in good faith for valuable consideration

were defined. Chief Justice Robinson said:

The only question is whether this defendant should be held to be a subsequent purchaser in good faith, within the meaning of the second section, in which case only would he be entitled to hold against the mortgage, in consequence of the defective description of the horses. I think he should be so held, for there seems to be no reason to doubt upon the evidence that he bought in good faith, in this sense, that he paid a fair consideration for the horse which is in question, and did not buy him collusively, in order to assist the mortgagors in placing him out of the plaintiff's reach. * * * * * * In our registry laws, the words "purchaser for valuable consideration" have never been held by courts of common law to exclude purchasers with notice of the unregistered conveyance.

In Manitoba, in 1892, the Court of Queen's Bench held in *Roff* v. *Krecker* (1) that a second chattel mortgage made in good faith, and for valuable consideration, takes priority over a prior unfiled chattel mortgage, even if the second mortgagee has actual notice of the prior mortgage. The Manitoba statute 48 Vict., ch. 35, amending a prior statute containing the words "without actual notice" which were struck out, used the expression

purchasers or mortgagees in good faith for valuable consideration.

Chief Justice Taylor relied on the English case of *Edwards* v. *Edwards* (2) decided under the English Bills of Sale Act, 17-18 Vict., ch. 36, the first section of which provided that every bill of sale should be

(1) 8 Man. R. 230. (2) [1876] 2 Ch. D. 291.

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registered within a certain time, otherwise it should be null and void to all intents and purposes against, among others, sheriff's officers and other persons seizing any property or effects comprised in such bill of sale, in execution of any process. Referring to this case, the learned Chief Justice said:—

> The court there held that the fact that an execution creditor was, at the time his debt was contracted, aware that his debtor had given a bill of sale did not prevent his availing himself of the objection that it had not been registered. *LeNeve* v. *LeNeve* (1) was there cited and relied on, but James L.J., said that he thought it would be dangerous to engraft an equitable exception upon a modern Act of Parliament. Mellish L.J., agreed with him saying "we ought not to put such constructions on modern Acts of Parliament"

Further on the learned Chief Justice said:

> It seems to me that under the authorities, the plaintiff being a purchaser in good faith for valuable consideration, his having had notice of the defendant's prior but unfiled mortgage is not material, and he is entitled to the protection of the statute.

Dubuc J. and Killam J. concurred in this view, the latter with some reluctance. He was however impressed by the fact that the words "without actual notice" had been omitted when the statute was amended in 1885. He expressed the hope that the legislature would restore the statute to its previous position as respects this question of notice. This however was not done, as the present Manitoba Bills of Sale and Chattel Mortgage Act, R.S.M., 1913, ch. 17, shews.

We have therefore in two provinces, Ontario and Manitoba, authoritative decisions laying down that notice of a prior bill of sale or chattel mortgage does not prevent the subsequent purchaser for a valuable consideration from being a purchaser in good faith.

(1) 3 Atk. 647.

The same construction has been adopted in the province of Saskatchewan. There the court of appeal held in *Ferrie* v. *Meikle* (1) that a purchaser in good faith and for a valuable consideration of chattels comprised in an unregistered lien note obtains a good title thereto, even though he has notice of the existence of the lien note. The court there followed *Moffat* v. *Coulson* (2) and *Roff* v. *Krecken* (3).

Should we now overrule these decisions which have settled the law in three provinces of the Dominion? For my part, even were I of a contrary opinion, I would feel extreme reluctance to overrule long standing decisions which have emphasized the necessity of registration of chattel mortgages and liens on personal property. To do so would be to disturb rights acquired in the belief that these long unquestioned decisions correctly stated the law.

Moreover we find in Saskatchewan the same development of the statutory law as in Manitoba. Ordinance No. 8 of the Northwest Territories in 1889, concerning receipt-notes, hire-receipts and orders for chattels, rendered the agreement, in the absence of registration, of no effect against any mortgagee or *bona fide* purchaser *without notice*. These words "without notice" were omitted by Ordinance No. 39 of 1897, section 1 of which is in the same terms as section 1 of chapter 145 R.S. Sask. (1909), and it does not seem possibleto disregard, in the construction of the statute as it now reads, the omission of these words in the new enactment.

On this question of statutory construction I have come to the conclusion to accept the interpretation placed on the words

purchasers or mortgagees in good faith for valuable consideration.

(1) 8 Sask. L.R. 161. (2) 19 U.C.Q.B. 341.
(3) 8 Man. R. 230.

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It is very important that the courts should respond to the efforts made by the legislature to require the registration of bills of sale, chattel mortgages and lien notes. And, for my part, I cannot concur in a construction which would give to notice or knowledge of a prior non-registered lien the same effect, against a purchaser who has on the faith of the registry bought goods and paid therefor, as the registration required by the statute.

It is contended that Mr. A. B. bought merely such rights as the Phœnix Company had in these goods. I think he bought the goods themselves, and the trial judge so held. It follows that the respondent is entitled to rely on the protection of the statute.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Mackenzie, Thom, Bastedo & Jackson.*

Solicitors for the respondent: *McCraney, MacKenzie & Hutchinson.*

DAME ALEXANDRA M. MELUKHOVA (PLAINTIFF)..... APPELLANT;

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*Feb. 20.
*Mar. 29.

AND

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION (GARNISHEE)..... RESPONDENT;

AND

ASBESTOS & ASBESTIC COMPANY (DEFENDANT).

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

Practice and procedure—Seizure by garnishment—Insurance policy—Suspensive condition—Payment—Arts. 675, 685, 686, 690 C.P.C.

The appellant obtained a judgment for $5,000 for damages against the defendant company as responsible for the death of her husband while in its employment. The defendant company being in liquidation, the appellant proceeded, by way of seizure in garnishment, against the respondent company which had insured the defendant company under an indemnity policy to the extent of $2,000 for each of its employees. A clause of the policy provided that no action would lie against the respondent until loss had been actually sustained and paid in money by the insured. The respondent company, as garnishee, declared that it owed nothing and the appellant contested the declaration.

Held that the contestation of the declaration as garnishee by the respondent company should have been maintained.

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

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Per Davies C.J. and Duff, Anglin, Brodeur and Mignault JJ.—The seizure in garnishment should have been declared *tenante;* as, although the respondent's obligation would not be payable until the defendant company had itself paid under the appellant's judgment, the appellant was nevertheless entitled to have the seizure remain binding until this condition should be fulfilled.

Per Idington J.—The respondent's obligation was payable at the time of the seizure under the clauses of the indemnity policy.

Judgment of the Court of King's Bench (Q.R. 32 K.B. 146) reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of Weir J. and dismissing the contestation of the declaration of the respondent made in answer to a writ of seizure in garnishment.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Dessaulles K.C. and *Morris K.C.* for the appellant.

Lafleur K.C. and *De Witt K.C.* for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Mignault, in which I concur, I would allow this appeal.

IDINGTON J.—The appellant is the widow of a man who when working for the Asbestos & Asbestic Co. Ltd. on the 3rd February, 1915, was accidentally killed under such circumstances as entitled her to recover on behalf of herself and children from his said employers (hereafter referred to as the "company") damages arising therefrom.

(1) Q.R. 32 K.B. 146.

At that time the said company held an insurance policy issued to it in the next previous 29th December by respondent assurance corporation (hereinafter referred to as the "corporation") to indemnify the said company against such risk to the extent of $2,000, out of a total of $10,000 provided for in the policy.

The corporation was, immediately after the said accident, notified by the company of the same and the death of appellant's husband resulting therefrom.

Nothing having been done by either the company or the corporation, the appellant brought on the 21st January, 1916, an action against the company to recover damages arising from the said accident.

On the 16th July, 1916, the company was put into liquidation under the "Winding Up Act" of Canada.

In November, 1916, the liquidator was granted by the court at Sherbrooke authority to pay a dividend of 10%.

On the 31st January, 1917, the liquidator also obtained from the court authority to retain a sum of $2,000 to cover the appellant's claim in the event of the said action being maintained.

By an order of the court on the 23rd January, 1917, the corporation, which had elected to defend appellant's action, was permitted to plead thereto in the name of the company and, accordingly, on the 28th April, 1917, filed a defence.

The action came for trial on the 26th of June, 1917, and resulted in judgment for the appellant of $5,000 with interest and costs against the company.

On or about the 9th of January, 1918, the respondent corporation paid the appellant's costs of the action but, notwithstanding the foregoing history and the attendant circumstances, refused to meet its obligation

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under the policy to pay the $2,000 indemnity thus established as clearly its duty, so far as I can see, falling back on the condition that the company before being entitled thereto must first hand over to appellant the two thousand dollars.

This I will presently revert to and deal with the legal aspects thereof in light of other conditions in the policy.

The appellant thereupon applied to the court for authority to issue a writ of execution by means of attaching the money in the hands of the respondent corporation as garnishee and, on the 14th September, 1917, was granted same but the said corporation made its declaration to the effect that it owed nothing to the company. Thereupon an order was made, after notice to the liquidator requiring him to contest same and his failing to do so, in the following terms:—

> Doth therefore grant the said motion to the extent following, namely, the said plaintiff is hereby authorized to take in the place and stead of the defendant and liquidator the necessary suits and proceedings to recover from the said Employers' Liability Assurance Corporation Limited the amount of the judgment rendered in favour of the plaintiff against the company defendant and liquidator bearing date the 29th June, 1917: and, further, the said plaintiff is authorized on her own behalf and for and on behalf of her minor children to contest the said declaration of the said garnishee, the whole with costs to follow the final result of such litigation.

Hence the proceedings which ensued whereunder Mr. Justice Weir found entirely in the appellant's favour notwithstanding that the respondent corporation set up the condition F. indorsed on the policy, reading as follows:—

> Condition F: No action shall lie against the corporation to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within ninety (90) days after final judgment against the assured has been so paid and satisfied. The corporation does not prejudice by this condition any defences against such action it may be entitled to make under this policy.

The sole part of the said condition upon which said corporation now relies, or can rely, is that the defendant company had not paid the judgment by reason of the manifest impossibility of its doing so after going into insolvency and liquidation, though everything else for which the condition provided was duly fulfilled and the interest of the corporation fully protected as it stipulated for.

The Court of Appeal, however, reversed Mr. Justice Weir's judgment on this ground alone.

Neither court seems to have had its attention drawn to Condition "I" which reads as follows:—

> Condition I:—If the business of the assured is placed in the hands of a receiver, assignee or trustee, whether by the voluntary act of the assured or otherwise, this policy shall immediately terminate, but such termination shall not affect the liability of the corporation as to any accidents theretofore occurring. If the assured is a corporation, a change of title, or if a firm or individual a change of title or of ownership, shall in like manner terminate this policy, unless such change is consented to by the corporation, by an indorsement thereon, signed by the manager.

I think this must be read along with condition F., and so read I fail to find how effect can be given to the words in condition I, just quoted,

> but such termination shall not affect the liability of the corporation as to any accidents theretofore occurring,

unless the ceremony of the actual payment by the company itself of that established to be due is thereby impliedly to be held as dispensed with. They expressly reserve the liability. How can that liability be pretended to be reserved, if effect is to be given to the present contention, that the mere non-payment by the defunct company of the money is, under such impossible circumstances, to be held as a barrier in the way?

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I can hardly imagine that the corporation deliberately contrived a trick by holding out a continued liability as being assured when in fact the term relied on had become simply impossible.

The non-payment might properly be relied upon as a protection against a dishonest scheme on the part of the insured, but when the personality of the insured had passed away I cannot think it either honest or the true meaning of the policy read as a whole.

I agree that all else designed in condition F. may well be needed for the protection of the corporation and must be observed, but this latter part as to the actual payment of the amount by the company I think has been eliminated or must be so if the stipulation in condition I for liability is to be given effect to.

I would allow the appeal with costs throughout against the corporation and give judgment for the $2,000 with interest thereon from the date of the judgment given the appellant.

DUFF J.—The responsibility of the respondent under the policy is conditional in the sense at all events that no action lies against them until loss has been actually sustained and paid in money. It may of course be argued that the loss insured against, that is to say, the loss in respect of which the respondents agreed to indemnify the Asbestos Company was a loss arising by reason of payment in money to the assured in satisfaction of a judgment; that payment, in other words, is not strictly a mere condition of the obligation but part of the substratum of fact out of which the obligation arises. It does not, however, seem to me to be seriously open to doubt that the obligation constitutes a conditional indebtedness within the con-

templation of Art. 675 C.P.C. and that the insurance moneys were "due under conditions * * * not yet fulfilled" when the seizure was made.

That being so it would follow that the appellant must succeed unless it should appear that the condition is one which could not be realized. I do not think this can be affirmed. A payment in part satisfaction would clearly I think give rise to a right of indemnity and that is a contingency which can not be put aside as beyond the bounds of practical possibility.

ANGLIN J.—I concur with Mr. Justice Mignault.

BRODEUR J.—J'en suis arrivé à la conclusion que la contestation de la déclaration de la tierce-saisie était bien fondée et qu'elle devrait être maintenue.

La demanderesse-appelante avait jugement contre la compagnie Asbestos-Asbestic pour dommages résultant d'un accident qui avait causé la mort de son mari lorsque ce dernier était à l'emploi de cette compagnie.

La compagnie Asbestos-Asbestic avait, lorsque cet accident est arrivé, un contrat d'assurance ou d'indemnité avec la compagnie intimée "The Employers Liability Assurance Corporation" par lequel cette dernière s'engageait de l'indemniser

against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered while this policy is in force by any employee or employees of the assured.

Ce contrat d'assurance contenait plusieurs conditions: par exemple, l'indemnité ne devait être que de deux mille dollars si l'ouvrier se faisait tuer (clause A); si un accident survenait, l'assuré devait immédiate-

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ment en avertir l'assureur (clause C); et il n'était pas permis à l'assuré d'assumer aucune responsabilité vis-à-vis la victime de l'accident ou de régler la réclamation de cette victime sans l'assentiment formel de l'assureur (clause E); si une poursuite était instituée contre l'assuré pour cet accident, il devait remettre l'action à l'assureur pour que ce dernier puisse lui-même conduire la défense (clause D); l'assuré ne pouvait pas poursuivre l'assureur pour les dommages qu'il avait subis, à moins qu'il n'ait au préalable payé la victime (clause F); dans le cas de faillite de l'assuré, la police

shall immediately terminate, but such termination shall not affect the liability of the corporation as to any accidents theretofore occurring

(clause J).

Voilà le résumé de quelques-unes des conditions qui tendent toutes à restreindre les obligations de la compagnie d'assurance et à diminuer les droits de l'assuré.

Il est fort possible que les contrats d'assurance en général peuvent prêter à des fraudes; mais dans une assurance comme celle-ci, on peut présumer difficilement qu'un ouvrier se ferait mutiler de propos délibéré pour donner à son patron l'avantage de faire une réclamation frauduleuse contre son assureur, et surtout quand il s'agit d'un cas où la victime a perdu la vie.

La compagnie Asbestos-Asbestic ayant été poursuivie par la demanderesse-appelante, elle a confié l'action à la compagnie d'assurance qui a, au nom de l'Asbestos-Asbestic, fait les défenses qu'elle a jugé à propos de faire contre cette réclamation; mais ces défenses ont été rejetées et jugement a été rendu en faveur de la demanderesse contre la compagnie Asbestos-Asbestic pour $5,000.

Un bref de saisie-arrêt après jugement a été émis entre les mains de la compagnie d'assurance en exécution de ce jugement et cette dernière est venue déclarer sous le serment de l'un de ses principaux employés qu'elle ne devait rien et qu' *elle ne devrait rien plus tard à la défenderesse.*

Cette déclaration était faite sous les dispositions de l'article 685 C.P.C. qui se lit comme suit:

685. Le tiers-saisi doit déclarer les choses dont il était débiteur à l'époque où la saisie lui a été signifiée, celles dont il est devenu débiteur depuis, la cause de la dette et les autres saisies faites entre ses mains.

Si la dette n'est pas échue, il doit déclarer l'époque où elle le sera.

Si le paiement de la dette est conditionnel ou suspendu par quelque empêchement, il doit également le déclarer.

Il doit donner un état détaillé des effets mobiliers qu'il a en sa possession appartenant au débiteur, et déclarer à quel titre il les détient.

Cette déclaration était absolument fausse et mensongère, car la compagnie d'assurance était débitrice de la compagnie Asbestos-Asbestic en vertu du contrat d'assurance qu'elle avait avec elle jusqu'à concurrence d'une somme de $2,000. Cette dette n'était peut-être pas exigible parce que la défenderesse n'avait pas sous la clause F du contrat payé elle-même le jugement qui avait été rendu. Mais à tout évènement la compagnie d'assurance, qui était bien au courant de toute la cause puisque c'est elle-même qui avait défendu l'action principale, aurait dû déclarer qu'il y avait une dette conditionnelle. Espérait-elle qu'avec cette déclaration mensongère elle empêcherait cette pauvre étrangère qu'était la demanderesse de se mettre un nouveau procès sur les bras? Heureusement que les autorités consulaires du pays d'origine de la demanderesse sont venues à son secours, qu'il s'est trouvé des avocats assez dévoués pour se charger de cette nouvelle cause, et elle a contesté la déclaration de la tierce-saisie.

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Si la tierce-saisie avait fait une déclaration véridique des faits, jugement aurait pu de suite être rendu déclarant la saisie-arrêt tenante jusqu'à l'avènement de la condition de sa police d'assurance qui exigeait paiement préalable par l'assuré (art. 690 C.P.C.). L'avocat de la demanderesse, suivant qu'il en avait le droit, a transquestionné l'officier de la compagnie qui a fait la déclaration (art. 686 C.P.C.). Et la demanderesse a obtenu par ce moyen des informations suffisantes pour établir qu'il y avait une obligation conditionnelle de la tierce-saisie en faveur du saisi.

Il me semble qu'après cela la tierce-saisie aurait dû de suite demander à amender sa déclaration de façon à la mettre conforme aux faits et aux prétentions qu'elle a émises plus tard sur la contestation de sa déclaration. Mais non. Elle n'a pas jugé à propos de ce faire; et alors la demanderesse a été obligée de contester la déclaration, ainsi qu'il a été jugé par la Cour de Revision.

Que les réponses d'un tiers-saisi aux questions qui lui sont posées par le saisissant et qui sont écrites à la suite de sa déclaration, ne forment pas partie de sa déclaration, et qu'un jugement ne peut être rendu sur ces réponses *de plano:* le saisissant doit contester la déclaration. (*Laframboise* v. *Rolland*) (1).

Par sa contestation la demanderesse a conclu à ce que la déclaration de la tierce-saisie soit déclarée fausse et mensongère et à ce que cette dernière soit condamnée à lui payer la somme de $2,000 qu'elle devait à la compagnie Asbestos-Asbestic par son contrat d'assurance; et elle s'est fait autoriser en même temps par le juge à exercer non-seulement ses droits comme la demanderesse mais aussi les droits de la compagnie Asbestos-Asbestic.

(1) [1885] M.L.R. 2 S.C. 75.

Je dois dire que pendant le procès sur l'action originaire la compagnie défenderesse a été mise en liquidation. Nous ne savons pas exactement la raison pour laquelle elle a été mise en liquidation; mais il est à supposer que l'était dû à son insolvabilité. Aucune preuve directe cependant n'a été faite de ce fait.

La cour supérieure a maintenu la contestation de la déclaration de la tierce-saisie. En appel ce jugement a été renversé. On y a déclaré que la tierce-saisie devait une dette conditionnelle. Tout de même, le dispositif du jugement est à l'effet que la contestation de la déclaration de la tierce-saisie est rejetée et que la saisie-arrêt est renvoyée avec frais, mais sans frais en cour supérieure.

Ce jugement ne me parait pas logique. En effet, du moment que la cour reconnaissait qu'il y avait une dette conditionnelle de due elle aurait dû maintenir la contestation de la déclaration et déclarer que la saisie-arrêt aurait été tenante. En effet, l'article 690 du code de procédure civile énonce formellement que si les deniers dus par le tiers-saisi ne sont dus que sous des conditions qui ne sont pas encore accomplies le tribunal peut ordonner que la saisie-arrêt soit déclarée tenante jusqu'à l'avènement de la condition.

Il y avait en cour d'appel, ainsi qu'en cour supérieure, sur cette contestation de la déclaration, deux points en litige, savoir si la dette était exigible dès maintenant ou si elle ne serait due que lorsque la défenderesse aurait elle-même payé le jugement qui avait été rendu contre elle en faveur de la demanderesse.

La cour supérieure a été d'avis que la dette était due et exigible.

La cour d'appel, au contraire, a été d'opinion que la dette ne devenait exigible que lorsque la défenderesse l'aurait payée à la demanderesse.

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En acceptant cette opinion de la cour d'appel je dis tout de même que le dispositif de son jugement est erroné en ce qu'au lieu de renvoyer la saisie-arrêt elle aurait dû la déclarer tenante et maintenir la contestation de la déclaration de la tierce-saisie.

J'en suis venu à la conclusion que la demanderesse avait eu raison de contester la déclaration de la tierce-saisie et que sa contestation devait être maintenue et que la saisie-arrêt devrait être déclarée tenante jusqu'à ce que la condition stipulée au paragraphe F de la police d'assurance ait été déclarée remplie par la cour supérieure.

L'appel doit être maintenu avec dépens de cette cour et des cours inférieures contre l'intimée, moins les frais de la cour du Banc du Roi où chaque partie paiera ses frais.

MIGNAULT J.—The appellant obtained, on June 29th, 1917, a judgment for $5,000.00 for damages against the Asbestos and Asbestic Company, Limited, as civilly responsible for the death of her husband while in its employment. During the proceedings, and before the filing of a plea, the company was placed in liquidation and William J. Henderson was appointed its liquidator. The respondent, thereunto obliged by an indemnity policy issued by it in favour of the company, contested the appellant's action in the name of the company, and several months after the judgment paid the appellant's costs of action. The present proceedings are to force the respondent to pay to the appellant the amount for which the respondent by its policy promised to indemnify the Asbestos and Asbestic Company, which, in the case of any one employee of the latter, was restricted to $2,000.00.

The appellant proceeded against the respondent by way of seizure in garnishment and the latter declared that it had not and was not aware that it would have hereafter in its hands, possession or custody, or in any manner whatsoever, any money, movable effects or other things due or belonging to the Asbestos and Asbestic Company, the defendant.

The declaration was contested by the appellant and her contestation was maintained by the Superior Court, Weir J. The Court of King's Bench, Guerin J. dissenting, reversed the judgment of the Superior Court, and dismissed the contestation without costs in the Superior Court, stating however that the respondent had not disclosed in its declaration that it was subject to a conditional obligation towards the Asbestos and Asbestic Company under its policy.

The reason for which the appellant's contestation of the respondent's declaration was dismissed may be briefly explained.

By the conditions of the policy, the insured company, on the taking against it of an action for an accident to one of its employees, was obliged forthwith to hand over the papers served on it to the respondent, and was prohibited from making any settlement or payment to the injured employee or his representatives, and the respondent undertook to defend the action at its own cost. Condition "F" of the policy on which the respondent now relies reads as follows:—

Condition F: No action shall lie against the Corporation to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within 90 (ninety) days after final judgment against the assured has been so paid and satisfied. The Corporation does not prejudice by this condition any defences against such action it may be entitled to make under this policy.

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The respondent successfully contended in the court below that no liability exists on its part until the insured company has actually paid in money the amount which it has been condemned to pay by a judgment, and, the insured not having paid the appellant's judgment, the respondent now argues that it truly declared that it owed and would owe nothing to the company. In my opinion the respondent's liability existed but was a contingent or conditional liability, and under Art. 685 C.P.C. the respondent should have declared that it was conditionally indebted. Had it done so, under Art. 690 C.P.C. the court, on motion of the plaintiff, could have declared the seizure binding pending the fulfilment of the condition. It follows that the respondent's declaration was not the one it should have made. This forced the appellant to contest it. In my opinion, however, the appellant cannot say that the respondent's obligation is payable or demand that the respondent be condemned to pay. So long as the Asbestos Company has not itself paid under the appellant's judgment, no demand of payment can be made against the respondent. But that does not mean that the appellant's seizure in garnishment should be dismissed as the Court of King's Bench dismissed it. Under Art. 690 C.P.C. the appellant, on the contrary, is entitled to have the seizure remain binding until the condition is fulfilled, if it ever be fulfilled.

