REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

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1904.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

The Hon. Robert Sedgewick J.

" Désiré Girouard J.

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

" Wallace Nesbitt J.

" Albert Clements Killam J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Charles Fitzpatrick, K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Henry George Carroll, K.C.

" " Rodolphe Lemieux, K.C.

ERRATA AND ADDENDA.

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

Page 2, line 12, for "lessor" read "lessee."

Page 81, line 8, delete "50 &."

Page 274, line 22, after "side" insert reference to report in court below, "Q. R. 13 K. B. 97."

Page 328, line 25, after "Scotia" insert reference to report in court below, "36 N. S. Rep. 275."

Page 604, line 6, after "from" insert reference to report in court below, "(Q. R. 13 K. B. 164)"; and insert similar reference after "side "in line 22.

Page 652, line 18, for "in different" read "indifferent."

Page 710, line 24, after "premises" add "connected."

APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF VOL. 33 OF THE SUPREME COURT REPORTS.

Attorney General for Manitoba v. *Attorney General for Canada* (34 Can. S. C. R. 287). Appeal dismissed; no order as to costs; August, 1904; (Canadian Gazette, vol. xliii., p. 438.)

Belcher v. *McDonald* (33 Can. S. C. R. 321). Appeal allowed with costs, April, 1904; ((1904) A. C. 429.)

Calgary and Edmonton Railway Co. v. *The King; Calgary and Edmonton Land Co.* v. *The King* (33 Can. S. C. R. 673). Appeal allowed with costs, August, 1904; (Canadian Gazette, vol. xliii., p. 439.)

Canadian Pacific Railway Co. v. *Blain* (34 Can. S.C.R. 74). Leave to appeal to Privy Council refused with costs; ((1904) A. C. 453).

Colonist Printing and Publishing Co. v. *Dunsmuir* (32 Can. S. C. R. 679). Leave to appeal refused by Privy Council, February, 1904.

Dominion Cartridge Co. v. *McArthur* (31 Can. S. C. R. 392), for note of arguments in appeal before Privy Council, see Canadian Gazette, vol. xliii., p. 376.

East Hawkesbury, (Township of,) v. *Township of Lochiel* (34 Can. S. C. R. 513). Leave to appeal to Privy Council refused.

Hamburg American Packet Co. v. *The King* (33 Can. S. C. R. 252). Leave to appeal to Privy Council granted, July, 1903; Canadian Gazette, vol. xli., p. 415.

Hanson v. *The Village of Grand'Mère* (33 Can. S.C.R. 50). Appeal to the Privy Council dismissed with costs, August, 1904; (Canadian Gazette, vol xliii., p. 439).

Hawley v. *Wright* (32 Can. S. C. R. 40). Leave to appeal to Privy Council refused, August, 1904.

Maddison v. *Emmerson* (34 Can. S. C. R. 533. Leave to appeal to Privy Council granted, July, 1904.

Meloche v. *Déguire* (34 Can. S. C. R. 24; Q. R. 12 K. B. 298). Leave to appeal to Privy Council refused, March, 1904.

Midland Navigation Co. v. *Dominion Elevator Co.* (34 Can. S. C. R. 578). Leave to appeal to Privy Council refused, July, 1904.

Miller v. *Grand Trunk Railway Co.* (34 Can. S. C. R. 45). Leave to appeal, *in formâ pauperis*, granted by Privy Council, July, 1904.

Montreal, (City of) v. *The Montreal Street Railway Co.* (34 Can. S. C. R. 459.) Leave to appeal to Privy Council granted, July, 1904.

Provident Savings Life Assurance Society of New York v. *Bellew* (35 Can. S. C. R. 35). Leave to appeal to Privy Council refused, July, 1904.

Representation in the House of Commons of Canada (34 Can. S. C. R. 475, 594). Appeals to the Privy Council dismissed without costs.

Water Commissioners of London v. *Saunby* (34 Can. S. C. R. 650). Leave to appeal to Privy Council granted, July, 1904.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

A.

B.

D.

E.