There seems to be some possibility that it may be fulfilled. In the record there is a judgment of Mr. Justice Hutchinson of the 7th February, 1917, authorizing the liquidator, on his petition, to retain the sum of $2,000.00 to provide for the payment of the claim and costs of this appellant. Should the liquidator pay this money in part satisfaction of the appellant's

judgment, the respondent will thereupon become liable to the Asbestos and Asbestic Company under condition "F" of its policy. This right of the Asbestos Company against the respondent is now being exercised by the appellant by virtue of her seizure in garnishment, so that, if the payment be made by the liquidator, she will be entitled to demand that the respondent make a new declaration under the seizure.

The parties were unable to inform us whether the liquidator still retains the sum of $2,000.00. Under the circumstances, and in view of the fact that the respondent did not make the declaration it should have made, I would give the appellant judgment declaring the seizure binding on the respondent until the condition rendering its obligation payable has been fulfilled. The appeal should therefore be allowed and the record remitted to the Superior Court for such further proceedings as may be necessary. Costs to the appellant in this court and in the Superior Court, and no costs to either party in the Court of King's Bench.

Appeal allowed with costs.

Solicitors for the appellant: *Lawrence, Morris & McGore.*

Solicitors for the respondent: *DeWitt, Tyndale & Howard.*

1922

*Feb. 24.
*Mar. 29.

A. P. BELAIR (DEFENDANT).....APPELLANT;

AND

LA VILLE DE STE.-ROSE (PLAINTIFF).....RESPONDENT.

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

Municipal corporation—Taxation powers—Bridge—"Immovable"—"Cities and Towns Act," R.S.Q. (1909 *art.* 5730—*R.S.Q.* (1909) *arts.* 5280, 5281, 5282—*"Charter of the Town of Ste. Rose,"* 8 *Geo. V., c.* 98, *ss.* 10, 11—*S. (L.C.)* 1830, 10 *&* 11 *Geo. IV., c.* 56—*Arts.* 375, 376, 377, 381 *C.C.*—Art. 16 M.C.

By a statute of Lower Canada of 1830 (10 & 11 Geo. IV., c. 56), one James Porteous, the assignor of the appellant, was authorized by the Crown to erect a toll bridge crossing a river between the Town of Ste.-Rose and the Village of Ste. Thérèse, the Crown reserving the right to become owner after fifty years by paying its value. The respondent brought an action to recover taxes imposed on part of the bridge.

Held, that the part of the bridge extending to the middle of the river was subject to taxation, as it was within the municipality and the property of the appellant and not of the Crown, such bridge being an "immovable" within the meaning of article 5730 R.S.Q. (1909).

Judgment of the Court of King's Bench (Q.R. 30 K.B. 181) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of Guerin J. at the trial and maintaining the respondent's action.

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

(1) Q.R. 30 K.B. 181.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

J. O. Lacroix K.C. and *J. P. Bélair* for the appellant.

Paul St. Germain K.C. for the respondent.

IDINGTON J.—When due regard is had to the statutory definitions given the words used relative to what properties are taxable within the powers of the respondent and to the terms of the statute under and by which the appellant owns the bridge in question, I can see no ground for the appellant's pretensions herein.

Nor do I see any ground for the final forlorn hope, as it were, set up here for the first time, that he does not know how much of the bridge property he is assessed for.

Plainly he is assessed for so much thereof as lies within the bounds of the municipality which on that side next the river extends to the middle of the stream according to the law laid down in the case of *Maclaren* v. *The Attorney General of Quebec* (1).

The township boundaries in question there seemed to have been definitely fixed by iron stakes placed on the respective banks of the stream, but the majority of this court held that to include the land to the middle of the stream and the court above maintained that holding, notwithstanding many surrounding circumstances tending to rebut that presumption of law.

And the assessment, according to the actual cadastral number, is specifically declared by statute as sufficiently definite.

I think the appeal should be dismissed with costs.

(1) [1914] A.C. 258.

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DUFF J.—I concur in the dismissal of this appeal with costs.

ANGLIN J.—The plaintiff appeals from the judgment of the Court of King's Bench reversing that of the Superior Court which had dismissed with costs the action of the respondent municipality to recover the sum of $300 for annual taxes imposed on a part of a bridge crossing the river Mille Isles, or Jesus, between Ste. Rose and Ste. Thérèse. This property is assessed as No. 425 in the cadastral survey of the municipality of Ste. Rose.

The appellant contests the validity of the assessment on four distinct grounds:—(1) The bridge is not his property; (2) the bridge is not an immovable; (3) the bridge is not within the limits of the municipality of Ste. Rose; (4) the assessment *ex facie* covers the whole bridge, of which a part is admittedly within the municipality of Ste. Thérèse.

(1) By statute of Lower Canada of 1830 (10 & 11 Geo. IV., c. 56) James Porteous was authorized to erect the bridge in question as a toll bridge. By s. 3 of that Act the bridge and its dependencies and approaches, including the toll house and turnpike to be erected thereon,

> are vested in Jas. Porteous, his heirs and assigns forever.

The appellant is admittedly the assign of Jas. Porteous and holds and enjoys all the rights in regard to the bridge formerly belonging to Porteous. In view of the terms of the statute I cannot regard it as open to question that the bridge is the property of the appellant, subject to such qualifications and restrictions upon his exercise of the rights of ownership as the statute imposes.

The fact that he has merely a right of servitude over the bed of the river presents no obstacle to his owning the structure of the bridge and its appurtenances.

(2) Whether the bridge and its appurtenances constitute an immovable is the only question which I regard as seriously debatable. The taxing power is conferred by Art. 5730 (R.S.Q. 1909) of the "Cities and Towns Act:"—

5730. The Council may impose and levy annually on every immovable in the municipality, a tax not exceeding two per cent of the real value as shewn on the valuation roll. (3 Ed. VII, c. 38, s. 474).

There is no definition of the word "immovable" in the "Cities and Towns Act." We therefore turn to the general law—the provisions of the Civil Code dealing with "The Distinction of Things"—to ascertain the scope of the term "immovable." The following articles bear on this question:—

375. Property is immovable either by its nature or its destination or by reason of the object to which it is attached, or lastly by determination of law.

376. Lands and buildings (*bâtiments*) are immovable by their nature.

377. Windmills and water-mills, built on piles and forming part of the building, are also immovable by their nature when they are constructed for a permanency.

381. Rights of emphyteusis, of usufruct of immovable things, of use and habitation, servitudes and rights or actions which tend to obtain possession of an immovable, are immovable by reason of the objects to which they are attached.

"Buildings" ("*bâtiments*") is not defined.

Although Littré defines "*bâtiment*" as

toute construction servant à loger soit hommes, soit bêtes, soit choses

and adds

étymologiquement, le bâtiment est ce qui porte, reçoit; * * * un pont est une construction et non un bâtiment,

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the word "*bâtiments*" in Art. 376 C.C. appears to be used in the wider sense of "*constructions.*" Thus in Baudry-Lacantinerie, Des Biens, No. 26, we read of the word, "*bâtiments*" in the corresponding article of the Code Napoléon, No. 518:

> 26. Il importe d'être bien fixé sur le principe même de l'immobilisation qui a sa cause nécessaire mais suffisante dans l'adhérence physique des objets au sol, dans leur *incorporation*. Ce principe, en effet, permet seul de résoudre convenablement les difficultés que soulève l'application de la loi. Celle-ci n'a pas défini le bâtiment; mais, étant donné le principe même qui régit l'art. 518, cette dénomination comprend certainement toutes les constructions adhérant au sol par fondement ou par pilotis, toutes celles qui, incorporées au sol peuvent être considérées comme partie intégrante du fonds, peu importe qu'elles soient intérieures ou extérieures. Ainsi, non seulement les maisons d'habitation, granges, magasins, sont immeubles par nature, mais aussi les bâtiments, puits, galeries et autres travaux nécessités par l'exploitation d'une mine.

Laurent says (vol. V., no. 409):

> Le mot bâtiment, dont se sert la loi, ne doit pas être pris dans un sens restrictif. Tout ce qui est attaché au sol, de manière à faire corps avec lui, est immeuble par nature.

In Murray's Oxford Dictionary "building" is defined:

> that which is built; a structure, edifice; a structure in the nature of a house built where it is to stand.

In *The Queen* v. *Proprietors of the Neath Canal Navigation* (1), Blackburn J. said that the word "buildings" in a taxing act (3 & 4 Wm. IV., c. 90, s. 33) would cover such a structure as the Holborn viaduct, which carries the main artery of London over Farrington St., but would not apply to a street paved and faced with stone work, which remains "land."

The words "*bâtiments*"—"buildings" in Art. 376 C.C. may therefore be taken to mean "structures" and it follows that a bridge over a river resting on piers is an immovable by nature because it is a

(1) [1871] 40 L.J.M.C. 193.

structure permanently affixed to the soil or bed of the river. This would certainly be the case if the appellant were the owner of such soil or bed. The fact that he is not such owner but is merely entitled to a servitude or right to maintain the bridge upon it does not prevent the character of immovability attaching to the bridge. Demolombe vol. 9, no. 128.

Il importe peu, (says Huc vol. IV no. 9) que les constructions ainsi incorporées aient été élevées par le propriétaire lui même ou par un tiers.

In Aubry & Rau, vol. II, no. 164 we read:

Les bâtiments, ou autres ouvrages unis au sol, sont immeubles par leur nature, qu'ils aient été construits par le propriétaire du fonds ou par un tiers, par exemple, par un fermier, par un locataire, ou par un usufructier, et ce, dans le cas même ou le tiers constructeur se serait réservé la faculté de les démolir de la cessation de sa jouissance.

The fact that the bridge is built on the bed of a river belonging to the Crown presents no difficulty. The statute declares the appellant's ownership of it; and its attachment to the soil gives to it its character of an immovable. Demolombe, vol. 9, nos. 126-7; Dalloz, Code Ann. Art. 518, nos. 23-25.

As something analogous to a windmill or a water-mill built on piles, specifically mentioned in Art. 377 C.C., which should probably be taken to express a rule of general application of which the windmill and the water-mill are illustrations (Fuzier-Herman, Code Civil Ann. vol. I, Art. 519, no. 6), the bridge may possibly also be regarded as within the purview of that article and the corresponding article of the Code Napoléon, no. 519. But if the word "building" should be given the narrower meaning of a "structure in the nature of a house" the presence in Art. 377 of the words "and forming part of the building" (*"et faisant partie du bâtiment"*) would probably exclude

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the bridge from its purview unless the conjunction "and" (*et*) should be replaced by the disjunctive "or" (*ou*), the view taken of the construction of Art. 519 C.N. (Huc. vol. IV, no. 13). On the other hand if "building" should mean any "structure", as I think it does, it would seem to be unnecessary to resort to Art. 377 C.C. since Art. 376 would cover the case.

Moreover the right of resting and maintaining the bridge on the bed of the river, which the statute of 1830 undoubtedly confers, I think vests in the appellant an interest in or right to the use of the bed or *fond* of the river in the nature of a servitude, which is declared by Art. 381 C.C. to be an "immovable." The bridge itself in my opinion and the right to maintain it on the river bed would therefore appear to be taxable under Art. 5730 (R.S.Q. 1909) of the "Cities and Towns Act."

(3) The combined operation of Art. 5280 R.S.Q. 1909, Arts. 10 & 11 of the charter of the town of Ste. Rose (8 Geo. V., c. 98) and Art. 16 of the Municipal Code of 1916 puts it beyond all doubt that the territory of the town of Ste. Rose extends to the middle of the River Jesus and includes the portion of the bridge shewn on the cadastral plan as no. 425. The case falls within Art. 5281 of the R.S.Q. 1909, which confers "jurisdiction for municipal and police purposes" over the whole territory of the municipality, and not within Art. 5282 which confers merely "police powers" over navigable or other waters lying in front of the municipality and applies when the municipal boundary does not extend to the middle of the river, as it does in this case.

(4) Finally, notwithstanding some apparent inaccuracy in the description of the cadastral lot no. 425 as given in the official registry of the county, and in

the "*Livre de Renvoi Officiel*" in the department of Crown Lands, the assessment is of the cadastral no. 425 and a reference to the cadastral plan produced in the record indicates that that number covers only the portion of the bridge lying within the municipality of Ste. Rose. Moreover this defence was not pleaded and there appears to have been no inquiry at the trial as to the alleged inaccuracy of the cadastral description in the county registry office and the department of Crown Lands. Had there been such an investigation it might have been demonstrated, as is probably the case, that the area of 89 perches and 40 feet mentioned in the description comprises only the superficies of that part of the bridge which lies within the municipality of Ste. Rose. This ground of appeal, I think, should not be entertained.

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

BRODEUR J.—La question en cette cause est de savoir si la ville de Ste-Rose a le droit de taxer un pont appartenant à l'appelant Bélair.

Ce pont est situé sur la rivière Jésus et relie la paroisse de Ste-Thérèse à la ville de Ste-Rose. Ce pont aurait été érigé par James Porteous en vertu d'une loi adoptée par la législature du Bas-Canada en 1830. Le propriétaire actuel, Bélair, qui est aux droits de Porteous, prétend que la ville de Ste-Rose n'a pas le droit de taxer ce pont: 1° parce qu'il n'est pas dans les limites territoriales de cette ville; 2° parce qu'il fait partie du domaine public; et en 3ème lieu, l'appelant allègue que si le pont est imposable la taxe est imposée illégalement parce qu'elle frappe tout le pont tandis qu'il n'y en a qu'une partie dans Ste-Rose.

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I

Le pont est-il pour partie dans le territoire de Ste-Rose?

Il s'agit de savoir, pour résoudre cette question, si la municipalité de la ville de Ste-Rose s'étend jusqu'au milieu de l'eau de la rivière Jésus.

Cette ville a été incorporée en 1918 par la législature de Québec, et la section 10 de sa charte déclare expressément que son territoire sera le même que celui du village de Ste-Rose. Or le village de Ste-Rose était régi par le code municipal qui, à l'article 16, dit que les limites d'une municipalité qui longe une rivière navigable ou flottable s'étendent jusqu'au milieu de l'eau de telle rivière.

Par conséquent, le territoire de la ville de Ste-Rose est par sa charte déclaré couvrir le même territoire que celui qui existait pour le village de Ste-Rose.

Mais l'appelant Bélair prétend que par l'article 5282 S.R.P.Q., dans la "Loi des cités et villes," la juridiction d'une ville qui borde une eau navigable ne s'étend jusqu'au milieu de telle eau que pour les *fins de police seulement* et que la ville de Ste-Rose n'a pas, à raison de cet article 5282, le pouvoir de frapper d'impôts les îles ou les propriétes privées qui seraient dans cette rivière Jésus.

Cette prétention aurait une certaine force si nous n'avions pas l'article 5281 de la même "Loi des cités et villes" qui déclare que la corporation a juridiction pour les fins municipales et de police et pour l'exercice de tous les pouvoirs qui lui sont conférés sur toute l'étendue de son territoire. Ce dernier article donne une juridiction aussi large que possible à une municipalité de ville et comporte naturellement le pouvoir de frapper d'impôts les immeubles qui se trouvent dans

son territoire. Or la ville de Ste-Rose par sa charte se trouve à couvrir la moitié de la rivière; et, par conséquent, elle peut y exercer tous les pouvoirs qui lui sont conférés.

Même si cet article 5282 était seul dans la "Loi des cités et villes" et si l'on n'y retrouvait pas les dispositions de l'article 5281, il se présenterait une intéressante question de savoir si la loi devrait être interprêtée aussi restrictivement que le suggère l'appelant.

Les mots "fins de police" (*police purposes*) qu'on relève dans cet article 5282 ont, dans l'acceptation ordinaire, un sens assez restreint. On les rattache à l'ordre et à la tranquillitê que les officiers de la paix doivent maintenir; mais dans bien des cas ils ont trait à l'organisation politique d'une municipalité en général et couvrent les ordonnances pour tout ce qui concerne la sûreté, la commodité et le bien-être de la municipalité ou de ses habitants. Cette expression nous vient du droit municipal américain où elle est définie

such as arise ordinarily in the administration of the affairs of cities and towns in the exercise of their powers to promote the public health, convenience and welfare. (1) Cyclopedia of Law, vol. 31, p. 903, words and phrases judicially defined, *verbo "Police purposes."*

Pour promouvoir le bien-être de la municipalité, il faut de toute nécessité prélever des fonds sur les propriétés qui y sont situées ou sur les personnes qui bénéficient de ses ordonnances. Aussi Tiedman, On Municipal Corporations, par. 254, dit formellement:

The power of taxation is but one phase of the police power of the government.

(1) *Sessions* v. *Crunkilton* [1870] 20 Ohio, 349, at p. 358.

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Il n'y a donc qu'une réponse possible à la question que je posais au commencement de ce paragraphe: c'est que le pont en question se trouve pour partie dans le territoire de la ville de Ste-Rose.

II

Ce pont fait-il partie du domaine de la Couronne?

Il nous faut pour disposer de cette question examiner la loi de 1830 qui en a autorisé la construction.

Il est érigé sur le lit de la rivière, qui est la propriété du souverain. Mais est-il tellement incorporé au sol qu'il devienne par droit d'accession propriété du sol lui-même? S'il en était ainsi, le lit de la rivière et le pont se confondraient et alors la corporation municipale, qui ne peut pas taxer les biens du souverain, se trouverait dans l'impossibilité de frapper ce pont d'impôts.

La loi de 1830 a simplement autorisé l'auteur de l'appelant à jeter des piliers sur la rivière et d'y faire un pont. Cette loi modifie la jouissance que le public avait du lit de la rivière où les piliers ont été érigés et la jouissance de la rivière elle-même pour les fins de navigation.

Mais la législature a conservé à la Couronne la propriété du sol où les piliers du pont sont érigés. Le jour où le pont cessera d'exister, la Couronne rentrera en pleine possession et jouissance du sol recouvert par les piliers. La législature a donné la jouissance d'une certaine partie du lit de la rivière, mais la propriété de cette même partie du lit de la rivière reste à la Couronne. Le droit de jouissance devient alors séparé de la nue propriété (art. 443 C.C.). Ce statut a donné à Porteous et à ses représentants le droit d'y construire un pont que la loi, à l'article

3, déclare être leur propriété. Le pont est un immeuble par sa nature parce que c'est un bâtiment et qu'il est édifié à perpétuelle demeure sur un terrain dont Porteous et ses représentants ont la jouissance. (Art. 376 et 377 C.C.).

En vertu de "l'Acte des cités et villes," la ville de Ste-Rose a le pouvoir de taxer les immeubles appartenant à des particuliers. Il est constant que ce pont, qui est situé dans les limites de la municipalité, est un immeuble et qu'en conséquence il peut être soumis à l'impôt foncier même contre celui qui n'aurait que la jouissance du sol sur lequel les piliers sont érigés.

Demolombe, au vol. 9, no. 128, discutant les droits de celui qui est autorisé à construire dans des conditions semblables au cas qui nous occupe, dit:

> En principe d'ailleurs il est très possible que celui qui n'est pas propriétaire du sol lui-même soit néanmoins propriétaire d'un immeuble édifié superposé sur ce sol: tel est le droit de superficie.
>
> Or tel paraît être le caractère du droit qui résulte de la concession par suite de laquelle un particulier a été autorisé à établir une usine sur une rivière navigable ou flottable, espèce de droit de superficie pendant la durée de cette concession. C'est ainsi que la Cour de Caen a jugé que les pêcheries, salines, etc., qui seraient établies en vertu d'une concession du gouvernement, sur les rivages de la mer, forment à l'égard des concessionnaires, dans les relations du droit privé, un bien immobilier, quoique les rivages de la mer fassent eux-mêmes partie du domaine public.

On nous réfère aux décisions de cette cour et du Conseil Privé dans les causes de *Central Vermont Railway Co.* v. *Town of St. Johns* (1), et *The Township of Cornwall* v. *The Ottawa and New York Railway Co.* (2).

Ces décisions portent sur les statuts qui empêchaient la taxation des ponts de chemins de fer comme tels, et par conséquent sont bien différents du cas qui nous est

(1) [1886] 14 Can. S.C.R. 288; 14 App. Cas. 590.

(2) [1915] 52 Can. S.C.R. 466. [1917] A.C. 399.

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soumis. Nous trouvons dans ces décisions des opinions qui déterminent d'une manière certaine que ces ponts sont des immeubles et que sans les lois spéciales qui les régissaient ils pourraient être frappés d'impôts dans les cas ordinaires.

Ce pont Porteous n'est pas dans le domaine de la Couronne. C'est une propriété qui, comme tous les immeubles appartenant à des particuliers, est susceptible d'être taxée.

III

L'impôt est-il illégal et frappe-t-il tout le pont?

Le pont est situé dans deux municipalités mais ne porte qu'un numéro au cadastre. La corporation de Ste-Rose ne pouvait imposer que la partie de l'immeuble qui se trouvait sur son territoire. Le rôle d'évaluation tel que fait peut porter à ambiguité, mais la preuve non contredite constate que l'on n'a évalué que la partie du pont qui se trouve dans la municipalité. L'impôt est donc légal et ne frappe pas tout le pont mais simplement la partie qui se trouve sur le territoire de la municipalité intimée.

Pour toutes ces raisons je suis d'opinion que la Cour du Banc du Roi, qui a maintenu la validité de la taxe réclamée par l'action de l'intimée, a bien jugé et que l'appel doit être renvoyé avec dépens.

MIGNAULT J.—La Cour du Banc du Roi, infirmant le jugement de la Cour Supérieure, a condamné l'appelant à payer à l'intimée $300.00 pour taxes municipales imposées sur le pont connu sous le nom de Pont Bélair, sur la rivière Jésus, en face de Sainte-Rose, et l'appelant se plaint de cette condamnation. J'examinerai très brièvement ses griefs d'appel.

Il dit d'abord qu'il n'est pas propriétaire du pont. Sa prétention, c'est qu'il n'a que le droit de prélever des péages, mais que le pont lui-même, comme la rivière qu'il traverse et le chemin public dont il fait partie, est une dépendance du domaine public et partant n'est pas imposable pour des taxes municipales.

La prétention de l'appelant serait peut-être discutable, n'était-ce le texte précis de l'Acte de la Législature 10-11 Geo. IV., ch. 56, qui donna à James Porteous, l'auteur de l'appelant, l'autorisation de construire ce pont. L'article 3 de cette loi déclare formellement

> que le dit James Porteous, ses hoirs et ayant cause, sont revêtus pour toujours de la propriété du dit pont et de la dite maison de péage, barrière et autres dépendances qui y seront érigées sur ou près d'iceux, et aussi de toutes les montées ou abords du dit pont, et de tous les matériaux qui seront, de temps en temps, obtenus et pourvus pour l'ériger, construire, faire, entretenir et réparer.

Et le même article ajoute qu'après cinquante ans Sa Majesté, ses héritiers et successeurs, pourront reprendre la possession et propriété du dit pont, etc., en en payant la valeur. Ceci démontre évidemment que la législature, l'autorité souveraine, a accordé à Porteous et à ses ayants cause la propriété même du pont, et puisque la couronne peut reprendre cette propriété, en en payant la valeur, c'est qu'elle s'en est départie. Il est donc inutile d'invoquer les textes concernant l'aliénabilité du domaine public, car la législature peut évidemment autoriser cette aliénation, et bien que la propriété de l'appelant soit une propriété restreinte puisqu'il est obligé de permettre au public, moyennant paiement de péages, de passer sur ce pont, ce n'en est pas moins une véritable propriété.

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La deuxième prétention de l'appelant est que le pont n'est pas un immeuble. Je me demande quelle serait la nature de ce pont s'il n'est pas immeuble, car ce n'est certainement pas un meuble, et il faut qu'il soit ou meuble ou immeuble. Le mot "bâtiments" dans l'article 376 C.C., a une grande extension et comprendrait même un pont tel que celui du demandeur. Mon honorable collègue, M. le juge Anglin, a discuté cette question à fond et en a fait une démonstration convaincante, dont j'avoue que je me serais dispensé tant le caractère immobilier de ce pont me paraît évident. Dans mon opinion, ce n'est pas à titre de servitude, car ce n'est pas une servitude, c'est par sa nature même que ce pont est immeuble.

Si l'appelant n'avait que le droit de percevoir des péages, ce droit me paraîtrait mobilier: Dalloz, 1865.1. 308. Mais le statut qu'il invoque lui confère la propriété même du pont, et alors poser la question de savoir si ce droit de propriété porte sur un immeuble ou sur un meuble, c'est la résoudre.

Si le pont est immeuble, nul doute qu'il est imposable. L'article 5730 S.R.Q., qui fait partie de la "Loi des cités et villes," laquelle s'applique à la ville de Sainte-Rose (sauf les changements faits par la charte de cette dernière), dit formellement que le conseil peut imposer et prélever annuellement, sur tout immeuble dans la municipalité, une taxe n'excédant pas deux pour cent de la valeur réelle, telle que portée au rôle d'évaluation. Le pont Bélair est donc imposable.

La troisième objection de l'appelant m'a paru à l'audition la plus sérieuse. Le pont Bélair est désigné au rôle d'évaluation comme étant le numéro 425 du cadastre. Dans la paroisse (maintenant la ville) de Sainte-Rose, le cadastre donne un numéro spécial à

chacun des ponts qui traversent la rivière Jésus (je n'exprime pas d'opinion sur la question de savoir si un pont pouvait recevoir un numéro au cadastre, l'article 2167 du code civil ne parlant que des lots de terre, car il ne s'agit ici que de déterminer ce que le cadastre indique par le no. 425), et il décrit le pont dont il s'agit comme suit:

Extrait du livre de renvoi officiel de la paroisse Sainte-Rose, comté de Laval.

Ponts.

No. du lot: 425.

Propriétaire: Joseph Placide Bélair.

Description.—Traversant la Rivière Jésus du sud-est au nord-ouest en décrivant une courbe, situé partie dans la paroisse de Sainte-Thérèse et partie dans la paroisse de Sainte-Rose; borné à une extrémité vers le sud-est par la paroisse de Sainte-Rose, à l'autre extrémité vers le nord-ouest par la paroisse de Sainte-Thérèse, d'un côté au nord-est et de l'autre au sud-ouest par la rivière Jésus et par une île qu'il traverse; contenant une perche de largeur sur huit arpents, neuf perches et quatre pieds de longueur; formant quatre-vingt-neuf perches et quarante pieds en superficie. (89-40).

Le plan officiel du cadastre montre sous le no. 425 le pont qui s'étend depuis la terre ferme jusqu'à une île dans la rivière, laquelle île paraît se trouver dans la paroisse de Sainte-Thérèse, savoir la paroisse qui fait face à Sainte-Rose de l'autre côté de la rivière Jésus. Comme il s'agit du cadastre de Sainte-Rose, la présomption serait que le pont qui reçoit ce numéro 425 est la partie du pont qui se trouve dans les limites de cette paroisse. M. Longpré, maire de la ville et régistrateur de comté de Laval, dit dans son témoignage que la partie du pont qui porte le no. 425 est la partie qui est dans Sainte-Rose. La description du livre de renvoi semblerait s'appliquer à tout le pont, puisqu'elle dit qu'il traverse la rivière Jésus du sud-est au nord-ouest en décrivant une courbe, et qu'il est situé partie dans Sainte-Thérèse et partie dans Sainte-Rose. En comparant cette description du livre de

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Mignault J.

renvoi au plan du cadastre, on voit que ce que le plan indique comme étant le numéro 425 n'est qu'une partie du pont, car l'autre côté de la rivière n'est pas montré sur le plan et on n'y voit pas non plus la courbe mentionnée au livre de renvoi. D'après toutes les présomptions il ne serait question, dans le rôle d'évaluation, que de la partie du pont dans Sainte-Rose.

Dans sa défense, le défendeur prétend que ce pont est erronément appelé immeuble, qu'il n'est ni plus ni moins qu'un pont de péage, entièrement situé en dehors des limites de la municipalité défenderesse; il ne soulève pas l'objection qu'il serait partie dans une municipalité et partie dans l'autre. Le factum de l'appelant discute la prétention émise par la défense. Or la ville de Sainte-Rose, d'après sa charte (8 Geo. V. (Qué.) ch. 98), est l'ancien village de Sainte-Rose et son territoire est le même (art. 10 de cette loi). Le territoire du village de Sainte-Rose, d'après l'article 19, parag. 1, de l'ancien code municipal, s'étendait jusqu'au milieu de la rivière. Je suis convaincu que le rôle d'évaluation de l'intimée ne s'applique qu'à la partie du pont qui se trouve à Sainte-Rose.

Depuis l'audition, un factum supplémentaire de l'intimée affirme que cette partie du pont qui se trouve dans Sainte-Rose a été vérifiée au bureau d'enregistrement par les avocats des parties comme ayant précisément la longueur mentionnée au livre de renvoi, 8 arpents, 9 perches et 4 pieds. L'appelant, qui a produit également un factum supplémentaire, n'a pas contesté cette affirmation. Dans ces circonstances, étant d'avis que toutes les prétentions de l'appelant sont mal fondées, je ne crois pas devoir renvoyer le dossier en cour supérieure aux seules fins de faire

vérifier un fait qui me paraît suffisamment découler des éléments de preuve que nous trouvons au dossier, savoir que l'intimée n'a imposé de taxes que sur la partie du pont Bélair qui se trouve chez elle.

Je suis d'avis de renvoyer l'appel avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *J. O. Lacroix.*

Solicitors for the respondent: *St. Germain, Guérin & Raymond.*

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*Feb. 28.
*Mar. 29.

DOMINION GLASS COMPANY (DEFENDANT) ..... } APPELLANT;

AND

JOSEPH B. DESPINS (PLAINTIFF) .. RESPONDENT.

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

Negligence — Accident — Damages — Fault — Presumption of fault — Industrial establishment—Employment of persons under 16 years— Liability of employers—Arts. 1053, 1054, 1055 *C.C.—"Industrial Establishments Act," R.S.Q.* (1909) *Arts.* 3835, 3835*d.*

The respondents' son, aged fourteen years and with no education, was employed at the appellant company's factory. With the probable intention of going out without being seen, he climbed over a barricade placed to prevent the use as a means of egress of a doorway, left open for the purpose of ventilation, and fell to the bottom of a smoke flue where his body was found two days later.

Held, Idington and Brodeur JJ. dissenting, that, upon the evidence, the appellant cannot be held liable for the accident, which was due to the sole fault of the respondent's son.

Per Anglin, Mignault and Cassels JJ.—The facts in this case do not constitute any presumption of fault against the appellant company under article 1054 C.C. *Quebec Railway, L.H. and P. Co.* v. *Vandry* ([1920] A.C. 662) discussed.

Article 3835 R.S.Q. (1909), as amended by 9 Geo. V., c. 50, provides that the owner of an industrial establishment shall not employ boys or girls under sixteen years of age unless they can read and write fluently; and article 5835d provides that the employers who do not comply with these enactments cannot, in case of accident, allege fault of the injured employee.

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*PRESENT.—Idington, Anglin, Brodeur and Mignault JJ. and Cassels J. *ad hoc.*

Held, Idington and Brodeur JJ. dissenting, that, notwithstanding the fact that the appellant company had employed respondent's son in contravention of the statute, it cannot be held liable as no fault on its part had been proven; the meaning of the statutory provisions being that the employer, when himself guilty of fault, cannot invoke the fault of the injured employee as a contributing cause of the accident.

Judgment of the Court of King's Bench (Q.R. 32 K.B. 30) reversed, Idington and Brodeur JJ. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), affirming the judgment of the Court of Review (2), and maintaining the respondent's action which had been dismissed by the trial judge.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

John Hackett K.C. and *E. F. Newcombe* for the appellant. The appellant company cannot be held liable, as no fault or negligence on its part had been proven; this is a finding of fact by the trial judge.

The "Industrial Establishments Act" does not apply, as the respondent's son was not an employee of the appellant at the time of his death, as he had voluntarily broken his contract.

The sanction of article 3835 of the Act is found in article 3835 (b), which provides that, in case of accident, the employer cannot plead contributory negligence on the part of the victim; but the fault of the employee can be invoked.

Guérin for the respondent.

(1) Q.R. 32 K.B. 30. (2) Q.R. 59 S.C. 199.

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IDINGTON J. (dissenting).—I think this appeal should be dismissed with costs.

ANGLIN J.—I am, with great respect, of the opinion that the judgment of the learned trial judge dismissing this action was right and should be restored.

Four grounds of liability are urged on behalf of the plaintiff:

(1) Actual fault on the part of the defendant, entailing liability under Art. 1053 C.C., as found by the Court of King's Bench;

(2) Presumed fault of the defendant, based on its having had the care of the thing which caused the death of the plaintiff's son, as found by the Court of Review;

(3) Fault under Art. 1055 C.C. because the slabs covering the flue were in bad condition;

(4) Breach by the defendant of the "Industrial Establishments Act" (Art. 3835 R.S.Q., 1909) in employing a boy under sixteen years of age who did not read and write fluently and easily, and also of the requirements of Art. 3831, which prescribes that all such establishments shall be built and kept in such a manner as to secure the safety of all employed in them.

The evidence makes it reasonably clear that the plaintiff's son was killed as the result of climbing over a barricade placed to prevent the use as a means of egress of a doorway, left open for the purpose of ventilation, and then jumping on a smoke flue a few feet below and to one side, which apparently gave way under the impact allowing him to fall nine feet to the bottom of the flue and incidentally to break his leg, which probably rendered futile any effort on his part to escape. His partly calcined body was found two days later in the broken flue.

The adequacy of the barricade to prevent any person mistaking the doorway in question as intended for use as an exit or accidentally falling through it admits of no doubt. There is not a vestige of evidence that the defendants had any reason to anticipate that anybody—even a lad running away from his work—would use the doorway as the unfortunate Despins did, or would jump down on top of the smoke flue, as he almost certainly must have done. The doorway in question opened on a court yard, the bottom of which was some eight feet below its sill, and from which there does not appear to have been any access to the street, unless by some very indirect route. I am unable to find actionable fault on the part of the defendants in regard to the condition of either the doorway or of the smoke flue. Both were made use of for a purpose and in a manner which it cannot be said the defendants should reasonably have anticipated. There is in my opinion no evidence to warrant either a finding of fault under Art. 1053 C.C. or a breach of Art. 3831 (R.S.Q. 1909) of the "Industrial Establishments Act." I also agree with the learned judges who have held Art. 1055 C.C. inapplicable to the circumstances of this case.

The employment of the plaintiff's boy may have been—probably upon the evidence in the record must be assumed to have been—in contravention of Art. 3835 of the "Industrial Establishments Act." Moreover, there may be very good reason for grave disapproval of the conduct of the defendant's foreman in regard to imposing extra work on the boy. But I cannot find that either one or the other of these matters was a determining cause of the accident which befell him. The only reasonable inference from the evidence seems to me to be that the sole determining

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cause of that accident was the boy's own rash act; and, while that may not be attributed to him by the defendant as a fault (Art. 3835 (d)), it excluded the existence of fault on the part of the defendant being a contributing cause.

It seems quite clear also, although no point is made of it, that keeping the boy at work during the night was a direct contravention of Art. 3835 (a). But this again was not a determining cause of the accident.

There is nothing to shew that the appellant's factory fell within any classification made by the Lieutenant Governor in Council under Art. 3833.

Where a master employs young boys and girls in any dangerous work he must no doubt take reasonable precautions to safeguard them against increased risk due to their inexperience and incapacity to protect themselves. He must keep a watchful eye on mischievous boys and guard them against such dangers as he does, or should anticipate they may incur. *Robinson* v. *W. H. Smith* (1) illustrates the principle. But a factory is not a kindergarten and injury sustained from causes not arising out of the employment and from conditions which a prudent master would not anticipate as at all likely to occasion it even to a youthful employee does not import fault.

The fact that the plaintiff himself was a party to the illegal employment of his son and incurred a statutory penalty for that offence (Art. 3850 R.S.Q. (1909)) probably presents a serious obstacle to his maintaining this action so far as it rests on a breach of the "Industrial Establishments Act."

Finally, there is no ground for a presumption of fault under Art. 1054 C.C. The damage was not

(1) [1901] 17 Times L. R. 235; 423.

caused by anything which the defendant had under its care. The sole proximate or determining cause, as already stated, was the act of the unfortunate boy himself. On this aspect of the case I agree with the views expressed by Mr. Justice Martin.

The appeal should be allowed. The defendants are entitled to their costs in the Court of Review, the Court of King's Bench, and this court, if they think it proper to exact them. There is not a little in the circumstances which leads me to express the hope that they will not do so.

BRODEUR J. (dissenting).—La question dans cette cause est de savoir si la compagnie Dominion Glass doit être tenue responsable de la mort d'Armand Despins, le fils du demandeur.

Armand Despins était un jeune garçon de quatorze ans et quelques mois qui travaillait de nuit dans les usines de cette compagnie. Le 18 juin 1919, son contremaître, après lui avoir reproché vivement son manque d'assiduité au travail et après lui avoir dit qu'il le congédierait s'il ne s'amendait pas, lui donnait cependant à faire une besogne plus considérable que d'ordinaire, vu l'absence d'un ouvrier. Il faisait très chaud dans les usines ce soir-là. Après avoir travaillé une couple d'heures, Despins a dit à un de ses jeunes compagnons de travail qu'il était fatigué et qu'il laissait le service. Il se fit donner son paletot par ce compagnon. Afin de se dérober à la vue du contremaître, il ne passa pas par la porte ordinaire, mais monta sur une passerelle qui aboutissait à une ouverture donnant sur une cour intérieure. Cette ouverture était de plusieurs pieds plus élevée que le sol de la cour; il lui a fallu sauter et il est allé retomber sur un

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conduit d'air chaud qui, quoique recouvert de quelques briques, a dû céder sous la pression de son poids, car deux jours après on retrouvait son cadavre dans ce conduit.

La cour supérieure a renvoyé l'action en disant qu'il n'y avait pas faute de la part de la défenderesse. La cour de révision a accordé cinq cents piastres de dommages. Deux des juges de cette dernière cour ont été d'opinion qu'il y avait eu par la défenderesse violation de la loi concernant l'emploi des garçons illettrés dans sa manufacture et qu'il y avait présomption de faute sous l'article 1054 du code civil. Le juge Demers était d'opinion qu'il avait responsabilité sous l'article 1053 C.C.

La cour d'appel a confirmé le jugement de la cour de révision, mais n'a pas acquiescé à la proposition que l'article 1054 C.C. et que la cause de *Quebec Ry. H. L. & P. Co.* v. *Vandry* (1), invoquée par la majorité des juges de la cour de revision, pouvaient s'appliquer. Deux des juges de la cour d'appel, les honorables MM. Martin et Flynn étaient dissidents.

Il y a eu, comme on le voit, beaucoup de divergence d'opinion dans les tribunaux inférieurs; et malgré qu'il ne s'agisse que d'un arrêt d'espèce et que d'une condamnation de $500, il y a dans cette divergence d'opinion suffisamment pour justifier la défenderesse de se pourvoir devant cette cour.

Je crois, pour ma part, qu'il y a responsabilité sous l'article 1053 du code civil et en vertu de la loi concernant l'emploi des garçons illettrés dans les établissements industriels. Je concours dans l'opinion exprimée si succinctement et si clairement par l'honorable juge Demers, quand il dit:

(1) [1920] A.C. 662.

Un maître, surtout lorsqu'il emploie de jeunes enfants, doit écarter tout danger dans ou près de son établissement. Il doit s'attendre que ces enfants parcoureront tous les alentours; s'ils ne le faisaient pas, ce ne seraient pas des enfants. Ce malheureux accident aurait pu et dû être prévenu.

Un patron doit prendre toutes les précautions voulues pour éviter les accidents qui peuvent survenir aux ouvriers qu'il emploie. La jurisprudence va même jusqu'à édicter sa responsabilité même dans les cas où des accidents seraient la suite de l'imprudence de l'ouvrier lui-même (Dalloz, 1881-2-79;1884-2-89; 1879-2-204).

Cette obligation du patron est encore plus étendue quand l'ouvrier est un enfant qui, ignorant le danger, n'a ni la prudence ni l'expérience nécessaires pour se protéger. Dalloz, 1879-2-47; 1886-2-153; 1887 -2-208; 1890-2-239).

Dans le cas actuel, il incombait à la défenderesse, la Dominion Glass Company, de fermer cette ouverture de façon à ce que les jeunes garçons qu'elle employait ne pussent pas y passer. Si comme elle le prétend, cette porte ne devait servir que pour ventiler son établissement, elle aurait pu alors mettre un grillage dans la partie supérieure. De plus, le conduit d'air chaud n'était pas recouvert de matériaux suffisamment solides pour ces ouvriers—et il devait y en avoir—qui avaient à aller dans cette cour de l'usine pouvaient être appelés d'un moment à l'autre à franchir ce conduit; et alors elle aurait dû s'assurer que la couverture fût assez solide pour cela. Il paraît évident, au contraire, par la preuve que certaines parties de cette couverture avaient perdu de leur force par la chaleur si intense et les gaz qui passaient dans ce conduit.

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Mais la défenderesse invoque la faute de l'enfant qui n'avait aucunement le droit d'aller dans cette cour où se trouvait ce conduit. Le statut cependant l'empêche d'invoquer cette négligence de la victime. La loi, à l'article 3835 des statuts refondus (1909), dit

> qu'il est prohibé à tout patron d'un établissement industriel * * d'employer un garçon ou une fille de moins de seize ans révolus, à moins qu'ils ne sachent lire et écrire.

Ces enfants doivent être porteurs de certificats visés par l'inspecteur des établissements industriels et les communiquer au patron qui doit en conserver copie (art. 3835b et 3835e S.R.Q.) et l'article 3835 (d) décrète que si le patron emploie un garçon qui n'est pas porteur de ce certificat,

> il ne peut dans le cas d'accident se prévaloir de la faute de la victime.

Voilà qui est bien clair.

Armand Despins n'avait pas encore quinze ans quand l'accident est arrivé. Il ne pouvait être employé par la Dominion Glass sans avoir un certificat qu'il savait lire et écrire. Ce certificat n'a jamais été émis, et la défenderesse n'en avait pas de copie en sa possession. Alors elle ne peut donc pas invoquer la négligence de ce jeune garçon.

Mais on dit que le demandeur, qui était le père de l'enfant était tenu, en vertu de la loi, de faire viser ce certificat par l'inspecteur (art. 3835b). C'est vrai que la loi déclare qu'il est tenu à cela "autant que possible;" mais cette obligation du père ne l'expose qu'à une pénalité; et elle ne saurait être invoquée pour diminuer la responsabilité du patron qui est énoncée aussi formellement que possible.

Pour ces raisons, l'appel doit être renvoyé avec dépens.

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MIGNAULT J.—Voulant déserter son poste à l'usine de l'appelante et tromper la surveillance du contremaître, le fils de l'intimé, âgé de moins de seize ans, s'est rendu, le soir du 18 juin 1919, dans une annexe de l'usine où il y avait une porte au deuxième étage donnant sur une sorte de cour. Cette porte était solidement barricadée jusqu'à une hauteur d'environ quatre pieds. Rendu là, le fils de l'intimé—personne ne l'a vu, mais ce sont des conjectures que les circonstances autorisent—aurait réussi à passer en dessus ou en dessous de la barricade et, dans le but de descendre dans la cour, aurait sauté sur un conduit ou tuyau en briques qui se trouvait à trois pieds en bas de la porte et un peu à côté, et qui servait de ventilateur à la chambre des fournaises. Ce conduit n'étant pas de force à soutenir le poids de l'enfant—ce n'était pas sa destination non plus—celui-ci tomba dans le conduit et fut trouvé là mort deux jours plus tard. C'est de cet accident que l'intimé tient l'appelante responsable.

La cour supérieure a renvoyé l'action de l'intimé, mais celui-ci obtint une condamnation de $500.00 à la cour de revision où la majorité des juges, trouvant qu'il n'y avait pas de faute de la part de l'appelante, ont cependant condamné cette dernière en vertu de la règle de responsabilité légale consacrée par la décision du conseil privé dans *Quebec Railway L. H. & P. Co.* v. *Vandry* (1). Sur appel à la Cour du Banc du Roi, ce dernier tribunal a confirmé le jugement de la cour de revision, retranchant toutefois le "considérant" où il est question de la responsabilité légale du fait d'une chose, l'opinion étant que la défenderesse avait été coupable de faute. Deux des juges, les honorables juges Martin et Flynn, firent enregistrer leur dissidence.

(1) [1920] A.C. 662.

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Je suis absolument de l'avis de tous les juges de la Cour du Banc du Roi que le moyen fondé sur la décision du conseil privé dans *Quebec Railway L. H. & P. Co.* v. *Vandry* (1) était mal fondé dans les circonstances de l'espèce. On me permettra d'ajouter, avec toute déférence possible, qu'il y a peu de décisions dont on ait plus abusé. Le conseil privé, dans cette cause, a interprété l'article 1054 du code civil, écartant le système traditionnel de la faute, et, dans le cas de dommages causés par une chose, rendant la personne qui avait la garde de cette chose responsable des dommages en vertu de la loi seule et abstraction faite de toute faute, à moins que cette personne n'eût démontré qu'elle n'avait pu empêcher le fait producteur du dommage. Cette décision nous lie, mais je me garderais bien de l'étendre, car elle innove visiblement dans un domaine où la doctrine de la nécessité de la faute, comme base de la responsabilité civile, paraissait solidement assise. Et dans le cas qui nous occupe, on ne peut dire que le dommage ait été causé par la porte. C'est malgré cette porte et sa barricade que l'enfant est parvenu à sortir de l'usine. Le fait générateur du dommage n'est donc pas la chose de l'appelante, c'est l'acte de l'enfant lui-même, et, pour réussir, l'intimé devait prouver une faute, à la charge du patron, qui a causé l'accident.

Je suis d'avis que l'intimé a failli dans cette preuve. L'appelante avait pris toutes les mesures que la prudence pouvait suggérer pour empêcher qu'on ne se fît mal en passant près de la porte, dont la fonction n'était pas de servir de sortie mais de donner de l'air à l'usine. La porte avait été solidement barricadée, et ce n'est pas l'insuffisance de la barricade qui a

(1) [1920] A.C. 662.

causé la mort de l'enfant de l'intimé, ce malheur est arrivé parce que l'enfant a sauté sur le conduit d'air chaud, lequel n'était pas destiné à cet usage. On prétend que l'appelante aurait dû mettre un écriteau à la porte pour défendre de sortir par là. Si la barricade n'a pas retenu l'enfant, l'écriteau ne l'aurait pas fait davantage, et on n'a pas prouvé que quelqu'un avant cet enfant avait essayé de passer par cette porte. D'après mon opinion, il n'y a aucune faute qu'on puisse reprocher à l'appelante.

L'intimé invoque la loi concernant les établissements industriels, art. 3829 et suiv. S.R.Q. (1909), qui, telle qu'amendée par la loi 9 Geo. V., ch. 50 (1919), défend d'employer des enfants de moins de seize ans dans ces établissements, à moins qu'ils ne sachent couramment lire et écrire, et, en cas d'accident, déclare que le patron ne peut se prévaloir de la faute de la victime (art. 3835*d*).