F.

G.

H.

J.

K.

L.

Mc.

Q.

R.

S.

T.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

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

JEAN CHRYSOSTOME LANGELIER (PLAINTIFF, CONTESTANT) ..... } APPELLANT;

1903

*Oct. 6.

*Oct. 20

AND

ANTOINE AIMÉ CHARLEBOIS (INTERVENANT) ..... } RESPONDENT.

AND

THE COMMERCIAL UNION ASSURANCE COMPANY ..... } GARNISHEES.

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

Ownership—Lease—Sheriff's sale—Title to land—Insurable interest—Fire insurance—Trust—Beneficiary—Principal and agent—Fraudulent contrivances—Estoppel.

The lessor of real estate insured the leased property "in trust" and notified the insurers that the lessee, his son, was the real beneficiary. The lessee paid all the premiums and, the property having been seized in execution of a judgment against the lessor, the lessee purchased at the sheriff's sale and became owner in

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*PRESENT:—Sir Elzéar Taschereau C. J. and Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

1903

LANGELIER
v.
CHARLEBOIS.

fee. He afterwards increased the insurance, the insurer acknowledging, in the second policy, the existence of the first in his favour. The property having been destroy by fire, payment of the amount of the first policy to the lessee was opposed by a judgment creditor of the lessor and the money attached in the possession of the company.

Held, that the lessee having had an insurable interest when the first policy issued and being, when he acquired the fee and when the loss occurred, the only person having such interest, he was entitled to the payment of the amount of the policy insured upon the application of the lessor.

Held, also, that even if the lessor knew that his father was embarrassed at the time he took the lease and when he purchased the property at the sheriff's sale, that would not make the transaction fraudulent as against the father's creditors.

A creditor who was a party to the action against the lessor in which the property was sold in execution subject to the lease and who did not oppose such sale could not, afterwards, contest payment of the amount of the policy on the ground of fraud.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montreal, and declaring that the intervenant alone was entitled to the moneys deposited in court by the garnishee and further dismissing the contestation of the intervention with costs.

In March, 1900, the appellant, having an unsatisfied judgment against Alphonse Charlebois, the defendant in the action, attached moneys in the hands of the garnishees, as belonging to him. The garnishees declared that in May, 1899, they had insured Alphonse Charlebois "in trust" to the amount of $3,500 for twelve months upon a property known as the "Academy of Music Theatre," Quebec; that after the policy was so taken out, they were informed that the trust was in favour of his son A. A. Charlebois, the respondent; that said A. A. Charlebois had paid the premium and that he had made a claim under the policy for loss by fire; and the sum of $3,500, admitted

to be payable under said policy, was deposited in court, to be disposed of as the court might direct.

The respondent then fyled an intervention asking to have the garnishment set aside upon the ground that, when the policy was taken, he had leased the property insured for nine years at a rental of $700 per annum, payable in improvements; that he had commenced to make said improvements in May, 1899, when he took the insurance policy of $3,500 through his father, the defendant, who was then acting as trustee for him; that on the 6th of February, 1900, he had purchased the said property at sheriff's sale, under execution; that on the 16th March, 1900, he had applied to the insurance company for additional insurance upon the same property, and that in the policy issued upon said second application the insurance company had recognized him as the beneficiary under their previous policy; and moreover that his purchase of the property at sheriff's sale had the effect of transferring to him the legal right to the policy, in virtue of clause 4 therein declaring that a change of title to the insured property "by succession, or by operation of law, or by reason of death" should not have the effect of voiding said policy.

The appellant contested this intervention upon the ground that all these transactions between the defendant and his son, the respondent, had been made by the former when notoriously insolvent to the knowledge of the son, and with the object of defrauding his creditors; that the father had made no legal transfer of the policy or his interest therein to the intervenant; and consequently, that the amount payable thereunder was properly seizable by defendant's creditors.

The trial judge maintained the plaintiff's contestation and dismissed the intervention. This judgment

1903

LANGELIER v. CHARLEBOIS.

was reversed by the judgment now appealed from, Hall J. dissenting.

Beaudin K.C. and *Gouin K.C.* for the appellant. The insertion of the words "in trust" after the defendant's name in the policy of insurance could not have the effect of altering his rights in the property or under the policy in respect to third parties to whom he was indebted; *Bank of Montreal* v. *Sweeny.* (1). Trusts as known to the English law are not recognized in the Province of Quebec but may be declared merely in a donation or a will; art. 981*a* C.C.; and cannot be proved by parol testimony; arts. 2570, 2571 C.C.

The agreement between respondent and his father with regard to the insurance policy was fraudulent and made with the sole intent of avoiding the payment of the defendant's debt to the appellant. The alleged lease is a contract of an onerous nature and was evidently made with a view of decreasing the value of the property in the event of a judicial or other sale. When it was signed on 7th August, 1899, the defendant was insolvent, and the respondent knew it. Under art. 1035 C. C. all contracts *à titre onéreux*, by an insolvent debtor with a party who knows of his insolvency, are presumed to be fraudulent. The respondent has not destroyed this presumption of the law, and it appears by his own testimony that the allegations of fraud contained in the contestation of his intervention were true.

The only person named as beneficiary under the policy is the defendant, and the amount cannot be paid to anybody else in the absence of a formal assignment or transfer.

The impressions or understandings of agents of the insurance company, at variance with the terms of the policy, cannot avail to defeat the seizing creditor.

(1) 12 App. Cas. 617

Arts. 2483, 2576 C.C.; *Forgie & al.* v. *Royal Insurance Co.* (1)

Brodeur K.C. and *Pelletier* for the respondent. The insurance company was, at the time of the delivery of the policy, made aware of the name of the real beneficiary, though it did not appear in the policy, by the declaration that the trust was in favour of the intervenant; May on Insurance (4 ed.) vol. 2, p. 1024, § 445; vol. 1, p. 179; also by his letter stating that he was the owner of the property insured. Intervenant had, at any rate, an insurable interest; art. 2271 C.C.; and the company received subsequent premiums from him with knowledge of the facts, after the purchase at sheriff's sale, at the same time admitting the validity of the former policy. At the time of these transactions, the appellant was not a creditor of the defendant and, at the time of the fire, defendant had no interest whatever in the property insured. A change of ownership took place under the sheriff's sale by operation of law and with the knowledge and consent of the company.

The company declared that they owed nothing to the defendant, that the policy was in trust for the respondent, and that after the loss the claim was filed by the respondent for his own benefit and interest. Under the circumstances, the appellant was bound to contest that declaration and to allege and prove that the defendant was entitled to the money. Having failed to do so the intervention was rightly maintained. The deposit of the $3,500 in court did not create a title of ownership in favour of the defendant or his creditors. The money so deposited is the absolute property of the respondent.

(1) 16 L. C. Jur. 34.

1903

LANGELIER v. CHARLEBOIS.

We refer to *Anchor Marine Insurance Co.* v. *Allan* (1); *Bank of Montreal* v. *Sweeny* (2); *Leipschitz* v. *The Montreal Street Railway Co.* (3).

The transactions in regard to the lease of the theatre, the character of the lease, the son's efforts to help his father through his financial troubles which, later on, caused him great distress, the public sale by the sheriff, made with the appellant's knowledge and unopposed by him, everything in connection with the case, as shewn in evidence, all go to prove absolute good faith and the entire absence of fraud on the part of the intervenant and his father, the defendant. There was no prejudice to the creditors in the lease—there is none by the sheriff's sale, and still less in the contract of insurance, which is completely independent of all the other transactions, and to which the defendant was not a party, except as the respondent's agent.

THE CHIEF JUSTICE.—This seems to me a plain case. The sheriff's sale to the respondent on the 6th of February, 1900, incontrovertibly put an end to the lease. The respondent could not be a tenant of his own property. Now that sale is not and cannot be impugned in this case, were it only for the absence of the parties to it. So that when the building was burnt down on the eighteenth of March the defendant suffered no loss. The only sufferer was the respondent. How then can the defendant claim an indemnity for a loss that he has not suffered? How could he have made proof of loss when he suffered none?