Cela ne veut pas dire qu'on peut condamner le patron qui a été sans faute, mais seulement que le patron fautif ne peut alléguer, comme justification partielle, la faute de l'enfant. Ici, s'il n'y a eu aucune faute du patron, il n'y a pas de base à la responsabilité civile et il importe peu que la victime ait ou n'ait pas été imprudente. On prétend que l'emploi d'un enfant en dessous de seize ans, qui ne sait ni lire ni écrire, est contraire à la loi. En supposant qu'il en soit ainsi et que le père de l'enfant, qui a profité de l'engagement de son fils, puisse reprocher cette illégalité au patron, ce n'est pas l'engagement de l'enfant qui a causé l'accident. Le patron a pu encourir l'amende infligée par cette loi, mais on ne saurait, à raison de l'emploi d'un enfant en contravention à la loi, rendre le patron, qui a été sans faute, responsable d'un accident dont l'enfant a été victime.

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Je maintiendrais l'appel avec frais de toutes les cours et je renverrais l'action.

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

Appeal allowed with costs.

Solicitors for the appellant: *Foster, Mann, Place, MacKinnon, Hackett and Mulvena.*

Solicitors for the respondent: *Trudeau & Guérin.*

CORPORATION OF POINT GREY. APPELLANT;

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*Feb. 9, 10.
*Mar. 29.

AND

WILLIAM SHANNON AND OTHER. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Municipal corporation—Taxation—Assessment of lands—Agricultural purposes—Power of Court of Revision—Whether imperative or discretionary—Appeal—Jurisdiction—Judicial discretion—B.C. "Municipal Act," s.s. 3 (c) of s. 219, as enacted by 9 Geo. V., c. 63—"Act to amend the Supreme Court Act" 10 & 11 Geo. V. c. 32, s. 1, s.s. (b).

Subsection 3 (c) of section 219 of the B. C. "Municipal Act," as enacted by 9 Geo. V., c. 63, provides that *inter alia* "the powers of (the Court of Revision) shall be * * * to fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purposes."

Held, Duff and Anglin JJ. dissenting, that this provision is imperative and does not admit of any discretionary power in the Court of Revision; that it requires that court to fix at its agricultural value the assessment of all lands held in blocks of three or more acres; and that the only discretion given the court is that of finding whether the land is solely used for agricultural purposes.

Per Idington J.—Assuming such a provision to be discretionary, then this case would not be appealable to this court, as it is expressly excluded by s.s. (b) of the first section of the "Act to amend the Supreme Court Act" 10 & 11 Geo. V., c. 32.

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*PRESENT.—Sir Louis Davies C.J. and Idington, Duff, Anglin Brodeur and Mignault JJ.

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CORPORATION OF POINT GREY v. SHANNON

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming, on equal division of the court, the judgment of Macdonald J. and maintaining the respondent's petition.

The respondents are the owners of 45·56 acres of land. In 1921, the assessor of the corporation appellant assessed part of this land at $2,700 per acre and the remainder at $2,250. The respondents appealed from this assessment to the Court of Revision of the appellant on the grounds that such land was and had been for several years used solely for agricultural purposes and should be assessed at the value which the same has for such purposes, without regard to the value for any other purposes, the respondents urging that the terms of s.s. 3 (c) of s. 219 of the B.C. "Municipal Act," [(B.C.) 1919, s. 63, s. 7] were mandatory. The Court of Revision dismissed the appeal and confirmed the assessment. On appeal to Macdonald J., it was held that the land was and has been used for agricultural purposes, and the assessment was reduced to $250 per acre. This judgment was affirmed by the Court of Appeal (1), on equal division of the court.

Lafleur K.C. for the appellant. The power of the Court of Revision is discretionary and not obligatory: *Julius* v. *Lord Bishop of Oxford* (2); *Rex* v. *Mitchell* (3).

McVeity for the respondents.

THE CHIEF JUSTICE.—This is an appeal from the Court of Appeal of British Columbia which on an equal division of opinion dismissed an appeal from the judgment of Mr. Justice McDonald who, in his turn

(1) [1921] 3 W.W.R. 442, 549. (2) [1880] 5 App. Cas. 214.
(3) L.R. [1913] 1 K.B. 561.

had allowed an appeal from the assessment of the Court of Revision assessing the lands of William Shannon and another, the now respondents, at their *actual* value and not at their *agricultural* value.

The learned judge held that on the proper construction of sec. 219 of the "Municipal Act Amendment Act," 1919, (9 Geo. V., c. 63) all the lands of the respondents lying to the west of Granville St. came within the amended section of the statute, clause (c) s.s. 3, and in being used for agricultural purposes should be assessed at an amount not exceeding $250 per acre.

The amended section of the Act of 1919 replaced a section of the Act of 1917 which was as follows:—

> The Court of Revision shall have power to reduce the assessed value of land held and used solely for agricultural or horticultural purposes to such an amount as may seem just and equitable notwithstanding that the same may be fixed thereby at an amount equal to its value for agricultural purposes. The section shall not apply to any lands the area of which is less than three acres.

That amended section reads as follows:

> The powers of such court shall be
> (c) To fix the assessment on such lands, as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes and during such use only at the value which the same has for such purpose without regard to its value for any other purpose or purposes.

The question in the appeal before us was whether this amended section was to be construed as discretionary or mandatory.

It is in my opinion necessary to read clauses (b) and (c) of s.s. 3 of sec. 219 of the Act of 1919 in order to gather their true meaning and intent.

Sub-section 3 of sec. 219 reads as follows:—

> 219 (3) The powers of the Court shall be:
> (a) To meet at the time or times appointed, and to try all complaints lodged with the assessor in accordance with the provisions of this Act;

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(b) To investigate the said roll and the various assessments therein made, whether complained against or not, and so adjudicate upon the same that the same shall be fair and equitable and fairly represent the actual value of each parcel of land and actual value of the land and improvements within the municipality; provided however, that the said court shall not during the year 1920 reduce the assessment of any parcel of land to an amount below ninety per cent of the amount for which such parcel of land was assessed on the assessment roll next preceding;

(c) To fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes.

Now clause (c) as I have said, was introduced into the Act of 1919 in substitution of the clause I have above quoted from the Act of 1917. That section vested in the Court of Revision a discretionary power

to reduce the assessed value of land held and used solely for agricultural or horticultural purposes to such an amount as may seem just and equitable.

It clearly vested in the Court of Revision a discretionary power to reduce the assessed value of lands held and used solely for agricultural purposes, but did not apply to any lands the area of which was less than three acres. It gave apparently no power to increase the assessment of such lands and its language was somewhat indefinite.

The amendment, clause (c) of sub-sec. 3 of sec. 219 of the Act of 1919 gave expressly no such discretionary power. Its language is mandatory and, in my opinion, clear and definite. The preceding clause (b) had vested a judicial discretion in the Court of Revision with respect to the various assessments made in the roll and so to adjudicate upon them that they

should be fair and equitable and fairly represent the actual value of each parcel of land and improvements within the municipality.

Clause (c), however, which follows, dealing with

lands held in blocks of three or more acres and used solely for agricultural or horticultural purposes and during such use only

explicitly directs the Court of Revision to

fix the assessment at the value which the same has for such purposes *without regard to its value for any other purposes.*

The general discretionary power given to the court by clause (b) does not and cannot in my judgment apply to such agricultural land. That is made an exception. The court is directed to fix the value which the land has for agricultural purposes only, and to make the intention of the legislature absolutely clear, the words are added

without regard to its value for any other purposes.

The court had to find first that the land was held in blocks of three or more acres and was used solely for agricultural purposes and when they had so found was to fix the value which the lands had

for such purpose without regard to its value for any other purpose or purposes.

No language could be used more clearly expressing the meaning of the legislature.

I can find no possibility of any discretion being vested in the court other than that expressly given. The court is directed to fix the assessment upon lands which they find exceed in area blocks of three or more acres and which are

used solely for agricultural or horticultural purposes * * * *at the value which the lands have for such purpose without regard to its value for any other purposes.*

I repeat I can find no room whatever for the introduction of any discretion on the part of the Court of Revision beyond that which the clause expressly gives of finding the value of the lands for agricultural purposes irrespective of its value for any other purposes.

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The reasonableness or unreasonableness of this provision is not of course open to consideration on our part. We have to deal only with the language used by the legislature which, as I have said, is in my opinion clear and distinct and not open to any doubt. Clause (c) is undoubtedly an exception to the general discretionary powers given and imposed upon the court by clause (b). The only discretion given the court in clause (c) is that of finding whether the lands are *bona fide* and solely used for agricultural or horticultural purposes, and when that is so found then the duty is imposed upon the court of assessing the lands at the value which the lands have for

agricultural purposes without regard to its value for any other purpose or purposes.

For these reasons I would dismiss the appeal with costs and so confirm the judgment of Mr. Justice McDonald.

IDINGTON J.—This is an assessment appeal which turns, if appealable, upon section 219 of the "Municipal Act Amendment Act," 1919, of British Columbia, which enacted as follows:—

219 (1). Every assessment roll shall be considered and dealt with by a Court of Revision, which shall consist of the members of the Council or five members thereof appointed for that purpose by resolution at the first meeting of the Council;

and by sub-section 3 thereof, as follows:

(3) The powers of such court shall be:—

(a) To meet at the time or times appointed, and to try all complaints lodged with the assessor in accordance with the provisions of this Act;

(b) To investigate the said roll and the various assessments therein made, whether complained against or not, and so adjudicate upon the same that the same shall be fair and equitable and fairly represent the actual value of each parcel of land and actual value of the land and

improvements within the municipality: provided however, the said court shall not during the year 1920 reduce the assessment of any parcel of land to an amount below ninety per cent of the amount for which such parcel of land was assessed on the assessment roll next preceding:

(c) To fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes;

(d) To direct such alterations to be made in the assessment roll as may be necessary to give effect to their decision.

It is sub-section (c) above quoted that we are especially herein concerned with, but I quote the other sections as means of illustrating the nature of the duty imposed by said sub-section (c) which is so much in dispute between the parties concerned herein that the Court of Appeal was equally divided.

The appellant contends that the said sub-section (c) gave only discretionary power to the Court of Revision to determine whether or not such lands as in question herein should be given or denied the partial exemption provided for under the circumstances indicated from taxation upon the full actual value of the properties in question.

It seems to me that if appellant's contention is correct then the duty of the Court of Revision was merely that of a regulative, administrative or executive jurisdiction, and, if so, there exists no jurisdiction in this court to hear this appeal for all such like cases are expressly excluded by s.s. (b) of the first section of the amendment of the "Supreme Court Act," 10-11 Geo. V, cap. 32.

I incline to the opinion that the legislature intended by said sub-section (c) to confer only a judicial discretion such as in the sub-section immediately before and after same, and imposed the duty thereby to exercise the power conferred.

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All the powers given by this sub-section 3 (c) of sec. 219, are classed thereby as of the same character and certainly most of them are clearly of a judicial character.

In either alternative this appeal should be dismissed with costs.

I very much doubt if now there is any way of getting special leave, to bring an assessment appeal before this court, as was suggested in argument herein, for section 41 of the "Supreme Court Act" which long was the basis for such appeals was repealed by said amending Act of 1920 just now referred to.

And the question arises as to whether what remains or is substituted, will permit of any leave to appeal.

The enumerated subject matters which may form the basis for such leave do not seem to comprehend assessment appeals.

DUFF J. (dissenting).—The single question raised by this appeal concerns the construction and effect of one of the enactments of the "Municipal Act Amendment Act" of 1919, c. 63. The enactment in question is clause (a) of s.s. 3 of sec. 219. Sub-section 3 enumerates the powers of the Court of Revision, and it will be convenient to set it out in full. It is in the following words:—

Sub-sec. 3. The powers of such Court shall be:—

(a) To meet at the time or times appointed, and to try all complaints lodged with the assessor in accordance with the provisions of this Act;

(b) To investigate the said roll and the various assessments therein made, whether complained against or not, and so adjudicate upon the same that the same shall be fair and equitable and fairly represent the actual value of each parcel of land and actual value of the land and improvements within the municipality: provided however, the said court shall not during the year 1920 reduce the assessment of any parcel of land to an amount below ninety per cent of the amount for which such parcel of land was assessed on the assessment roll next preceding;

(c) To fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes;

(d) To direct such alterations to be made in the assessment roll as may be necessary to give effect to their decision;

(e) To confirm the roll either with or without amendment.

(f) Any member of the court may issue a summons in writing to any person to attend as a witness, and any member of the court may administer an oath to any person or witness before his evidence is taken;

(g) No increase in the amount of assessment and no change in classification from improved to wild lands shall be directed until after five days' notice of the intention to direct such increase or change, and of the time and place of holding the adjourned sittings of the Court of Revision at which such direction is to be made, shall have been given by the assessor in the manner set out in section 214, to the assessed owners of the land on which the assessments are proposed to be increased or changed as to classification, and any party interested or his solicitor or agent if appearing shall be heard by the Court of Revision.

The respondents applied to the Court of Revision to have the authority reposed in that court by clause (c) exercised in relation to certain property of theirs in the municipality which had been valued by the assessor in the usual way, that is to say, in conformity with the rule laid down in section 207 of the Act that land "shall be assessed at its actual value." The application was rejected and on appeal to Mr. Justice Macdonald that learned judge held that by the clause in question a duty was imposed upon the Court of Revision as regards lands satisfying the description of the clause (lands held in blocks of three or more acres and used solely for agricultural or horticultural purposes) to "fix the assessment upon such lands" according to the standard laid down in the clause itself. There being no dispute upon the point that the respondents' property falls within the category described, the learned judge allowed the appeal. On appeal to the Court of Appeal the judges of that court

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were equally divided in opinion, the learned Chief Justice and Mr. Justice Galliher taking the view that a discretion is reposed by the clause in the Court of Revision and that the decisions of the court in exercise of that discretion are not reviewable on appeal; while the other two learned judges constituting the court, Mr. Justice McPhillips and Mr. Justice Eberts, sustained the view of Mr. Justice Macdonald.

The municipality now appeals. The British Columbia "Municipal Act" (for the purposes of assessment and taxation) provides for the appointment of an assessor whose duty it is in each year to prepare an assessment roll in which he is, among other things, to state the value of lands assessed, the value of improvements upon them and to classify all such lands as wild lands or otherwise; in valuing lands and improvements he is to follow the rules prescribed by sec. 207 already referred to. It is moreover the duty of the assessor, after having sent certain notices to make a statutory declaration to the effect that he has set out in the roll to the best of his judgment and ability "the true value of the land and improvements" within the municipality, to return the roll to the clerk of the municipality. The statute sets up a Court of Revision which is to consist of the members of the council or five members thereof appointed at the first meeting of the council and the Act explicitly provides that any person appearing on the roll as the owner of lands or improvements may, at any time not later than ten days before the first annual meeting of the court, complain of any error or omission in the assessment prejudicially affecting him and in particular that any land or improvement in respect of which he is assessed has been valued too high or too low. (Sec.

216 s.s. 1, 2). In the year 1917 by c. 45 of the statutes of that year, sec. 46, a provision was for the first time introduced authorizing the Court of Revision to deal with agricultural lands in a special way, and that provision was in these terms:—

> 223a:—The Court of Revision shall have power to reduce the assessed value of lands held and used solely for agricultural or horticultural purposes to such amount as may seem just and equitable, notwithstanding that the same may be fixed thereby at an amount equal to its actual value for agricultural purposes. This section shall not apply to any lands the area of which is less than three acres.

In the year 1919 the provisions of the "Municipal Act" relating to assessment and taxation were consolidated and extensively revised. This Act makes very important modifications, and sec. 223a now appears as sec. 219, s.s. 3 (c).

Section 219 is the first of a group of sections ending with section 222 which is introduced by the heading "jurisdiction and proceedings," and s.s. 3 of that section is, unquestionably, primarily a provision dealing with jurisdiction. The words, it will be noted are, "the powers of such court shall be" those which are set forth in the enumerated clauses. *Prima facie* this is not the language of legislation designed to confer or create substantive rights and when these clauses (other than clause (c)) are examined it will be found that, save in respect of one particular, the power given is a power to give effect to rights or to perform duties elsewhere provided for. Clause (a) for example, confers authority to try all complaints lodged in accordance with the provisions of the Act and that authority is an authority to effectuate the rights given and to perform the duty imposed by sec. 216, s. ss. 1, 2 and 3; the right to prefer the complaint on

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the one hand and on the other the duty to hear and decide upon the complaint. Sub-sec. (b) is an authority to examine the roll and to see that the same shall be equitable and fairly represent the actual value of the land and improvements, in other words, to see that the assessments have been made in conformity with the provisions of sec. 207 and to perform the duties imposed upon the court by sec. 219 s.s. 1, which requires that each assessment roll shall be considered and dealt with by a Court of Revision. Sec. (d) which gives authority to direct alterations in the assessment roll in order to give effect to the decisions of the court merely confers jurisdiction to carry out the duties imposed by sec. 216, s. ss. 1, 2 and 3. Clause (e) gives authority to confirm the roll either with or without amendment and that is an authority to carry out the duties imposed by sec. 222, s.s. 1 and by sec. 216, s. ss. 1, 2 and 3, where the court decides that the roll is unobjectionable.

Thus, with the exception of clause (b), it can be affirmed in respect of all clauses just referred to that the true office of them is that which is their *prima facie* office, namely, to confer jurisdiction and to give effect to rights or to perform duties elsewhere provided for. As regards sub-clause (b) authority is given to revise and to correct the roll in pursuance of a complaint which authority, as already mentioned, is an authority to do no more than to give effect to the rights and perform the duties provided for by sec. 216; but there is a further authority and that is to investigate assessments even in the absence of complaint and as regards the value of lands and improvements, to bring the assessed value in to accord with the value as determined by the standard laid down in sec. 207.

Now it seems to be abundantly clear that this last mentioned authority is a discretionary authority. In the first place it is incredible that the burden of examining every valuation, collecting evidence in relation to it and passing upon it should have been placed upon the board of revision. Again if such were the duty of the Court of Revision, the imperative duty of the Court of Revision, it is not easy to see the necessity for the enactments of sec. 216 requiring the board in terms to reconsider an assessment in respect of which complaint is made. In the second place the contrast between the language of sec. 216 which, in case of complaint, requires the board to proceed, and the language of sub-clause (b) which is facultative only, appears to be conclusive upon the point.

Coming now to clause (c). In relation to the matter dealt with in this clause, the sub-section, here as in relation to the other enumerated matters, professes simply to give jurisdiction. The words, as they stand, (to quote Lord Cairns, in the case of *Julius* v. *Lord Bishop of Oxford* (1),

> are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no authority to do. They confer a faculty or power and they do not of themselves do more than confer a faculty or power.

Nevertheless, as Lord Cairns points out, although such is the effect of the words in themselves, there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, making it a duty of the body in whom the authority is reposed to exercise that authority. But Lord Cairns proceeds:

> It lies upon those * * * who contend that an obligation exists to exercise (the) power, to shew in the circumstances of the case something which * * * creates this obligation.

(1) 5 App. Cas. 214, at p. 222.

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And the question as Lord Selborne lays down in the same case at p. 235,

> in general * * * is to be solved from the context of the particular provisions or from the general scope and objects of the enactment conferring the power.

The clauses of s.s. 3 other than clause (c) afford admirable examples of a power or faculty conferred by language in itself enabling only, which upon definite conditions it becomes by reason of provisions enacted *aliunde* the duty of the authority possessing it to exercise. For example clause (b) in so far as it gives jurisdiction to hear and decide complaints in respect of the valuation of property is a jurisdiction which the person assessed or the municipal council itself is entitled to invoke and which it is a duty of the Court of Revision to exercise where the party invoking it has complied with the conditions laid down in sec. 216, s.s. 1, 2 and 3.

The question upon which we have to pass is whether such a duty—with the correlative right—arises by virtue of clause (c), a duty which requires the court to exercise the authority thereby given when it is shewn that a piece of property falls within the description supplied by the clause; and for this purpose we must examine the pertinent provisions of the statute relating to this subject of assessment and assessment appeals to ascertain whether there is adequate evidence of an intention on the part of the legislature to establish the right and the duty contended for.

There is nothing in the provisions of the Act in express terms conferring such a right or creating such a duty. On the contrary there is much in the Act to indicate that the legislature had no intention of doing so. In the first place, what I have already said sufficiently indicates that where an imperative duty was

to be laid upon the Court of Revision the legislature has imposed the duty in explicit terms. In the next place, the system of assessment, as I have already mentioned, contemplates a valuation in the first instance by an assessor, according to standards of valuation laid down in obligatory fashion by the statute. These obligatory standards of valuation are standards which are dealt with in elaborate terms in a part of the Act exclusively devoted to that purpose and grouped under the heading "valuation." There is not a syllable in its provisions giving countenance to the idea that any such obligatory standard as is now contended to be applicable to this case was contemplated. The function of the Court of Revision is in general that which is implied in its title; and perhaps still more clearly implied in the terms of the oath prescribed for the members of the court by sec. 219, s.s. 2. It is a court appointed for the purpose of revising the assessment roll, correcting the work of the assessor and causing the assessment roll as made up by the assessor to conform to the requirements of the statute where such requirements are of an obligatory character. According to the interpretation now proposed, an exception would be introduced and a departure from this rule for which there appears to be no satisfactory reason. I cannot conceive any reason why (if in the case of lands meeting the description of clause (c) the standard of valuation is that which is now suggested) the statute has not made it the duty of the assessor in the first instance to deal with the subject. The assessor has responsible duties; it is his duty as already pointed out, to value lands and to classify lands, and I have heard no reason why, if the provision in question is to have the effect contended for, there should have been this departure from the

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ordinary procedure. The amendment of 1917 clearly gave to the Court of Revision an authority which was discretionary; and having regard to the considerations mentioned the doubtful language (conceding for the moment that it is doubtful) of clause (c) does not, I think, afford sufficient evidence that the legislature contemplated a change of the law in this respect.

It is not necessary for the purpose of this appeal to decide whether or not the discretion vested in the Court of Revision is one which may be exercised in relation to individual cases; or, on the other hand, whether the clause is not intended to confer upon the Court of Revision an administrative authority to establish in its discretion a rule governing the valuation of all lands in the municipality answering the description contained in the clause. It is quite plain on either view that it is not competent to a court of appeal to set aside a decision of the Court of Revision in exercise of its discretion on the ground that it has erred in exercising it.

The appeal should be allowed.

ANGLIN J. (dissenting).—I concur with Mr. Justice Duff.

BRODEUR J.—The question in this case is whether agricultural or horticultural lands in the municipality of Point Grey should be assessed as such or should be assessed at their actual value.

The Court of Revision that has been established for the purpose of "confirming and authenticating" the assessment roll is composed of the members of the council or of five members thereof. The members of the court, before acting, take an oath that they will

honestly decide the complaints presented to the court. The powers of the court are to be found in sec. 219, s.s. 3 of the Municipal Act of British Columbia. It has the power to investigate the roll, whether complained of or not, and to adjudicate that the same shall be fair and equitable. One of those powers is

> to fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose.

The Court of Revision in the present case refused to assess Shannon's property as agricultural lands. An appeal from that decision having been brought before Mr. Justice Macdonald, the Court of Revision's decision was reversed and it was held that, the lands in question being used solely for agricultural or horticultural purposes, it was the duty of the Court of Revision to assess them as such and that the power which was given the court was not discretionary but mandatory.

Some previous legislation dealing with the same subject for the first time in that province might have been properly construed as giving a discretionary power to the Court of Revision. But the law was amended, and the evident purpose was to impose a duty which formerly was of a discretionary nature.

There is no doubt that the land in question has been for thirty years or more a true agricultural land and has been exploited as such. Its value has been increased by the fact that the surrounding properties have become a residential part. If it were converted into town lots, it would give a larger income but their owners are satisfied to continue its exploitation as a farming land.

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The legislature, with the evident intention of encouraging agriculture, has enacted the legislation under review.

In *Julius* v. *Lord Bishop of Oxford* (1), Lord Selborne said, p. 235, respecting the construction of the words: "it shall be lawful, and the like, when used in public statutes":

> I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power.

All the powers which are vested in the Court of Revision in the different subsections of section 219 of the "Municipal Act" are of a mandatory character with the exception of the investigating power; why should the power given as to agricultural lands not be put on the same footing?

I have come to the conclusion that the words in question are "significant of an obligation" to use the expression of Lord Selborne, and that it was then the duty of the Court of Revision to use its powers for the benefit of the farmers and horticulturists of good faith whose farms are in the territory of Point Grey.

The appeal should be dismissed with costs.

MIGNAULT J.—This is an appeal from the judgment of the Court of Appeal of British Columbia, dismissing on an equal division an appeal from the judgment of Mr. Justice Macdonald. The latter decided, in

(1) 5 App. Cas. 214.

favour of the respondents, an appeal from the decision of the Court of Revision of the Corporation of Point Grey, a suburb of the City of Vancouver, and his judgment is attacked by the appellant.

The question to be decided, briefly stated, is whether, in the case of the assessment of lands coming within the contemplation of paragraph (c) of sub-section 3 of section 219 of the "Municipal Act Amendment Act" of 1919, 9 Geo. V, c. 63 ,the Court of Revision has any discretion to refuse to fix the assessment of the lands at the value they have for agricultural or horticultural purposes without regard to their value for any other purposes.

Mr. Justice Macdonald found all the facts in favour of the respondents holding that their land was acquired in 1890, and has ever since been used by them solely for agricultural purposes, and that there was no suggestion that they were simply utilizing their property in this manner for the purpose of coming within the provisions of the statute. The only question that now arises is therefore the proper construction of the statute.

Referring very briefly to the system of municipal assessment and taxation in British Columbia, I may say that properties are assessed at their actual value by a municipal officer known as the assessor. From this valuation an appeal lies by a complaint lodged with him to a body called the Court of Revision consisting of the members of the municipal council or five members thereof appointed for that purpose by resolution of the council. This court, the statute shews, is the real assessing body.

The duties of the Court of Revision are laid down in detail by section 219 of the statute, subsection 3, which is in the following terms: (see page 559).

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The assessment in question is for the year 1921, so the proviso of paragraph (b) is without application.

The construction of paragraph (c) is in issue between the parties. This provision before 1919, and as enacted by the "Municipal Amendment Act" of 1917, ch. 45, sec. 46, read as follows:—

> The Court of Revision shall have power to reduce the assessed value of lands held and used solely for agricultural or horticultural purposes to such amount as may seem just and equitable, notwithstanding that the same may be fixed thereby at an amount equal to its actual value for agricultural purposes. The section shall not apply to any lands the area of which is less than three acres.

It is important to note that the earlier enactment probably conferred a discretionary power on the Court of Revision, which, in the case of land held and used solely for agricultural or horticultural purposes, could reduce the assessed value of the land to such an amount as might seem just and equitable, so that the valuation might be placed anywhere between the actual value and the value for agricultural purposes.

The change in the language of this enactment is an important factor in arriving at its proper construction. There is no question now of reducing the assessed value of the land to such an amount as may seem just and equitable, but the power of the Court of Revision is to *fix* the assessment upon the land in question at the value which it has for agricultural or horticultural purposes without regard to its value for any other purposes.

The appellant contends that the Court of Revision may refuse to so fix the assessment although the land comes within the description of paragraph (c); that it can have regard to the value of the land for other than agricultural or horticultural purposes; and that

it can discriminate between different agricultural or horticultural lands, and in some cases fix the assessment at the agricultural or horticultural value, and in other cases refuse to do so.

This appears to me so contrary to the plain language of the statute that I cannot accept the appellant's contention.

An effort no doubt should be made to give to permissive words in a statute their natural meaning, but it is equally clear that where a jurisdiction or a power is conferred to be exercised for the benefit of certain persons who are within the intendment of the statute, permissive words such as "may" or "shall have the power" are to be construed as imposing a duty coupled with a power and are therefore imperative. In *Macdougall* v. *Paterson* (1), it was held that where a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application. See also *Howell* v. *The London Dock Co.* (2).

I have not overlooked the rule of construction contained in the British Columbia "Interpretation Act," R. S. B.C. 1911, ch. 1, sec. 25, as to the meaning of words such as "may" or "shall," but these rules apply only where there is nothing in the context or in other provisions pointing to a different meaning, and here I find in the context and accompanying provisions a clear indication that the power conferred by paragraph (c) must be exercised.

(1) [1851] 11 C.B. 755.

(2) [1858] 27 L.J.M.C. 177.

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Mignault J.

Subsection 3 opens with the words: "the powers of such court shall be." Paragraph (a) concerns the meeting of the court at the time or times appointed. This is surely imperative. Paragraph (b) requiring the court to investigate the roll and the various assessments, whether complained against or not, and to so adjudicate that the same shall be fair and equitable is also imperative. Paragraph (d)

> to direct such alterations to be made in the assessment roll as may be necessary to give effect to their decision,

and paragraph (e) "to confirm the roll either with or without amendment" are certainly mandatory. The only paragraph which possibly allows the court to deal with a matter of policy is paragraph (g) which refers to increases in the amount of assessment and to changes in classification from improved to wild land; the other paragraphs I have mentioned impose a duty on the court.

Under these circumstances, in the absence of apt words conferring a discretion, such perhaps as those contained in the 1917 enactment, it seems difficult to conclude that paragraph (c) is not as imperative as paragraphs (a), (b), (d), and (e) undoubtedly are.

It is said that in the case of the suburbs of a large city like Vancouver, it is unreasonable to value lands solely used for agricultural or horticultural purposes on a different scale from the neighbouring lands not utilized for such purposes, and that the Court of Revision should have the discretion to discriminate between lands so situated and lands in an entirely rural district. It suffices to answer that paragraph (c) makes no such distinction. To refuse to fix the value for agricultural or horticultural purposes would be to refuse to exercise the power conferred by this

paragraph and, in my opinion, that cannot be done. The court is called upon to determine whether the conditions contemplated exist and if they do exist it has no choice but to fix the lower value. This determination is the only thing the court is empowered to adjudicate upon and when this is done, it must apply the legal consequences. Otherwise it would give effect to the will of the legislature in one case and in a similar case, in so far as the contemplated conditions are concerned, it would refuse to carry it out. I cannot place this construction on paragraph (c).

The authorities cited by Mr. Justice Macdonald in the first court and by Mr. Justice Martin and Mr. Justice McPhilips in the Court of Appeal certainly support the conclusion they have adopted, and looking at sub-section 3 as a whole, this construction appears to me to give full effect to the scheme of assessment and taxation which the legislature has placed on the statute book.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. G. Harvey.*

Solicitor for the respondents: *D. Donaghy.*

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*Mar. 31.
*Mar. 29.

DAME G. GRACE FAUCHER (PLAINTIFF) ..... APPELLANT;

AND

LA COMPAGNIE DU ST.-LOUIS (DEFENDANT) ..... RESPONDENT.

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

Appeal—Jurisdiction—Interlocutory injunction — Substantive right—Final judgment—Discretion—"Supreme Court Act," s. 2, s.s. i; s. 38.

A judgment refusing an interlocutory injunction, in which no substantive right is determined, is not a "final judgment" as that term is defined in sec. 2 (1) of the Supreme Court Act and therefore not appealable to this court.

Per Brodeur J.—Such a judgment is one in which the judge of first instance exercises his discretionary powers and is non-appealable by sect. 38 of the Act.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec, affirming the judgment of the Superior Court, at Quebec and dismissing the appellant's petition for an interlocutory order of injunction.

The appellant leased from the respondent an hotel property built on a lot bearing cadastral number 2609 mentioned in the lease. The whole heating apparatus of the hotel was installed under a wooden

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

shed, on the adjoining lot No. 2608 which was not mentioned in the lease. Later, the respondent leased lot 2608 to Tanguay & Co. where they intended to build an automobile garage. In the course of the construction, Tanguay & Co. began the demolition of the wooden shed without interfering with the heating apparatus. The appellant, alleging that the lease of the hotel implicitly included the shed, applied for the issue of an interlocutory injunction.

The application was refused by the Superior Court, which judgment was affirmed by the Court of King's Bench. On appeal to the Supreme Court of Canada, the respondent moved to quash for want of jurisdiction.

A. C. Hill for the motion: The judgment appealed from is not "a final judgment."

St. Laurent K.C. and *Alleyn Taschereau, K.C., contra:* The judgment involves a "determination" of a "substantive right" of the appellant, as one of the *considérants* of the judgment of the Superior Court held that the shed had not been leased to the appellant.

THE CHIEF JUSTICE.—I am of the opinion that the motion to quash should be granted with costs.

IDINGTON J.—I am of the opinion that the motion to quash should be granted with costs.

DUFF J.—The judgment appealed from in its essence determines only that the plaintiff was not entitled to an interlocutory injunction in the circumstances. There has been no determination of any substantive right in whole or in part in controversy in the action, a con-

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Duff J.

dition which is necessary to bring the judgment within the definition of "final judgment" to be found in clauses (*e*) and (*i*) of sec. 2 of the "Supreme Court Act" relied upon by the appellant.

ANGLIN J.—The plaintiff seeks to appeal from the judgment of the Court of King's Bench affirming a judgment of the Superior Court refusing an interlocutory injunction. The defendant moves to quash the appeal on the ground, *inter alia*, that the judgment appealed from is not a "final judgment," within the meaning of that term as used in the "Supreme Court Act." In my opinion this objection to our jurisdiction is well taken.

All that has been "determined" is that for certain reasons a case was not made which entitled the plaintiff to the remedy of an interlocutory injunction. It is urged that amongst the reasons assigned there is at least one which involves an adverse determination of the cause of action itself. But, as I apprehend the practice of the courts of the province of Quebec, any reasons affecting the merits of the cause of action which may have influenced the court in passing upon this interlocutory application are open for reconsideration at the trial of the action. Notwithstanding that the application for an interlocutory injunction under Quebec procedure is an independent proceeding by way of petition, and possibly may be made before and without the issue of a writ in the action to which it is incidental, *Allard* v. *Cloutier* (1), the disposition of it, in my opinion, cannot be said to involve a "determination" of any "substantive right" of the plaintiff, within the definition of "final judgment" in clause (i) of s. 2 of the "Supreme Court Act."

(1) [1919] Q.R. 29 K.B. 565.

BRODEUR J.—L'intimée, La compagnie du St. Louis, fait motion pour casser l'appel faute de juridiction.

Le jugement a *quo* a été rendu sur une requête pour injonction interlocutoire. Il y aurait eu d'abord une première ordonnance d'injonction intérimaire émise le 26 mars 1921 par l'honorable juge Malouin; mais cette ordonnance a été, sur exception à la forme, déclarée nulle et non avenue par l'honorable juge-en-chef, Sir François Lemieux, le 4 avril 1921, parce que l'exécution de cette ordonnance n'avait pas été accompagnée ou suivie d'un bref d'assignation.

L'honorable juge-en-chef avait basé sa décision sur le jugement de la Cour du Banc du Roi dans une cause de *Allard* v. *Cloutier* (1). Dans cette cause, la cour d'appel, afin de mettre fin aux divergences d'opinion qui s'étaient manifestées au sujet de la procédure sur les injonctions demandées lors de l'émission du bref d'assignation, avait déclaré qu'une requête pour injonction interlocutoire pouvait être présentée avant l'émission du bref et que si le juge refusait de l'accorder, alors il pouvait y avoir appel de sa décision avant l'émission du bref d'assignation.

L'appelante, nous dit M. St. Laurent, aurait alors tenté de suivre les règles indiquées par la cour d'appel. Elle aurait donné avis, en avril 1921, qu'une requête pour émission d'une bref d'injonction interlocutoire serait présentée à un juge de la cour supérieure. L'honorable juge Letellier, après avoir entendu les parties, renvoyait la requête le 26 avril 1921. Appel de cette dernière décision fut porté à la cour du Banc du Roi qui a confirmé la décision de M. le juge Letellier. Et ce jugement de la Cour du Banc du Roi est maintenant porté devant cette cour.

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Brodeur J.

Nous avons à décider si nous avons juridiction pour entendre cette cause.

Il s'agit, comme on le voit, d'une requête pour injonction interlocutoire qui devrait être émise avec le bref d'injonction.

Ces requêtes, nous dit l'article 957 C.P.C., peuvent s'accorder lorsqu'il appert: 1. que le demandeur a droit au remède demandé et que ce remède consiste en tout ou en partie à empêcher la commission d'une opération quelconque; 2. lorsque la commission d'une opération causerait un tort irréparable.

Les requêtes accordées pour le premier motif préjugent bien souvent le procès, car elles peuvent adjuger sur le droit lui-même du demandeur. Mais les décisions qui interviennent sur ces requêtes peuvent être revisées par le jugement final. Dans le cas actuel, l'honorable juge Letellier n'a exercé qu'une discrétion; or en vertu de la section 38 de l'"Acte de la Cour Suprême," il n'y a pas d'appel des ordonnances où le juge a exercé un pouvoir discrétionnaire. Il est vrai que le juge, en rédigeant son jugement, y a inséré certains considérants qui peuvent préjuger quelques-uns des points en litige. Mais ce n'est qu'un jugement interlocutoire; et l'on sait que les interlocutoires ne lient pas la cour qui décide définitivement la cause et qu'ils sont susceptibles d'être revisés par le jugement final, après audition de la preuve et des parties.

Pour ces raisons, l'appel doit être cassé et la motion de l'intimée doit être accordée avec dépens.

MIGNAULT J.—Je concours dans le jugement cassant l'appel pour défaut de compétence de cette cour. Cependant je ne veux pas dire qu'en aucun cas, il ne peut y avoir appel à cette cour d'un jugement refusant

une injonction interlocutoire; car le refus de cette injonction peut quelquefois être tellement préjudiciable à la partie qui l'a demandée qu'on pourrait dire que le jugement rentrerait dans la catégorie des jugements que la loi de la cour suprême considère comme définitifs. Telle n'est pas l'espèce que nous avons devant nous, et le jugement final pourra facilement remédier à tout inconvénient que le refus de l'injonction interlocutoire pourra causer à la demanderesse, en supposant qu'il y ait réellement préjudice sérieux.

Motion granted with costs.

1921
Oct. 17.
1922
Feb. 7.

WINNIPEG ELECTRIC RAILWAY COMPANY (DEFENDANT). } APPELLANT;

AND

LAURA AITKEN (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Limitation of action—Railway—Negligence—Carriage of passenger—Contract—Manitoba Railway Act R.S.M. [1913] c. 168 s. 116.

By sec. 116 of The Manitoba Railway Act "all suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained or, if there be continuation of damages, then within twelve months next after the doing or committing of such damage ceases, and not afterwards."

Held, reversing the judgment of the Court of Appeal (31 Man. R. 74) Idington and Cassels JJ. dissenting, that the limitation prescribed applies in case of an action brought by a railway passenger claiming indemnity for injury so sustained. *Ryckman* v. *Hamilton, etc., Rly. Co.*, (10 Ont. L.R. 419) considered.

Per Cassels J. The words "or if there be continuation of damages, etc." indicate that the section was not intended to apply to the case of a passenger injured by negligence of the railway as a common carrier.

APPEAL from a decision of the Court of Appeal for Manitoba (1) reversing the judgment at the trial in favour of the defendant.

The only question submitted on the appeal is whether or not the statutory provision quoted in the head-note applies to the case of injury to a passenger. The

PRESENT.—Idington, Duff, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

(1) 31 Man. R. 74.

contention for the respondent is that the action was one claiming damages for breach of contract to carry safely to which the limitation in the Railway Act does not apply. The Court of Appeal so held reversing the judgment for the railway company at the trial.

Tilley K.C. for the appellant.—The earlier decisions in Ontario and other provinces that the limitation clause does not apply to the case of a passenger carried for here are no longer of authority. *Greer* v. *Canadian Pacific Ry. Co.* (1): *Canadian Northern Ry. Co.* v. *Pszenicnzy* (2): and see *Lyles* v. *Southend-on-Sea* (3). The action is based on negligence and its character cannot be changed by claiming for breach of contract.

Chrysler K.C. for the respondent, relied on the Ontario decisions and *Sayers* v. *British Columbia Electric Ry. Co.* (4) approved by Duff and Anglin JJ. in *British Columbia Electric Ry. Co.* v. *Turner* (5).

IDINGTON J. (dissenting).—The respondent was injured whilst a passenger on the appellant's railway by reason of one of the company's cars running behind that in which she was being carried negligently colliding with said car.

The appellant's only defence, so far as this appeal is concerned, is rested upon the following statutory limitation, being section 116 of the Manitoba Railway Act:—

> All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained, or if there be continuation of damages then within twelve

(1) 51 Can. S.C.R. 338.
(2) 54 Can. S.C.R. 36.
(3) [1905] 2 K.B. 1.
(4) 12 B.C. Rep. 102.
(5) 49 Can. S.C.R. 470.

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Idington J.

months next after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the special Act.

I think this, as all statutes of limitation, must be held inoperative as a defence unless the language used is so clearly expressed as to leave no doubt of its meaning and that the intention clearly appears to have been to bar the action in which its limitation is so invoked.

Certainly if we have regard to the judicial opinions expressed in this case and many others upon statutes similarly framed, there must exist the gravest doubt of its ever having been intended by the legislature to take away the right of such persons as respondent resting a claim upon a breach of contract.

I need not labour the question for I cannot hope to succeed better than many others in numerous other cases which turned upon the like legislative expressions.

Many of these cases are cited in the opinions of the learned judges below.

And yet we are asked, by way of escape therefrom, to apply the decisions reached upon the Public Protection Act, 1893, far more clearly expressed than the very ambiguous section above quoted.

I think this appeal should be dismissed with costs.

DUFF J.—The respondent's action against the appellant was brought to recover damages for negligence resulting in a collision between two of the appellant's cars in which the respondent, who was travelling as a passenger in one of them, was injured; and the sole question raised by the appeal concerns the construction of section 116 of the Manitoba Railway Act. That section is in these terms:—

All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained, or if there be continuation of damages then within twelve months next after the doing or committing of such damage ceases, and not afterwards: and the defendants may plead the general issue and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the special Act.

It is not disputed that the negligence to which the respondent's injuries are to be ascribed was negligence in the working of the appellant company's railway; and the point for examination does not touch the meaning of the phrase "operation of the railway" the application of which, in cases like the present, would seem to present no difficulty but turns upon the view to be taken of the general scope and purview of the section and the precise point for inquiry is: Does this section embrace within its purview an action brought by a passenger for default in the company's duties arising out of a contract of carriage or from the aceptance of the passenger for carriage?

This section appears to have been taken from the first sub-section of section 242 of the Dominion Railway Act of 1903. That section was a modification of an earlier section in which the class of proceedings affected by it was described in these words:

All actions or suits for indemnity for any damages or injuries sustained by reason of the railway,

and these words have been the subject of examination in a series of cases in the courts of Ontario beginning at least as early as 1865. These decisions were subjected to an exhaustive scrutiny in a very able judgment by Osler J. A., speaking for the Ontario

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Court of Appeal in *Ryckman* v. *Hamilton, etc. Ry. Co.* (1) at pages 426 *et seq.*, from which the conclusion was deduced that the class of proceedings contemplated did not include an action based on a railway company's breach of its common law duties founded on its undertaking to carry safely. The decisions were, broadly speaking, based on the view that the protection afforded by the limitation clause was intended to be available only where proceedings were taken against the company for something done in exercise or professed exercise of the special statutory powers given to the company for the purpose of its railway undertaking and was not intended to confer a privilege in respect of proceedings arising out of contracts and relations entered into by the company in the ordinary course of its business as carrier. It is difficult, no doubt, to extract from the judgments a precise definition of the scope of the provision, but one limiting rule was clearly established, and that is that the section did not apply to actions arising out of negligence in the carrying of passengers and some warrant for this way of construing the statute was supposed to be found in the last clause of the section which provided that the

> defendants * * * may prove that the same was done in pursuance of and by authority of this Act or of the special Act.

Perhaps the best summary of these authorities is to be found in the judgment of Boyd C. in *Traill* v. *Niagara St. Catharines and Toronto Rly. Co.* (2) at page 2, and it is in these words:—

> The prescription or limitation clauses of the Railway Act have been uniformly held to apply to actions for damages caused or occasioned in the exercise of powers given by the Legislature to the company for enabling them to construct and maintain the line—but not to

(1) [1905] 10 Ont. L.R. 419. (2) [1916] 38 Ont. L.R. 1.

actions arising out of negligence in the carrying of passengers. This was laid down by the Court of Queen's Bench in 1856, *Roberts* v. *Great Western R. W. Co.* (1). The reason of this rule was well defined by Richards J. soon afterwards in *Auger* v. *Ontario Simcoe and Huron Ry. Co.* (2): "The limitation clauses do not apply when the companies are carrying on the business of common carriers * * * (in the) use (of) locomotives, etc., for the conveyance of passengers and goods, etc., but the liability arises in those cases from the breach of contract, arising from their implied undertaking to carry safely, and to take proper care of the goods, etc." These decisions were accepted as rightly stating the law in *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric Ry. Co.* (3).

The earlier section passed upon in these cases was to be found in virtually identical form in the railway legislation of most of the provinces as well as that of the Dominion and in 1903 as already mentioned that section was replaced in the Consolidation of the Dominion Railway Acts by a section consisting of two sub-sections, the first of which, as already mentioned, is identical with section 116 of the Manitoba Railway Act quoted above, and the second of which was in these words:—

(2) In any such action or suit the defendants may plead the general issue, and may give this Act and the special matter in evidence at the trial, and may prove that the said damages or injury alleged were done in pursuance of and by the authority of this Act.

This substituted section was held by Boyd C. in the decision above cited to be governed in its construction by the course of decision upon the earlier section; and the field of its application was held on that ground as well as by reason of the express language of sub-section (2) to exclude an action by a passenger for the negligent working of the railway. Section 116 of the Manitoba Act contains no provision corresponding to sub-section (2) but it is argued that the considerations to which

(1) 13 U.C.Q.B. 615. (2) [1859] 9 U.C.C.P. 164, 169.
(3) 10 Ont. L.R. 419, 428.

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effect was given in the construction of the earlier section equally apply to section 116 and that the change in language made for the first time in 1903 is not sufficiently marked to indicate an intention on the part of the legislature to bring about a radical change in the law.

The existing section has been the subject of consideration more than once in this court. One of the decisions only has, I think, any relevancy to the present case but that decision does, I think, relieve me from the responsibility of expressing an independent opinion as to the effect of it. I refer to *Canadian Northern Ry. Co.* v. *Pszenicnzy* (1). That was an action brought by an employee of the C. N. Rly. Co. under the Employers' Liability Act of Manitoba, R.S.M. C. 13, sec. 61, for negligence which was held to be the cause of injuries suffered by him while engaged in unloading rails from a car unsuitably equipped for the protection of employees so occupied. Section 306 of the Dominion Railway Act was held to apply. The earlier decisions were relied upon by the plaintiff but it was decided that the section is available in such an action.

This decision necessarily involved the proposition that the principle of the restriction established by the earlier decisions could have no application to section 306. I am not aware of any among the earlier decisions which deal with the case of an action by an employee against the railway company for default in its duty arising out of the contract of employment but every argument which could be adduced to sustain the exclusion of actions by passengers for default in respect of duties arising

(1) [1916] 54 Can. S.C.R. 36.

out of the acceptance of a passenger for carriage applies with, if anything, increased force to such an action by an employee. The rights conferred by the Employers' Liability Act are, to borrow a phrase used by Lord Haldane in delivering the judgment of the Judicial Committee in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1), at page 191, "the result of statutory conditions of the contract of employment," that is to say they are rights attached to the relation of the employer and employee by force of the general law governing the reciprocal rights and duties appertaining to that relation and in no way depend upon the special powers and privileges conferred upon the company by statute for the purposes of its railway undertaking. I am unable to perceive any principle upon which a distinction could rest; by which the first clause of section 306 could properly be held at once to include within its ambit such an action by an employee and to exclude from it such an action as that out of which the present appeal arises. It is not unimportant that the course of decision upon a statutory provision so widely in force should retain some perceptible degree of logical coherency.

The appeal must, in my opinion, be allowed and the action dismissed with costs.

ANGLIN J.—The plaintiff was injured when about to alight on Main Street in the City of Winnipeg, from a car of the defendant company in which she had been carried as a passenger. She had paid fare. Her injury was caused by another car also operated by the defendant company running into that in which she

(1) [1920] A. C. 184.

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was, and the collision is now conceded to have been ascribable to negligence in the running of the cars. The action was begun a few days after the expiry of a year from the time when the injury was sustained and the sole question for determination here is whether it is barred by section 116 of the Manitoba Railway Act (incorporated in the defendant company's special Act, 55 Vict. (Man.) c. 56, by s. 32), which reads as follows:—

> All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained, or if there be continuation of damages then within twelve months next after the doing or committing of such damage ceases, and not afterwards; and the defendant may plead the general issue and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the special Act.

Was the plaintiff's injury sustained by reason of the operation of the defendant's railway? This question would seem to admit of but one answer. If the running of the cars is not "operation of the railway," I find it difficult to conceive what would be. Viscount Haldane in delivering the judgment of the Judicial Committee in *Canadian Nor. Ry. Co.* v. *Robinson* (1), referring to the phrase "operation of the railway," found in a similar collocation in section 242 of the Railway Act of Canada of 1903 (s. 306 of c. 37 of the R.S.C. 1906), said at page 745:—

> Such operation seems to signify simply the process of working the railway as constructed.

In doing the act or acts that resulted in the collision in question the defendants were "working the railway as constructed," negligently, it is true, but with the intention of carrying it on in good faith.

(1) [1911] A. C. 739.

The primary rule of statutory construction is that, unless to do so would lead to absurdity, repugnancy or inconsistency with the rest of the statute the grammatical and ordinary sense of the words should prevail. The language of section 116 of the Manitoba Act is precise and unambiguous. No absurdity, repugnancy or inconsistency can arise from giving to it its natural and ordinary sense. On the other hand to hold that the case of a man in the street who is injured through negligence in running the cars falls within the purview of the section, but that the case of a passenger who sustains injury from the like cause does not, seems to me to involve inconsistency and repugnancy to common sense as well. Unless compelled by authority to hold otherwise, I should have no doubt that the plaintiff's injury was sustained "by reason of the operation of the defendant's railway" and that her action is therefore barred by the Manitoba statute above quoted.

It is said to be established by a long series of decisions, however, that claims for personal injuries sustained by passengers because they do not arise out of the work of construction or maintenance of the railway, are not within this limitation provision; and it is also urged that the plaintiff has based her claim on a breach of the defendants' contract to carry her with due care rather than upon tort and that her action therefore falls within a line of cases in which similar statutory provisions have been held inapplicable to claims for breach of contract.

The only paragraph in the statement of claim in which a contract is alluded to reads as follows:—

3. On or about the 6th day of February, A.D. 1919, the plaintiff was received by the defendant as a passenger on its railway, having

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paid her fare for that purpose, to be by it safely carried in a street railway car going from Saint Boniface aforesaid into Winnipeg aforesaid and north along Main Street in the said City of Winnipeg and delivered at her destination.

The fourth paragraph alleges negligence causing the collision; and that is the substantial issue in the action. The prayer is merely for the recovery of stated damages. All the allegations in the third paragraph might with equal propriety be made in an action for tort as in one for breach of contract. Suing in tort the payment of fare would properly be alleged in order to exclude the idea that the plaintiff had been a trespasser or had been carried gratuitously—to establish the degree of care which the defendant owed her; that she was received as a passenger and was to be carried to a destination would be averred to shew the duration of the defendant's duty as a carrier. Neither by contract nor under its obligation as a carrier was the defendant company bound to carry the plaintiff safely, as the statement of claim alleges. Its duty was to carry her with due care, or, as put by Mr. Justice Dennistoun, citing *Kelly* v. *Metropolitan Ry. Co.* (1),

> safely as far as reasonable care and forethought can attain that end.

Breach of the duty to take such care is negligence and it is that negligence that it was essential the plaintiff should establish in order to maintain her action, in whatever form it was taken. I am not at all satisfied that the form of the plaintiff's action is for breach of contract rather than in tort.

But modern English authority seems to establish that in determining the applicability of a section such as that before us to the case of a person suing a rail-

(1) [1895] 1 Q.B. 944, 946.

way company to recover damages for personal injuries sustained while he was a passenger the distinction as to the form in which the action is launched is not material. *Lyles* v. *Southend-on-Sea Corporation* (1), was such a case. The plaintiff had paid his fare and taken a ticket in the ordinary way and without any special conditions for carriage on a tramway operated by the defendants. He was injured while a passenger, as he alleged, through the fault of the defendants' employees. The question at issue was, whether the defendant was entitled to the benefit of a limitation provision. The existence of a contract, evidenced by the facts that the plaintiff had paid fare and taken a ticket, was relied upon as taking the case out of the statute. The statute invoked (s. 1 of the Public Authorities Protection Act, 1893) bars an action

> against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority * * * unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

The English Court of Appeal was unanimously of the opinion that

> the action was in substance founded on a breach by the defendants of their duty as a public authority engaged in the carriage of passengers.

Vaughan-Williams L. J. says at page 19:—

> The case of *Taylor* v. *Manchester, &c., Ry. Co.* (2), seems to shew that, even in a case in which a ticket is issued to the passenger, and the passenger through the negligence of the railway company's servants sustains personal injuries, the cause of action arising would in substance, although it might not in form, be founded upon tort and not upon contract.

(1) [1905] 2 K.B. 1.

(2) [1895] 1 Q.B. 134.

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If that decision is applicable to a case arising under the Public Authorities Protection Act, 1893, the result would be that the present action must be treated as one in which the real substantial complaint is not for a breach of contract, but for a tort. *Taylor* v. *Manchester, &c., Ry. Co.* (1), was a decision under the County Courts Act, 1888, the question being whether the costs were to be allowed as in an action of contract or as in an action of tort. But I think the decision is applicable to a case in which the question is whether, in regard to the Public Authorities Protection Act, 1893, an action founded on a breach of the duty of the defendants towards a passenger to whom a ticket has been issued is to be regarded as an action for breach of contract or as an action in respect of a tort; and the result is that the present action fails because it was not brought within the six months limited by the Public Authorities Protection Act, 1893.

The result might have been different if the ticket had had upon its face special conditions, and I do not wish to conclude the question of the obligation of a railway company as common carriers even in cases in which there are no special conditions in the receipt given to the consignor.

Romer L. J. says, at page 20:—

The fact that as a matter of pleading the plaintiff's case against the defendant authority might be stated either as one founded on breach of implied contract, or as one founded on tort, does not appear to me to shew that the words of s. 1 of the Act ought not to be held to apply. The question whether the Act does or does not apply to a particular action or proceeding depends upon what is the substance of the action or proceeding. In the present case the substance of the action is damage to the plaintiff by neglect on the part of the defendant public authority in duly performing its public duty or authority of carrying passengers by its tramway. There was no special or particular contract between the defendant authority and the plaintiff in reference to his journey by the tramway in the course of which the accident occurred. The plaintiff was using the tramway as one of the ordinary public, availing himself in the ordinary way of the general obligation cast upon the defendants to work the tramway and to carry passengers by it.

Stirling L. J., says, at page 21:—

(3) The plaintiff's cause of action does not depend on contract, but arises out of a breach of the duty to carry the plaintiff safely cast upon the defendant corporation by the fact of his being taken as a passenger. *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (2); *Austin* v. *Great Western Ry. Co.* (3); *Harris* v. *Perry & Co.* (4).

(1) [1895] 1 Q.B. 134.
(2) [1851] 11 C.B. 655.
(3) L.R. 2 Q.B. 442.
(4) [1903] 2 K.B. 219.

While the right of the defendant municipality to invoke section 1 of the Public Authorities Protection Act was undoubtedly upheld on the ground that the carriage of tramway traffic had been imposed on it by a statutory authority, this case seems clearly to support the proposition that where the plaintiff's claim rests on negligence of the defendant in the capacity in which it is entitled to the benefit of the statutory limitation, that limitation applies notwithstanding that the plaintiff may be entitled to claim, and may have averred, that such negligence also constituted a breach of the defendant's contract with him. Indeed that this is the position is distinctly recognized by Osler J. A., delivering the judgment of the Court of Appeal in *Ryckman's Case* (1), at pages 431-2, where *Taylor* v. *Manchester, &c., Ry. Co.* (2), is cited as authority for it. The learned judge said:—

> Whether the party was a paying or a gratuitous passenger the substance of the action is a tort for (or) a misfeasance, an act of positive negligence on the defendants' part * * . Even where there was a contract of carriage the plaintiff might have declared simply as for a breach of duty to carry safely, and the application of the limitation clause cannot depend upon the form in which the plaintiff has chosen to bring his action if the facts shew that it arises out of the defendants' breach of duty as carriers.

See too *Kelly* v. *Metropolitan Ry. Co.* (3).

There is not a little to be said in support of the view, if it were material here, that under clause 14 of by-law 543 of the City of Winnipeg, confirmed by 55 Vict. (M.), C. 56, sec. 34, a statutory obligation to operate a street railway service on Main Street was imposed on the defendants much the same as that

(1) 10 Ont. L.R. 419. (2) [1895] 1 Q.B. 134, 138.
(3) [1895] 1 Q.B. 944.

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imposed on the municipality in *Lyles' Case* (1). But my opinion in this case in no wise depends on the company being under any such obligation to operate its railway.

Although sub-section (3) of section 306 of the Dominion Railway Act (R.S.C. 1906, C. 47; now 9 & 10 Geo. V., C. 68, sec. 391), which expressly excepts from the operation of that section

> any action brought upon any breach of contract express or implied for or relating to the carriage of any traffic,

(including the carriage of passengers, s.s. 31 of s. 2), has been said merely to embody an interpretation put upon the limitation clause of the earlier railway Acts and well established by authority; *Canadian Northern Ry. Co.* v. *Anderson* (2); *Canadian Northern Ry. Co.* v. *Robinson* (3); it may possibly go further and exempt from the operation of the section the case, which would otherwise be within sub-section (1), of personal injury to a passenger, when the claim is based on his contractual relations with the railway company, as was held in *Traill* v. *Niagara Ry. Co.* (4). That is a question not now before us and I prefer to reserve it for further consideration, notwithstanding what I said in *Robinson's Case* (3). But under the provision of the Manitoba Act here invoked, from which the express exception made by sub-section 3 of the Dominion section is omitted, I am convinced that although the plaintiff's claim be in form for breach of contract, that circumstance should not be held to take the case out of its operation.

(1) [1905] 2 K.B. 1.
(2) [1911] 45 Can. S.C.R. 355, 368.
(3) 43 Can. S.C.R. 387, 408.
(4) 38 Ont. L.R.1.

But are claims for personal injuries sustained by passengers caused by negligence, however framed, within the purview of the Manitoba statute? I find nothing in its language to exclude them. Two suggestions made in the course of the argument should be noticed here. They were (a) that the words "if there is continuation of damage, etc.," would be inapt in such a case and their presence indicates that the section does not apply to such claims: (b) that the second member of section 116 places a restriction upon the generality of the preceding member which would exclude from it such claims for personal injuries.

(a) As to the former suggestion, I fail to appreciate its force. The legislature has no doubt provided for cases where there is "continuation of damages," but not exclusively. It has equally clearly provided for cases, such as that at bar, where the entire damage is sustained when the injury is inflicted. There are other classes of claims within the section to some of which the provision for continuing damage may be appropriate. Moreover a similar provision contained in the limitation section of the Public Authorities Protection Act, 1893, dealt with in *Lyles' Case* (1), was not held to render the limitation inapplicable to the plaintiff's claim for injuries sustained while a passenger.

(b) The second member of section 116 in my opinion has not any restrictive effect upon the earlier member of the section. It merely sanctions a plea of the general issue and the putting in evidence of the Railway Act and the special Act with the facts necessary to bring the case within the authority they confer. In the revision of the Ontario Railway Act 1906 (6 Edw. VII, c. 30) it was wholly omitted from the limitation section

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(no. 223), presumably in pursuance of a modern Ontario policy to do away with the plea of "not guilty by statute," Holmested Jud. Act, 4 ed., p. 605. Neither the authority of the Railway Act nor that of the special Act affords an answer to claims founded on negligence, and it is for such claims that the protection of the limitation provision is required. It is true that in some of the earlier cases decided when the section dealt with claims for injuries received "by reason of the railway," the view was taken that it applied only to actions for damages occasioned in the exercise, or intended exercise, of powers given for the construction or maintenance of the railway. *Roberts* v. *Great Western Ry. Co.* (1) approved in *Ryckman's Case* (2). I cannot but think that the words "the construction or operation of" were inserted to prevent such a narrow interpretation being given to the section in the future and to ensure that its application should extend to cases of injury arising from the operation or running of the railway as well as to those due to works of construction or maintenance. Parliament and the legislatures should be credited with having had some purpose in making the change. I think that purpose was to put it beyond doubt that the limitation is applicable to all claims for injuries and damages resting on negligence in working the railway. There can of course be no justification for refusing to give effect to the intention with which the law was changed. *The Ydun* (3), at page 241. In *Greer* v. *Canadian Pacific Ry. Co.* (4), my brother Duff was of the opinion that "operation of the railway" includes acts other than those done in the discharge of some duty imposed by statute. With Mr. Justice Dennistoun

(1) 13 U.C.Q.B. 615.
(2) 10 Ont.L.R. 419, 430.
(3) [1899] P. 236.
(4) [1915] 51 Can.S.C.R. 338, 34 .

I adopt the view of Osler J. A., in *Ryckman* v. *Hamilton etc., Ry. Co.* (1), at p. 426, that the words "may prove that the same was done in pursuance of and by authority of this Act and the special Act," mean no more than "may prove that the damage or injury was sustained by reason of the construction or operation of the railway," as in the earlier part of the section.

But, if the limitation should be held to apply only to claims for damage or injury sustained by reason of acts

done in pursuance of and by authority of this Act and the special Act,

I would find it not a little difficult to conceive the running of tramcars on the public streets in the City of Winnipeg to be aught else than something so done. The special Acts in this case are the statutes, 55 Vic., c. 56 (Man.), incorporating the defendant company and ratifying by-law no. 543 of the City of Winnipeg, and 58 & 59 Vic., c. 54.

It is said, however, that in deference to a long series of decisions claims for personal injuries to passengers should be held to be outside the purview of section 116 of the Manitoba Railway Act as it now stands. The two cases chiefly relied on are *Ryckman* v. *Toronto, Hamilton & Grimsby Ry. Co.* (1), in which the Ontario decisions up to that time are reviewed, and *Sayers* v. *British Columbia Electric Ry. Co.* (2), a decision of the full court of British Columbia. In each of these cases it was held that a claim for personal injury sustained while a passenger was not within the limitation provision—in the former section 42 of c. 207 of the Revised Statutes of Ontario, 1897; in the latter section 60 of c. 55 of the statutes of British Columbia for the year 1896. Of course neither of these decisions binds us.

(1) 10 Ont. L. R. 419. (2) [1906] 12 B.C. Rep. 102.

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In the Ontario case Osler J. A., delivering the judgment of the Court of Appeal, says, at page 427:—

> In the present state of the authorities it is to be desired, that a clear ruling should be given upon the subject by the Supreme Court.

In the British Columbia case Martin J. said, at page 111:

> The question is not at all free from doubt and it is desirable in the public interest that it should be set at rest either by the legislature or the court of last resort.

It was not until 1903 that the words, "by reason of the railway," of the earlier limitation sections were replaced in the Dominion Railway Act by the words "by reason of the construction or operation of the railway." The corresponding change was effected in provincial railway Acts only some years later. In Manitoba the change was made in 1907 (6 & 7 Edw. VII, c. 36, sec. 3); in Ontario in 1906, (6 Edw. VII, c. 30, sec. 233). The limitation in the Ontario statute considered in *Ryckman's Case* (1), in 1905, dealt with claims for injury or damage sustained "by reason of the railway," and the earlier Ontario and Upper Canada decisions there discussed were based on statutes couched in the like terms. In the *Sayers Case* (2), where the defendant company's Act of Incorporation required that

> all actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company shall be commenced within six months,

it was held that the words "by reason, *et seq.*" should be read *separatim* as describing different branches of the company's undertaking. The words relating to the carrying of the tramway traffic were held to be "by reason of the tramway or railway," and the

(1) 10 Ont. L.R. 419. (2) 12 B.C. Rep. 102.

court, following the decision in *Ryckman's Case* (1), held the section not applicable to an action for injury sustained by a passenger. A like view had been expressed by Gwynne J. in this court in *North Shore Ry. Co.* v. *McWillie* (2), at page 514.

In *British Columbia Electric Ry. Co.* v. *Gentile* (3), however, which did not come to this court, Lord Dunedin in delivering the judgments of their Lordships said, at page 1039, in referring to s. 60 of the statute dealt with in the *Sayers Case* (4), which had been cited in argument,—

> Their Lordships assume without deciding that the words "operations of the company" include the negligent running of cars.

In *Greer* v. *Canadian Pacific Ry. Co.* (5), the present Chief Justice of Ontario said, at page 107:

> It is no doubt well settled that the limitation section (i.e., s. 306 of the Dominion Railway Act of 1906) does not apply to a cause of action for a breach of the duty of a railway company as a common carrier; and all that was decided in that case (*Ryckman's Case*) (1), was that the action was for breach of the duty of the defendant as a common carrier to carry safely; and that the limitation section did not therefore apply.

With deference, there seems to be some slight confusion here of the responsibility of a railway company as a carrier of passengers with its responsibility as a common carrier of freight. The inapplicability of the limitation section of the Dominion Railway Act as it stood before 1903, and of the corresponding section of the Ontario Railway Act as it stood when *Ryckman's Case* (1) was decided, to claims for personal injuries sustained by passengers may perhaps be

(1) 10 Ont. L.R. 419.
(2) 17 Can. S.C.R. 511.
(3) [1914] A.C. 1034.
(4) 12 B.C. Rep. 102.
(5) 32 Ont. L. R. 104.

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regarded as having been "well settled" after that decision for the purposes of the Appellate Divisional Court, on which it was of course binding. But I doubt if it could in this court or the Privy Council properly be said to be "well settled" even on the plea that a long series of uniform decisions in the lower courts, though erroneous, should not be overruled.

In *Roberts* v. *Great Western Ry. Co.* (1), it was held, Robinson C. J. presiding, that the limitation section (16 V., c. 99, s. 10) did not apply to the case of a passenger injured by the defendant's negligence in running the train. The view which prevailed was that the application of the section was confined to actions for damages occasioned in the exercise of powers of construction or maintenance of the railway. The court was influenced by the terms of the statute, 7 Wm. IV, c. 14, s. 19, which it said "expressed very clearly to what causes of action the limitation of actions was meant to extend." That section read as follows:—

> XIX. And be it further enacted by the authority aforesaid, That when it shall not be otherwise provided in any Act to be hereafter passed, for any of the purposes aforesaid, and whereby powers and authority are given to be exercised over the property, real or personal, or over the person of any individual, for the promoting and securing the objects intended to be advanced by the corporation created by any such Act, then if any action shall be brought against any person or persons, for anything done in pursuance, or in execution, of the powers and authorities given by such Act, such action shall be commenced within six calendar months next after the fact committed; or in case there shall be a continuation of damage, then within six calendar months after the doing or committing such damage shall cease, and not afterwards; and the defendant or defendants in such action may plead the general issue, and give such Act, and the special matter, in evidence at the trial.

(1) 13 U.C.Q.B. 615.

This differs *toto coelo* from the limitation section in the Railway Clauses Consolidation Act, 14 & 15 V. (C.) c. 51, s. 20, the prototype of the section found in the Canadian Railway Acts (C.S.C. 1859, c. 66, s. 83, and later statutes) and resembles the limitation provisions considered in *Palmer* v. *Grand Junction Ry. Co.* (1), and *Carpue* v. *London and Brighton Ry. Co.* (2), which I shall presently discuss briefly.

With profound respect I am unable to accept the view that owing to some historical connection the scope of such general words as "all suits for indemnity for any damage or injury sustained by reason of the railway" found in the Railway Acts and in 16 Vic., c. 99, s. 10 should have been restricted to that of the limitation provision of an earlier statute expressly confined in its application to actions brought for something done in pursuance or in execution of extraordinary powers over private property and persons conferred on railways. Why should Parliament when it dropped the restrictive words of the earlier statute be presumed to have intended nevertheless to continue them in operation notwithstanding the generality of the language in which the later Act is couched? *Roberts' Case* and *Carpue's Case* (2), were the basic authorities for the decision in *Ryckman's Case* (3), and, notwithstanding the change made in the Dominion Railway Act in 1903 by the introduction of the words "the construction or operation of," the view which prevailed in *Ryckman's Case* (3), found favour with the present Chief Justice of this court, who dissented, in *Greer's Case* (4), at pages 341-2. Our courts have too often applied to Canadian statutes decisions of the English courts upon statutes considered to be

(1) [1839] 4 M. & W. 749.
(2) [1844] 5 Q.B. 747.
(3) 10 Ont. L.R. 419.
(4) 51 Can. S.C.R. 338.

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in pari materia but couched in different language, intended to apply to other circumstances and indeed sometimes dealing with a different subject-matter. See the judgment of Duff J., in *Toronto* v. *J. F. Brown Co.* (1), at pages 181 et seq.

In *May* v. *Ontario and Quebec Ry. Co.* (2), it was held by Wilson C. J., after reviewing the prior decisions, that any damage done through negligence upon a railway in the carriage of passengers and the like is damage done "by reason of the railway," and the same view was taken by O'Connor J. in *Conger* v. *The Grand Trunk Ry. Co.* (3). In these two actions, brought by persons who had been injured through alleged negligence of the respective railway companies while being transported as passengers, demurrers by the defendants were maintained.

In *Auger* v. *Ontario, Simcoe & Huron Ry. Co.* (4), a case of horses killed at a highway crossing, Richards J. expressed the opinion that while cases where the liability rested on breach of contract to carry safely (amongst which he included cases of injury to passengers) were excluded from the operation of the limitation section, the principle of the decisions so holding did not extend to actions for tort for an alleged wrong done by the railway in exercising its statutory powers.

In *Prendergast* v. *Grand Trunk Ry. Co.* (5), section 83 of the C.S.C. c. 66, was held not to apply to a case where fire on the right of way had negligently been allowed to spread to adjacent land on the ground that the injury charged was at common law, by one proprietor of land against another, and was quite independent of any user of the railway.

(1) [1917] 55 Can. S.C.R. 153.
(2) [1885] 10 O. R. 70.
(3) [1887] 13 O. R. 160.
(4) 9 U.C. C. P. 164, 169.
(5) [1866] 25 U.C.Q.B. 193.

In *Brown* v. *Brockville & Ottawa Ry. Co.* (1), a case of injury to the plaintiff and his wagon on a highway crossing, Robinson C. J., delivering the judgment of the court said:—

"By reason of the railway" is a very comprehensive expression.

Referring to the omission of the statutory signals on approaching a highway crossing he added

It may be said that the damage was not sustained by reason of the railway, but rather by reason of the manner in which the carriages on the railway were driven; but we think the substance and effect are the same in the one case as the other.

The other ground of complaint was defective construction of the crossing.

McCallum v. *Grand Trunk Ry. Co.* (2), was a case of fire, caused by sparks from a locomotive igniting material negligently left on the right of way, which spread to the plaintiff's land. Negligence in regard to the locomotive was not charged. The Court of Error and Appeal held that this was an injury sustained "by reason of the railway."

Draper C. J. A., said at page 532:—

The *causa causans* was therefore a part of the working of the railway, and the effect was "by reason of the railway," and we are not deciding whether the defendants were guilty of negligence in letting the fire extend in manner and form as the second count charges, but whether, admitting that the second count is proved, it is a count claiming indemnity for a damage or injury by reason of the railway.

Hagarty C. J. C. P. added:—

It was certainly by reason of the railway the injury was caused.

But he adds:

The case may be readily distinguished from others where some direct malfeasance has caused injury, or where contracts express or implied are broken.

(1) [1860] 20 U.C.Q.B. 202. (2) [1871] 31 U.C.Q.B. 527.

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In *Anderson* v. *Canadian Pacific Ry.* (1), the limitation section was held not to apply to an action for loss of baggage where there was a special contract limiting the defendant's liabilities.

In the comparatively recent case of *Traill* v. *St. Catherines and Toronto Ry. Co.* (2), Boyd C., held that an action for damages for personal injury to a passenger was not within section 306 of the Dominion Railway Act (1906). But the learned judge seems to have regarded the liability as one for breach of contract.

Until *Ryckman's Case* (3), was decided the law on the point under consideration can scarcely be said to have been "well settled" in Ontario, even under the section as it formerly stood.

In *Kelly* v. *Ottawa Street Ry. Co.* (4), the action, which was to recover damages for injuries sustained by a man in the street owing to the careless driving of one of the defendant's cars, was held by the Court of Appeal to be within the limitation section. If the plaintiff in the case at bar had reached the pavement before the moment of the collision so that her transportation as a passenger had terminated, her action would admittedly have been barred by the Manitoba limitation section. What ground of distinction, not purely whimsical, can be suggested for holding that, although in that case she would have been injured "by reason of the operation of the railway," she should be deemed not to have been so injured because she was still in the vestibule or on the steps of the car in course of leaving it when the collision occurred?

(1) [1889] 17 O. R. 747; 17 Ont. App. R. 480.
(2) 38 Ont. L. R. 1.
(3) 10 Ont. L.R. 419.
(4) [1879] 3 Ont. App. R. 616.

Although this court has in several cases considered the limitation section of the Dominion Railway Act since the introduction into it in 1903 of the words "the construction or operation of" (*Canadian Pacific Ry. Co.* v. *Robinson* (1); *Canadian Northern Ry. Co.* v. *Anderson* (2); *Greer* v. *Canadian Pacific Ry. Co.* (3), and *Canadian Northern Ry. Co.* v. *Pszenicnzy* (4)) the question whether an action for personal injury to a passenger due to negligent running of a train of cars of a railway company comes within the section as it now stands, i.e., whether such injuries are sustained by reason of the "operation of the railway," has never been passed upon here, although the principle of our decision in the case last cited may bear upon it. It is true that in *British Columbia Electric Ry. Co.* v. *Turner* (5), Mr. Justice Duff reiterated the opinion which had prevailed in the *Sayers Case* (6), and I also expressed an inclination to the view that such an action was not within the limitation clause. We were there dealing, however with a British Columbia statute, which read "by reason of the tramway or railway," and I was greatly influenced by the judgment in the *Ryckman Case* (7). I have already alluded to the dicta of Gwynne *J.* in the *McWillie Case* (8), and of Duff J. in *Greer's Case* (3).

Robinson's Case went to the Privy Council and is reported in [1911] A.C., at page 739. The claim there was based on the alleged wrongful cutting off of a spur line. It was held that such a refusal of facilities was not an act done in the operation of the railway

(1) 43 Can. S.C.R. 387.
(2) 45 Can. S.C.R. 355.
(3) 51 Can. S.C.R. 338.
(4) 54 Can. S.C.R. 36.
(5) [1814] 49 Can. S.C.R. 470.
(6) 12 B.C. Rep. 102.
(7) 10 Ont. L.R. 419.
(8) 17 Can. S.C.R. 511.

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and therefore did not fall within the limitation enacted by section 306 of the Dominion Railway Act of 1906. Referring to this section Lord Haldane in delivering the judgment of the Board said, at page 745:—

> In the opinion of their Lordships the special provisions do not apply. They are confined to damages or injury sustained by reason of the construction or operation of the railway. The words of exception under the sub-section relate to carriage of traffic and to tolls, and do not require any construction which extends the meaning of the phrase "operation of the railway." Such operation seems to signify the process of working the railway as constructed. The refusal or discontinuance of facilities for making a siding outside the railway as constructed and connecting it with the line does not appear to be an act done in the course of operating the railway itself.

There is no other case in the Privy Council, so far as I am aware, which has any direct bearing on the subject under consideration.

Two English cases, however, much relied on in Ryckman's case and in many of the other Canadian decisions, should be noticed.

In *Palmer* v. *The Grand Junction Ry. Co.* (1), the claim against the company was

> for not safely carrying and conveying some horses in their carriages on the railway whereby one was killed and others were injured.

The question discussed was whether the company was entitled to notice of action under section 214 of its incorporating Act, 3 & 4 Wm. IV., c. 34. That section in terms applied to actions, etc.,

> for anything done or omitted to be done in pursuance of the Act or in the execution of the powers or authorities, or any of the orders made, given, or directed in, by, or under the Act, unless fourteen days' previous notice in writing shall be given by the parties intending to commence or prosecute, etc.

(1) 4 M. & W. 749.

It was held that the company was not entitled to notice of action as for a thing done or omitted to be done in pursuance of the Act. Baron Parke in delivering the judgment of the court, said:—

> The defendants are sued as common carriers, who have received nine horses for the purpose of being taken to their journey's end, which they have not so delivered, but that on the contrary one has been killed, and three severely injured, in consequence of an accident on the railroad; the action is brought against them, therefore, in their character of common carriers; and it appears to me that a breach of their duty in that character is not a thing omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it.

The difference between the terms of s. 214 of the statute dealt with in the *Palmer Case* (1), and those of the Manitoba limitation provision is manifest. The one is expressly restricted to things done or omitted to be done pursuant to the authority or requirements of the statute or of orders made under it. The other is general in its terms applying to

> all suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway.

It is sought to restrict this general language to damages or injury occasioned by acts "done in pursuance of and by authority of this Act and the special Act" because in the same section provision is made for giving "this Act and the special Act * * * in evidence," under a plea of the general issue. As already stated I regard the inference of such a restriction upon the scope of the earlier member of the section as wholly unwarranted. In making it, to quote Mr. Justice Osler in *Ryckman's Case* (2):—

> judges * * * have refined and limited (the) construction and application

(1) 4 M. & W. 749.

(2) 10 Ont. L.R. 419, 427.

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of the section. The subject matter of the portion of section 116 which follows the semicolon is entirely distinct and different from that dealt with in the earlier part of the section. The two clauses were in my opinion very properly made to form separate sub-sections in the revision of the Dominion Railway Act in 1906 (c. 37, s. 306) and the like arrangement is continued in the new Railway Act of 1919, s. 391 of c. 68 of 9 & 10 Geo. V. See, too, R.S.O. 1914, c.263, s. 265; R.S.B.C. 1911, c. 194, s. 269. The first member of section 116 of the Manitoba Act seems to be directed to claims based on tortious acts or omissions in the course of constructing or operating the railway and must, I think, cover all such cases. Such acts or omissions are not within any statutory authorization. Statutory authorization does not afford a defence to actions founded on them, whether preferred by pleading the general issue or otherwise. The *Palmer Case* (1), moreover, dealt with the contractual obligation of common carriers of freight to carry it safely. In such a case proof of fault or negligence is not at all essential to the plaintiff, as it always is in a claim for personal injuries.

Carpue v. *London & Brighton Ry. Co.* (2), on the other hand, was a case of personal injury to a passenger. The defendant company was incorporated by the 7 Wm. IV. and 1 Vic., c. 119 which, after empowering it to construct the railway and to use locomotives, enacted that no action for anything done or omitted to be done in pursuance of the Act or in execution of the powers or authorities given by it should be brought without twenty days' previous notice. It was held that notice of action was unneces-

(1) 4 M. & W. 749. (2) 5 Q.B. 747.

sary, the defendants being sued in their capacity of common carriers. Here again we find a section of which the application is by its terms expressly confined to cases in which the act or omission constituting the cause of action is something authorized or imposed by the statute. Negligent acts or omissions in the course of the operation of the railway were not so regarded. In the Manitoba statute on the other hand "operation" is now expressly included and that word was inserted, as I think, for the very purpose of precluding in the future the restriction of the general terms in which the first member of the section is couched to matters of construction and maintenance—a restriction which had been inferred by the courts from the presence of the concluding clause of the section in the Canadian Railway Acts when the language of its earlier provision had been "by reason of the railway." See *Parker* v. *London County Council* (1). Neither *Palmer's Case* (2), nor *Carpue's Case* (3), it seems to me, warrants the application of the principle on which it was decided to the limitation sections found in our Railway Acts, federal or provincial, in actions for injuries sustained by passengers through fault or neglect of railway employees in working the railway.

My conclusion from this review of the leading authorities, (for the length of which I feel I should apologize, although it seemed to be necessary because of the uncertainty and confusion existing as to their effect), is that taken as a whole they would not have compelled us to hold that the present action would not have been within the purview of s. 116 had it stood as it was prior to 1907, i.e., if it still read "by

(1) [1904] 2 K.B. 501. (2) 4 M. & W. 749.
(3) 5 Q.B. 747.

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reason of the railway." There certainly is nothing whatever in them seriously to embarrass us in giving the section in its present form the construction for which its plain, precise and unambiguous words, read in their grammatical and ordinary sense, appear to call. "Operation" means "the working of the railway as constructed" and that assuredly includes the running of the cars. While section 116 of the Manitoba statute, notwithstanding the omission from it of a provision similar to s.s. (3) of s. 306 of the Dominion Railway Act of 1906, which can scarcely have been other than designed, may not apply to actions of which the substance is breach of contract, as in cases of loss of or injury to freight in transport, in my opinion it clearly does apply to actions such as that at bar, of which the substance is fault or neglect attributable to the defendant in the operation of its railway occasioning personal damage or injury to the plaintiff. I cannot see any reasonable ground for distinguishing in this respect between the case where the person so injured is a passenger and that where he does not hold that relation to the company but is lawfully where he is, whether on a highway or elsewhere, when he sustains the injury.

I would for these reasons allow this appeal with costs here and in the Court of Appeal and would restore the judgment of the learned trial judge dismissing the action.

MIGNAULT J.—My brother Anglin having made an exhaustive review of the decisions bearing on the construction of the limitation section of the Manitoba Railway Act (R.S.M. 1913, ch. 168, section 116), I propose very briefly to state my reasons for thinking that this appeal must be allowed.

Section 116 reads as follows:—

116. All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained or, if there be continuation of damages, then within twelve months next after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the special Act.

The respondent was injured when just about to alight from one of the appellant's cars through a collision brought about by the negligent operation of another of the appellant's cars. She waited more than a year before bringing this action, and the appellant contends that her right of recovery is now barred by section 116. The learned trial judge so held, but his judgment was reversed by the Court of Appeal.

The nature of the respondent's action was much discussed at bar. She alleges that she had been received by the appellant as a passenger on its railway, having paid her fare for that purpose, to be safely carried to her destination, and that owing to the negligence of the appellant in the management of its railway, the car in which she was travelling came into collision with another car operated by the appellant, and she was injured.

In substance this action appears to be based on a tort, the negligent operation by the appellant of its railway. But because some of the cases have distinguished between actions on tort and actions for breach of contract, the respondent urges that she has really sued for breach of contract, to wit, the contract to carry her safely to her destination.

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As I read section 116, the distinction relied on by the respondent would not really help her, for undoubtedly her suit claims indemnity for "damage or injury sustained by reason of the * * * * operation of the railway," and such a suit certainly comes within the intendment of section 116. I might add that the contract implied by the purchase of a ticket for transportation is not a contract to carry the passenger safely, but with due care, and while the word "safely" is often rather loosely used in this connection, its meaning is simply that due care must be exercised in the carriage of passengers. So the allegation of negligence is an essential averment of an action like that of the respondent, whether it be viewed as based on a contract or a tort, and in either event it certainly comes within the language of section 116.

Independently of the many judicial pronouncements on limitation provisions of this kind, no difficulty can arise as to the construction of this section. The inquiry in this case is whether the damage was sustained by reason of the operation (i.e. the negligent operation) of the appellant's railway, and if so we cannot disregard the plain language, construed as it should be according to its ordinary and grammatical meaning, of section 116.

Some decisions have held that the limitation section does not apply to cases where the question is as to the common law liability of a common carrier. But a carrier acts as a common carrier only when he carries goods, of course as a public employment. His liability when he carries passengers is subject to other rules, and does not arise unless negligence be proved (Halsbury, Laws of England, vo. Carriers, paragraphs 1 and 6). Therefore, as I have said, negligence is an essen-

tial element of the right of recovery of the passenger. Whether this takes his action out of the realm of contract into that of tort might be an interesting question to discuss, but I must hold that in any case the action of the respondent is clearly within the descriptive words of section 116.

What I have said disposes of any question as to the applicability of this section to the respondent's action, unless we are bound by authority to hold that, notwithstanding its clear language, it does not bar the action of a passenger for damages caused by reason of the negligent operation of the railway. The consequence of so holding would be rather startling, for the respondent must concede that the section would apply had a stranger on the street been injured by this same collision, while at the same time contending that it does not bar her own action, she having been on the appellant's car as a passenger when the collision occurred. But my brother Anglin has conclusively shewn that the question of the proper construction of section 116 is open to this court, and I entirely agree with him. I may add that the language of provisions like section 116 has been changed from time to time. The wording was "by reason of the railway" when the *Ryckman* and *Sayers Cases*, much relied on by the respondent, were decided. Going further back, as my learned brother has done, we find language that may explain many of the decisions, but to persist in making a distinction which the statute does not now justify after its language has been changed, is something which for my part I cannot agree to.

I do not think that the concluding portion of section 116 can restrict the generality of the limitation clause. It deals with an independent matter, the defences to

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the action, and moreover, if the authority of the statute can sometimes be set up as a defence, it certainly cannot avail where the statutory powers have been negligently used.

My opinion is therefore that the respondent's action is barred by section 116. I would allow the appeal with costs here and in the Court of Appeal and restore the judgment of the learned trial judge dismissing the action.

CASSELS J. (dissenting).—The question raised in this appeal is as to the applicability of section 116 of the Manitoba Railway Act to the case of injury to a passenger by reason of the negligence of the railway. The section reads as follows:—

> All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained, or if there be continuation of damages then within twelve months next after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the special Act.

Limitation clauses of a similar character applicable to railways have been discussed in a great number of cases, and it has been almost uniformly held that clauses similar to the one in question do not apply to actions arising out of negligence in the carrying of passengers. I think it is too late now to place a different construction on the section.

Down to a certain date, the cases are reviewed by MacMurchy & Denison in the 2nd edition of the Railway Law of Canada, commencing at page 512, and by Chancellor Boyd in *Traill* v. *Niagara, St. Catharines and Toronto Ry. Co.* (1). The authorities

(1) 38 Ont. L.R.

are also elaborately reviewed in the judgments of the Chief Justice of Manitoba and Mr. Justice Dennistoun. I have read over most of the cases referred to. I do not find in any one of them any reference to the words in this section: "or if there be continuation of damages then within twelve months next after the doing or committing of such damage ceases, and not afterwards."

These words seem to me to indicate that the section was not intended to apply to the case of an injury to a passenger by reason of the negligence of the railway as a common carrier. Where a collision takes place and injury is inflicted upon a passenger, the damage or injury is sustained then and there, and it is difficult to see how in that case there could be a continuation of damages.

Moreover I would call attention to the fact that in the Dominion legislation referred to by the Chief Justice and in the Dominion Railway Act of 1919 (9 & 10 Geo. V., c. 68, sec. 391), similar words are found which by reason of sub-section (3) cannot apply to cases of injury to a passenger.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Anderson, Guy & Chappell.*

Solicitors for the respondent: *Coulter, Collinson & Procter.*

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*Feb. 15.
*May 31.

THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA (DEFENDANT)..... APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..... RESPONDENT;

AND

R. P. RITHET (DEFENDANT).

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Statute—Construction—"Royalties"—Bona vacantia—B. N. A. Act, (1867) *ss.* 102, 109.

The word "royalties," in section 109 of the B.N.A. Act, must be construed in its primary and natural sense as the English equivalent of "Jura regalia" and its scope is not limited by its association with the words "lands, mines and minerals." *Bona vacantia* fall within the meaning of that term and therefore belong to the provinces. Davies C.J. *contra.*

APPEAL from the judgment of the Exchequer Court of Canada, maintaining the respondent's action.

The material facts of the case and the questions in issue are fully stated in the judgments now reported.

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

J. A. Ritchie K.C. for the appellant.—The term "royalties" is not limited to escheats or something arising out of land but should be construed in its full natural and primary sense.

E. L. Newcombe K.C. and *C. P. Plaxton* for the respondent.—The scope of the word "royalties" ought to be limited by reference to the subjects with which it is found associated in section 109 B.N.A. Act. The term includes only those royalties which are connected with "lands, mines and minerals." The qualifying words "the property of the province," attached to the enumeration in section 109 have the effect of confining the operation of that section to subjects in respect of which at Confederation the province not only possessed the power of appropriation but had also exercised that power.

THE CHIEF JUSTICE (dissenting).—The question to be determined in this case is whether the sum of $7,215, representing the proceeds of certain assets and effects in the province of British Columbia agreed by both parties to be *bona vacantia* belongs to the Province of British Columbia or to the Dominion of Canada. The answer to this question depends upon the construction to be placed upon sections 109 and 126 of the "British North America Act, 1867."

The learned President of the Exchequer Court held that the meaning of sec. 109 was to pass to the provinces royalties arising from "lands, mines, minerals" (and) "royalties" limited to escheats or something arising out of lands as referred to in sec. 1 of the statute 15-16 Vict. (and) did not think it was ever in contemplation that under that term "Royalties" all royalties of every kind, including *bona vacantia*, were left to the provinces under the provisions of the statute.

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After carefully reading the several judgments of the Judicial Committee which deal with the construction of the two sections, and having given the question before us my best consideration, I have reached the same conclusion.

Mr. Newcombe on behalf of the Crown submitted that the legislature of British Columbia having had power before and at the union of that province with Canada to appropriate the casual revenue arising within the colony from *bona vacantia*, with the assent of the Crown, it follows, whether the power was exercised or not, that the casual revenues from this source fall within sec. 102 of the B.N.A. Act and, therefore, belong to the Consolidated Revenue Fund of Canada, unless they be part of the revenue covered by the words of exception in that section.

In *Attorney-General of Ontario* v. *Mercer* (1), the Earl of Selborne delivering the judgment of the Judicial Committee, said, at page 775:

> The words of exception in sec. 102 refer to revenues of two kinds: (1) such portions of the pre-existing "duties and revenues" as were by the Act "reserved to the respective Legislatures of the provinces" and (2) such duties and revenues as might "be raised by them, in accordance with the special powers conferred upon them by the Act" It is with the former only of these two kinds of revenue that their Lordships are now concerned; the latter being the produce of that power of "direct taxation within the provinces, in order to the raising of a revenue for provincial purposes" which is conferred upon Provincial Legislatures by sec. 92 of the Act.
>
> There is only one clause in the Act by which any sources of revenue appear to be distinctly reserved to the provinces, viz., the 109th section: "all lands, mines, minerals and royalties belong to the several provinces of Canada, Nova Scotia, and New Brunswick, at the Union * * * shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise," etc.

The Judicial Committee in that case held that "royalties" in this section included the revenue arising from escheated lands. In the *Precious Metals*

(1) 8 App. Cas. 767.

Case (1), that Committee held that it reserved to the provinces the revenues arising from gold and silver mines. In neither of these cases did the Judicial Committee feel called upon to decide whether the word "royalties" in sec. 109 extends to other royal rights besides those connected with or arising out of "lands, mines and minerals." The question now presented is whether "royalties" in this section includes the casual revenue arising from *bona vacantia* in British Columbia.

The Judicial Committee seems to have concluded the question adversely to the province in the interpretation which it has put upon said sec. 109 in the cases which have come before it. In *Mercer's Case* (2) the Judicial Committee uses language as to the object and effect of the word "royalties" which limits the word to *Royal territorial rights*. This meaning is confirmed by Lord Watson in *St. Catharines Milling and Lumber Co.* v. *The Queen* (3), when, at page 58, referring to sec. 109, he said:

> Its legal effect is to exclude from the "duties and revenues" appropriated to the Dominion, all the *ordinary territorial* revenues of the Crown arising within the provinces. That construction of the statute was accepted by this Board in deciding *Attorney-General of Ontario* v. *Mercer* (2).

If this be a correct and comprehensive interpretation of the object and effect of sec. 109, and I am disposed to think it is, then it cannot apply to royal rights which are not territorial, such as rights in respect of personal property, e.g., *bona vacantia* The alternative contention would seem to be that "royalties" must be understood in an unlimited sense—that is to say as comprehending not merely

(1) *Attorney General of British Columbia* v. *Attorney General of Canada* 14 App. Cas. 295.
(2) 8 App. Cas. 767.
(3) 14 App. Cas. 46.

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all *royal territorial revenues*—i.e., the revenue arising from lands, mines, minerals—but also all other royal revenues.

In the result, I have reached the conclusion that the term "royalties" in section 109 following the words "lands, mines, minerals," should be construed as limited to royalties incident to or arising out of the preceding words. In other words, the term "royalties" extends to such as arise out of territorial rights only, and does not extend to *bona vacantia* such as are in question in this action.

The Judicial Committee in the cases I have referred to, in accordance with its usual practice, was careful to confine its actual decision to the questions specially before it for decision in each case. But the observations used alike by Lord Selborne and by Lord Watson, which I have quoted, are such as to satisfy my mind at any rate that the true construction of the section is such as I have stated.

IDINGTON J.—A company incorporated in England in 1871 to carry on business in British Columbia having, in the exercise of such powers as given it in that regard, acquired property in that province, of which the sum of $7,215.04 proceeds thereof remained in the hands of respondent Rithet some time after the time of the dissolution of the said company and later death of its liquidator without any special provision in law for the disposition of said balance.

Mr. Rithet applied to English representatives of the Crown, and in turn was referred by such to those in British Columbia or Canada.

Hence proceedings were taken in the Exchequer Court here by the Dominion authorities as against Rithet and the Attorney-General of British Columbia.

The case was tried before Sir Walter Cassels J. of that court who rendered judgment on the 22nd January, 1918, awarding the said money, less costs of Mr. Rithet, to the respondent on behalf of the Dominion.

The Attorney-General for British Columbia appeals here from that decision, claiming that such *bona vacantia* belong to the Crown on behalf of that province.

We are not enlightened by way of evidence or admissions from what source this balance of money now in question was derived, or exactly when it was realized.

The same kind of commendable industry as was devoted to produce the interesting results put before us in the case and appendix possibly would have disclosed that the original source of the money was an exploitation of the natural resources of the province, now in law beyond dispute belonging to it, such as the precious metals, for example, and realized upon since the dissolution of the company.

The exact date of the conversion thereof into money might in relation to the actual facts of the date of the extinction of the company and legal authority of any one to represent it have shed some light upon the basic facts, or what should have been looked upon as the basic facts, to which the relevant law should be applied. It may have been that the conversion into money took place after the property had become *bona vacantia* and, under such circumstances, as to entitle appellant beyond doubt to recover same.

The converse speculation as to whether or not the conversion was of property to which the Imperial authorities on behalf of the Crown could have claimed, under the circumstances, upon the actual facts if disclosed, might have put the respondent on behalf of the Dominion out of court.

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We are deprived of the instruction or perhaps amusement which a close investigation might have led to, and must, leaving appellant in future to see that his province is adequately protected by administrative or legislative measures, proceed on the assumption that the *bona vacantia* in question must be of some class that is neither land, mines or minerals, but may be of the class which can be properly described as within the class named "Royalties" in section 109 of the B.N.A. Act of 1867, which reads as follows:—

> 109.—All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

I am clearly of the opinion that the word "royalties" as used in that section never was intended to be given only the narrow and limited interpretation and construction that is contended for by counsel for the respondent on behalf of the Dominion.

I cannot conceive of the men who in fact framed the scheme of government to carry out which this Act was enacted, listening for a moment to such a contention, unless to laugh at it.

In the *Mercer Case* (1), Lord Selborne delivering the judgment of the Judicial Committee of the Privy Council, spoke as follows:—

> It appears, however, to their Lordships to be a fallacy to assume that because the word "royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated,—lands as well as mines and minerals; even as to mines and

(1) 8 App. Cas. 767 at p. 778.

minerals it here necessarily signifies rights belonging to the Crown *jure coronae*. The general subject of the whole section is of a high political nature; it is the attribution of royal territorial rights, for purposes of revenue and government, to the provinces in which they are situate, or arise. It is a sound maxim of law, that every word ought, *prima facie*, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense "royalties" is merely the English translation or equivalent of *"regalitates," "jura regalia,' "jura regia."* (See, *in voce* "royalties" Cowell's "Interpreter" Wharton's Law Lexicon; Tomlins' and Jacobs' Law Dictionaries.) *"Regalia"* and *"regalitates"* according to Ducange, are *"jura regia;"* and Spelman (Glos. Arch.) says, *"Regalia dicuntur jura omnia ad fiscum spectantia."* The subject was discussed with much fullness of learning, in *Dyke v. Walford* (1), where a crown grant of *jura regalia*, belonging to the county palatine of Lancaster, was held to pass the right to *bona vacantia*. "That it is a *jus* (said Mr. Ellis, in his able argument, ibid, p. 480) is indisputable; it must also be *regale*, for the Crown holds it generally through England by Royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the Sovereign. It stands on the same footing as the right to escheats, to the land between high and low water mark, to felons' goods, to treasure trove, and other analogous rights." With this statememt of the law their agree, and they consider it to have been, in substance, affirmed by the judgment of Her Majesty in Council in that case.

Part of that was quoted by Lord Watson approvingly in the *Precious Metals Case* (2).

Needless to say these cases did not decide the question raised herein, but these *dicta* from high authorities point the way in which we should go to interpret and construe such an Act as that now in question; I respectfully submit that was not the path followed by respondent or this litigation never would have arisen.

The said *dicta* indicate the trend of thought I have sought to apply in my perusal of this case which consists chiefly of argument.

Reading, in that spirit the word "royalties" which the conjunction "and" in said section 109 indicates to be given a separate and distinctly additional item

(1) 5 Moore P.C. 434.

(2) 14 App. Cas. 295 at p. 304.

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of subject matter or class of revenue, to be assigned each of the respective provinces, I conclude that the appellant province is entitled by such reading alone to the *bona vacantia* in question.

There is no doubt of its being entitled under the terms of its union with the Dominion to that much.

And the articles to which we have to refer to find the terms of the Union with the Dominion, indicate to me, that if British Columbia had, before the Union, any greater rights in regard to such a subject as that now in question, she did not lose them by reason of the Union.

The respective rights in this regard of the several provinces which originally constituted the Dominion may not have been identically the same, but the law enacted in 15-16 Vict., c. 39, ss. 1 and 2, put all such colonies as British Columbia on the same footing in that regard, unless wherein otherwise provided for.

British Columbia's history I need not follow. She, at least by the time of her union with Canada, had acquired the right to assert the right given, to claim and collect such sources of revenue as now in question.

I repeat I cannot find that she lost, by the Union, any such right.

I cannot agree with Mr. Newcombe's argument that some legislative enactment was necessary before the Union. The power to enact or assert was continued, and is all she needs to rest upon herein.

But it is the sections 126 and 146 of the B.N.A. Act which must be read and applied, as those by and through which the negotiations which took place, under the latter, before reading section 102 which only gives the Dominion that which is left after such adjustment.

The legal history of that Union is to be found in the pages LXXXIV and CVII of the Orders in Council preceding the Dominion Statutes for 1872.

Properly read and considered along with other material above referred to, I submit with great respect that it seems to me there is no foundation for the judgment appealed from.

The argument of Mr. Ritchie before the Exchequer Court relative to the powers assigned the provinces over property and civil rights, deserves more attention than it got before us. For let any one who has considered the questions from that point of view and all that succession duties mean, and, in the last analysis, the fundamental question of the right in or to property, and see how easy it is for the local legislature to take care not only of the property of the intestate, who has only remote next of kin, but also by same power to avoid the need of any consideration of failure of heirs-at-law or next of kin by supplying a substitute therefor, and then it would appear that the contention set up herein is hardly worth while.

I think this appeal should be allowed with costs, if any, to be allowed respondent Rithet, to be paid by his co-respondent, or out of the fund.

If there is an understanding, as probably there is, that the other parties are not to recover from each other costs, neither ought to recover costs.

Possibly there should be no costs directed except as to Mr. Rithet.

DUFF J.—Both the Dominion and the Province concur in presenting the view which the very able argument on behalf of the Dominion sufficiently establishes that the hereditary casual revenues of the Crown including *bona vacantia* arising within the

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limits of the Province were included in the "duties and revenues" over which the Province had power of appropriation before the Union; and consequently the question to be determined is whether the word "royalties" in sec. 109 embraces *bona vacantia*. The scope of that expression was the subject of consideration by the Judicial Committee in *Attorney-General* v. *Mercer* (1). But the question upon which we have now to pass was left undecided. In effect their Lordships' view expressed in that case, in so far forth as presently relevant, is perhaps most clearly disclosed in the following passage from the judgment delivered by Lord Selborne taken from p. 778 of the report:—

> It appears, however, to their Lordships to be a fallacy to assume that, because the word "royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense—as to (at all events) all the subjects with which it is here found associated,—lands as well as mines and minerals; even as to mines and minerals it here necessarily signifies rights belonging to the Crown *jure coronae*.

On behalf of the Dominion it is contended that the scope of the word "royalties" ought to be limited by reference to the subjects with which it is "found associated" in sec. 109; that is to say that it includes only those royalties which are connected with "lands, mines and minerals."

The object of the provisions of the B.N.A. Act beginning with sec. 102 dealing with the distribution of property between the provinces and the Dominion was, as their Lordships pointed out in *Mercer's Case* (1), the attribution of Royal Rights for the purposes of revenue and government as part of a broad political

(1) 8 App. Cas. 767.

scheme. I can perceive no reason why the word "royalties" occurring in this enumeration of the assets assigned to the provinces should not be given its full natural sense—"its primary and appropriate sense"—without restriction. If the intention had been to express the limited meaning the Dominion seeks to ascribe to the term it would have been easy to employ language more plainly limited in its scope. In effect the adoption of the Dominion construction involves, I think, the addition of some qualifying words to the language of the statute.

Mr. Newcombe also argued that the qualifying words, "the property of the province," attached to the enumeration in sec. 109 have the effect of confining the operation of that section to subjects in respect of which at Confederation the province not only possessed the power of appropriation but had also exercised that power. Admittedly *bona vacantia* had not up to that time been the subject of any special legislation or of any special appropriation to the public purposes of the colony; but I think the suggested consequence does not follow. As Lord Watson points out in delivering the judgment of the Judicial Committee in the *Liquidator of the Maritime Bank* v. *Receiver General of New Brunswick* (1), the title to the property disposed of by this provision was, and after Confederation remained, in the Queen as Sovereign Head of the province; it was the property of the province in the sense only that the legislature and government of the province had been invested with the power of appropriation over it. That I think, is the sense in which the word "property" is used in sec. 109.

The appeal ought, I think, to be allowed.

(1) [1892] A. C. 437 at pp. 443 and 444.

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ANGLIN J.—It is common ground that the monies paid into court by the defendant Rithet are *bona vacantia*. The parties are also agreed that the province of British Columbia prior to entering Confederation had the right to appropriate casual revenues of the Crown arising within that colony, other than *droits* of the Crown and *droits* of Admiralty (15-16 V. (Imp.) c. 39, s. 2), and that revenues arising from *bona vacantia* did not fall within either exception. All claim to the property in question has been expressly renounced by the Imperial authorities. That it belongs either to the provincial government of British Columbia or to the Dominion government may therefore be taken for granted.

The question at issue is whether *bona vacantia* are "royalties" reserved to the province by s. 109 of the "British North America Act," and, as such, excepted from s. 102 and within s. 126 of that statute. The solution of that question depends upon the scope of the word "royalties" in s. 109. Is it used, as Mr. Ritchie, representing the Attorney-General of British Columbia, contended, in its primary and natural sense, or is it used, as Mr. Newcombe argued on behalf of the Dominion government, in a sense limited by its association with the words "lands, mines, minerals?" The latter view found favour with the learned President of the Exchequer Court.

Section 109 reads as follows:—

> All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals and royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trust existing in respect thereof and to any interest other than of the Province in the same.

The applicability of this section to the province of British Columbia is of course conceded.

While in s. 102 of the "British North America Act" we find the clause

> over which the respective legislatures had and have the power of appropriation,

and in s. 109 the phrase,

> belonging to the several provinces * * * at the Union,

I cannot seriously doubt that royalties of the class which the provincial legislatures had the right to appropriate were royalties "belonging" to the provinces in the sense in which "belonging" is used in s. 109.

"Lands, mines (and) minerals" actually "belonged" to the several provinces at the Union. Stricty speaking, royalties (such e.g. as escheats—*The Mercer Case*), (1) belong to a province only when they come into existence upon the occurrence of the circumstances out of which they arise—in the case of an escheat, the death of the owner of land intestate and without heirs. The abstract right to them is what "belonged" to the several provinces at the Union. Hence the use, in the latter part of s. 109, of the two verbs "are situate" and "arise"—the former applicable to "lands, mines (and) minerals," the latter to "royalties."

That *bona vacantia* fall within the term "royalties" *regalitates, jura regalia* or *jura regia*, when used without restriction, is authoritatively settled in *Attorney-General v. Mercer* (1), where the holding to that effect in *Dyke & Walford* (2), is accepted and a passage from the argument of Mr. Ellis in support of that view (p. 480) is expressly approved.

(1) 8 App. Cas. 767, at pp. 778-9. (2) 5 Moore P.C. 434.

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Although their Lordships of the Judicial Committee have twice had to consider the scope and meaning of the term "royalties" as it occurs in s. 109, in accordance with their well established practice when dealing with provisions of the "British North America Act," they, on each occasion, abstained from further definition of it than was necessary for the determination of the case actually before them. Thus, in the *Mercer Case* (1), they held that it extended, at all events, to all revenues arising from prerogative rights of the Crown in connection with "land" as well as "mines" and "minerals." In the *Precious Metals Case* (2), they held that a conveyance by the province of certain "public lands" did not imply a transfer of revenue arising from the prerogative rights of the Crown in regard to precious metals found therein, which belong beneficially to the province, not as mines or minerals and not as an incident of the land, yet under s. 109 and therefore as "royalties." While their Lordships were careful in these two cases not to say that the term "royalties" is used in sec. 109 in its unrestricted sense, it may I think be gathered from the general tenor of the judgments that they inclined to the belief that its signification is not limited by its association with the words, "lands, mines, minerals." Thus in the *Mercer Case* (1)

> they see no reason why it should not have its primary and appropriate sense as to (at all events) all the subjects with which it is here found associated, lands as well as mines and minerals;

and they add

> it is a sound maxim of law that every word ought *prima facie* to be construed in its primary and natural sense unless a secondary or more limited sense is required by the subject of the context.

(1) 8 App. Cas. 767. (2) 14 App. Cas. 295.

In the *Precious Metals Case* (2), while they said (pp. 304-5)

> it is not necessary for the purpose of this appeal to consider whether the expression "royalties" as used in section 109 includes *jura regalia* other than those connected with lands, mines and minerals,

they pointed out that "mines" and "minerals" in the sense of sec. 109 cover only the baser metals, which are incidents of land, and that the prerogative right in regard to precious metals is a *jus regale*, and as such not an accessory of land. But their Lordships add that the right to "lands" granted by the province to the Dominion Government by the 11th article of Union did not, to any extent, derogate from the provincial right to royalties connected with mines and minerals under sec. 109 of the "British North America Act." (p. 305) thus indicating that in their view the *jus regale* in regard to the precious metals is, in some sense, a right connected with "mines" and "minerals," notwithstanding that the latter term as used in sec. 109 comprises only the baser metals.

I find great difficulty in appreciating the force of the argument in favour of restricting the meaning of the word "royalties" to such *jura regalia* as are associated with "lands, mines (or) minerals." This is not the ordinary case of generic words following particular and specific words. "Royalties" is neither more nor less a generic word than "lands, mines, (or) minerals." The fact is that the term "royalties" denotes a class of subjects differing entirely from "lands, mines (and) minerals." No common genus embraces them.

(2) 14 App. Cas. 295.

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Without belittling the rule of construction invoked on behalf of the respondent—*noscitur a sociis*—care must always be taken that its application does not defeat the true intention of the legislature; *Hawke* v. *Dunn* (1); and the cardinal rule that

> an Act of Parliament is to be construed according to the ordinary meaning of the words in the English language as applied to the subject matter, unless there is some other very strong ground derived from the context or reason why it should not be construed, *Hornsey Local Boars* v. *Monarch Investment Building Society* (2)

should not be disregarded.

I share, to some extent, the view expressed by Rigby L. J. in *Smelting Co. of Australia* v. *Commissioners of Inland Revenue* (3).

> The rule of construction which is called the *ejusdem generis* doctrine or sometimes the doctrine *"noscitur a sociis"* is one which, I think, ought to be applied with great caution because it implies a departure from the natural meaning of words in order to give them a meaning which may or may not have been the intention of the legislature.

Were we to accede to the argument of Mr. Newcombe we would, I fear, put on the ordinary meaning of "royalties" a restriction that Parliament did not intend. Indeed, Parliament has already limited that word by the qualification, "belonging to the several provinces * * * at the Union." Why should the court superadd another? It may be that from other provisions of the B.N.A. Act other limitations upon the signification of "royalties" should be deduced. For instance, the rights asserted by the Dominion to legislate concerning *bona confiscata*, deodands and royal fish, may be well founded; but, saving such possible exceptions, with profound respect, "neither in "the subject nor in the context" do I find adequate reason for giving to the word "royalties" in s. 109

(1) [1897] 1 Q.B. 579, at p. 586. (2) 24 Q.B.D. 1, 5.
(3) [1897] 1 Q.B. 175, at p. 182.

other than its primary and natural meaning. I think it includes the *jus regale* to *bona vacantia*. It would, indeed, present a curious incongruity if escheats should be included in, but *bona vacantia* excluded from, the royalties granted to the provinces.

I would therefore allow this appeal and direct that judgment be entered for the Attorney-General of British Columbia.

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

MIGNAULT J.—The controversy here is whether the province of British Columbia or the Dominion of Canada is entitled to certain monies, to wit $7,135 brought into court by the defendant, Robert Paterson Rithet, who, as agent for the liquidator of the Colonial Trust Corporation, a company incorporated in England and which was dissolved in 1904, collected these monies in British Columbia as being due to the company. The liquidator died in 1911, and the Crown as represented by the Government of the United Kingdom makes no claim to this sum. Both parties before us concede that the monies in Mr. Rithet's hands are *bona vacantia* and it is on this basis that the court below dealt with them, and decided that they should be paid to the government of the Dominion. The Attorney-General of British Columbia now appeals and I will assume, as the parties both contend, that the monies collected by the defendant are really *bona vacantia*. The shareholders, if any remain, of the dissolved company have made no claim to these monies, and should they ever do so, nothing in the judgment to be rendered should stand in the way of justice being done to them.

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The question to be decided turns on the construction of sections 102 and 109 of the "British North America Act, 1867," which are as follows:—

102. All duties and revenues over which the respective legislatures of Canada, Nova Scotia and New Brunswick before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one consolidated revenue fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided.

109. All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

British Columbia came into the Canadian Confederation in 1871 and these sections apply to it as if it were named therein. *Attorney-General of British Columbia* v. *Attorney-General of Canada. The Precious Metals Case* (1).

The point which arises in this case is not covered by any authority by which we are bound. In *Attorney-General of Ontario* v. *Mercer* (2), the question of the meaning of the word "royalties" in section 109 was considered by the Judicial Committee, but as their Lordships stated in the *Precious Metals Case* (1), at page 305, their decision did not go further than to hold that the word "royalties"

comprehends, at least, all revenues arising from the prerogative rights of the Crown in connection with "lands," "mines," and "minerals."

(1) 14 App. Cas. 295, at p. 304.

(2) 8 App. Cas. 767.

On behalf of the Dominion it is contended that this is all that the word "royalties" really comprehends; that to understand it in a general sense as synonymous with *jura regalia* would be to give to the provinces some species of property coming within the meaning of *jura regalia*, such as wrecks, confiscated property or deodands, which belong to the Dominion; and that since the word "royalties" as used in section 109 cannot be taken without some restrictions, a fair construction would be to limit these royalties to those connected with the enumerated species of property, lands, mines and minerals, applying the *ejusdem generis* rule.

The contention of British Columbia is that "royalties" in section 109 should receive its natural meaning as the English equivalent of *jura regalia*, and that as *bona vacantia* are among the *jura regalia* to which the King was entitled by virtue of his prerogative, the property in question belongs to the province and not to the Dominion. It is also suggested that at least the term "royalties" comprises any species of property as to which the province has powers of legislation, which would explain the exclusion of wrecks, deodands and property confiscated by virtue of the criminal law.

It was argued in the *Mercer Case* (1) that the term "royalties" had a special meaning restricting it to a royal right connected with mines and minerals, but their Lordships considered it a fallacy to assume that because the word "royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought therefore to be limited to those subjects. They also said that they saw no reason why it should not have

(1) 8 App. Cas. 767

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its primary and appropriate meaning, as to (at all events) all the subjects with which it is here found associated—lands as well as mines and minerals, adding that the general subject of the whole section is of a high political nature, that it is the attribution of royal territorial rights, for purposes of revenue and government, to the provinces in which they are situate or arise.

If the object of section 109 is to attribute royal territorial rights for purposes of revenue and government to the provinces in which they are situate or arise, can it be applied to mere personal property such as this sum of money which the defendant collected in British Columbia as being due to the dissolved company? There does not appear to be any occasion here—since the monies collected are *bona vacantia* and therefore without an owner—to apply any rule such as *mobilia sequuntur personam*. The property is in British Columbia and has no other situation, real or notional. Moreover the whole question is whether *bona vacantia* of such a kind, under section 109 of the "British North America Act," come within the meaning of the word "royalties" as used in that section. If they do, they are within the exception made by section 109 to section 102 and belong to British Columbia; if not, under the general rule of section 102, they should go to the Dominion.

After full consideration, my opinion is that the word "royalties" in section 109, should be construed in its primary and natural sense as being the equivalent in English of *jura regalia*. Thus construed, it comprises *bona vacantia* (see *Dyke* v. *Walford* (1) approved by the Judicial Committee in the *Mercer Case* (2)). In

(1) 5 Moore P.C. 434. (2) 8 App. Cas. 767.

my judgment it is not restricted or controlled by the words "lands, mines and minerals" which precede. It is a fourth head added to lands, mines and minerals, and should comprehend all property which is properly described as "royalties," or at least such property as the property here in question. It may be that under Imperial statutes some species of *jura regalia* such as wrecks, do not go to the province, a point on which it is unnecessary to express an opinion here. It may also be that as an incident of the legislative authority of the Dominion Parliament over criminal law, property confiscated by virtue of the decision of a court of criminal jurisdiction should be attributed to the Dominion, a point also which does not call for a decision in this case. All that I intend to hold is that *bona vacantia* of the kind here in question belong to the province under section 109.

I have not failed to notice the ingenious argument of Mr. Newcombe, founded on the difference of expression between sections 102 and 109, that while at the Union the province of British Columbia had the power of appropriation over "royalties" in the general sense, which would bring them under the general rule of section 102, it is not shown that this species of property "belonged" to British Columbia at the union, section 109 referring to "royalties" *belonging* to the province at the Union. But in my opinion the question here is of a right belonging to the province, and where the province has the right of appropriation over property it seems to me clear that the right to that property belongs to the province. I therefore think that this argument, while ingenious, is not conclusive against the right of British Columbia to claim the property in question.

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I would in consequence allow the appeal but without costs and decide that the monies in Mr. Rithet's hands should be paid to the province of British Columbia. I agree with the first court that Mr. Rithet is entitled to his costs.

Appeal allowed with costs.

Solicitor for the appellant: *J. A. Ritchie.*

Solicitor for the respondent: *C. P. Plaxton.*

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CODE OF CIVIL PROCEDURE

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SALE OF LAND—*Continued.*

On the 15th of October, 1910, the appellant's wife bought an immoveable property by oral contract from one D. She having died the appellant was appointed tutor to her children, heirs to the estate. On the 29th of November, 1910, D. was legally asked to sign a deed of sale but refused to do so. The next day D. died, leaving his wife B. as usufructuary legatee of his estate and naming her testamentary executrix with power to sell. In January, 1911, an action *en passation de titre* was brought by the appellant against B. In February, 1911, the appellant registered a notice or *bordereau* alleging the *mis-en-demeure* served upon D. On the 23rd of June, 1913, judgment was rendered maintaining the appellant's action, which judgment was confirmed on appeal, both judgments being registered as soon as rendered. On the 3rd of March, 1911, B. sold the same property to the respondent, who had knowledge of the alleged sale to appellant's wife and of the institution of the action *en passation de titre*, this deed of sale being registered some days later. After judgment had been rendered by the appellate court in the above action, the appellant brought the present action *au petitoire* against the respondent in order to be put in possession of the immoveable property.

Held, that the mere fact of the respondent's knowledge of the anterior sale did not deprive him of the benefit of priority of registration of his own title.—*Held*, also, that the registration by the appellant of a *bordereau* indicating a verbal sale to him of the property is not equivalent to the registration of a right in or to that property within the purview of the registration provisions of the code.—*Held, also*, that the appellant and the respondent "derive their respective titles from the same person" within the terms of art. 2089 C.C., although the first bought the property from the owner and the second from his universal legatee and testamentary executrix.—*Per* Duff, Mignault and Bernier JJ. Although there is *res judicata* against the respondent as to the validity of an anterior title to the appellant, that does not deprive the respondent of the benefit of the prior registration of his own title.—Judgment of the Court of King's Bench (Q.R. 29 K.B. 273) affirmed. SAMSON *v.* DECARIE. **11**

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2 —— *Public auction — Mistake — Parcel intended to be sold and bought—Not included in particulars—Rights of purchaser.*] The receiver of the C. P. Lumber Co. was, by order of the court, authorized to borrow from the appellant bank a certain sum which should be a first charge on the whole assets of the company and the order provided for a sale of those assets in default of repayment. Such default having occurred, the bank sold the property to the Investment company appellant by public auction, the conduct of the sale being in the hands of the bank's solicitor under the supervision of the court. Owing to this solicitor being under the impression that a certain parcel of land did not belong to the lumber company, it was omitted from the particulars of sale. The solicitor for the receiver and the bank approved the particulars in the belief that they covered the omitted parcel and the purchasers bought under the same erroneous belief. One condition of the sale provided that "any error of description * * * shall not annul the sale nor shall any compensation be allowed in respect thereof." There was evidence that the omitted parcel had a very substantial value but no evidence was adduced that a greater price might have been obtained for the assets, if the omitted parcel had been included. Upon the discovery of the mistake, the appellants applied for an order by the court that the receiver execute and deliver to the purchaser a conveyance of the said parcel omitted in the particulars of the sale; this application was resisted by the respondent acting as trustee for the bondholders of the Lumber Company.—*Held*, that the appellants' application should not be granted; and that, although the purchaser may have been entitled to rescission of the sale on the ground of mistake, the order prayed for should not be granted, as the appellants had failed to shew anything which would raise an equity against the bondholders such as might have enabled the court to direct that the deficiency in the land should be made good by the receiver at the bondholders' expense.—Judgment of the Court of Appeal ([1921] 3 W.W.R. 209) affirmed. DOMINION BANK *v.* MARSHALL..... **352**