Assuming that at first the policy should be held to have been issued to the defendant, the respondent became the equitable owner of it, as against the defendant, when he acquired the ownership of the property, and, with the company's assent to continue

(1) 13 Q. L. R. 4, (2) 12 Can. S.C.R. 661. (3) Q. R. 9 Q. B. 518.

the insurance for him and as if a new policy were taken in his name, he became the insured to all intents and purposes.

I would dismiss the appeal with costs.

SEDGEWICK J. concurred in the judgment dismissing the appeal with costs.

GIROUARD J.—Il ne s'agit ici que d'une question de faits décidée dans un sens par la cour supérieure et dans un autre par la cour d'appel, Hall J. différant.

Il est incontestable qu'à l'époque de l'incendie de l'Académie de Musique, le défendeur, Charlebois, n'en était pas propriétaire, et il nous semble qu'en présence de ce fait les deniers saisis en cette cause qui représentaient cette propriété, ne peuvent être réclamés par lui. Ce simple motif devrait suffire pour nous engager à renvoyer l'appel. Voilà peut-être pourquoi la cour d'appel, composée de Würtèle, Hall, Blanchet, Ouimet et Tellier, *ad hoc*, J.J., a simplement déclaré :

Considérant que la somme de $3,500, déposée en cour par la compagnie d'assurance, 'The Commercial Union Assurance Company Limited, appartient à Antoine-Aimé Charlebois,l'intervenant, et que le défendeur Alphonse Charlebois n'y a aucun droit maintient l'appel, etc.

Les notes des juges ne nous ont pas été transmises, bien que demandées. Nous avons cependant le jugement motivé du juge Charland, siégeant en la cour supérieure et le dissentement élaboré de M. le Juge Hall.

L'appelant soutient que ce moyen ne pourrait être invoqué que par la compagnie d'assurance Commercial Union, qui non seulement ne l'invoque pas, mais a déposé en cour le plein montant de la police pour être remis à qui de droit, et qu'il ne peut l'être par Charlebois fils qui n'était que le prête nom de son père insol-

1903

LANGELIER v. CHARLEBOIS.

Girouard J.

vable, dans le but de soustraire cet immeuble aux poursuites de ses créanciers. Il est donc préférable et dans l'intérêt des parties d'examiner cette partie de la cause qui a induit M. le juge Hall à différer de M. le juge Charland.

La preuve au dossier justifie-t-elle la prétention de l'appelant? Elle n'est pas volumineuse, consistant principalement dans le témoignage de Charlebois fils et de ses ouvriers. Charlebois père ne fut pas témoin. Les ouvriers attestent qu'ils n'ont eu affaires qu'avec le fils et qu'ils furent payés par lui. Le témoignage de ce dernier offert de sa part est long; il a été soumis à des transquestions rigoureuses et serrées. Ses réponses sont promptes, fermes et entières, sans équivoque ou hésitation, et après les avoir lues et relues, je suis resté convaincu qu'il dit la vérité, toute la vérité. Il fait disparaître entièrement la présomption de fraude que la parenté fait naître tout d'abord. Il établit, à mon entière satisfaction du moins, que les transactions et opérations du fils étaient non seulement dans les limites de la légalité, mais qu'elles étaient marquées au coin d'un des plus nobles sentiments, la reconnaissance, malheureusement trop rare de nos jours.

Que le fils ait connu le mauvais état des affaires de son père à l'époque où il en obtenait le bail, le printemps de 1899, c'est certain; il l'admet lui-même, sans pouvoir dire s'il était réellement insolvable car il ne connaissait pas ses affaires et il l'avait toujours cru riche. Aucune demande de cession pour bénéfice de ses créanciers n'avait été faite. Il savait, cependant, que plusieurs jugements avaient été récemment rendus contre lui, et que des saisies avaient été pratiquées sur ses biens. C'est alors qu'il résolut de venir à son secours et de l'aider, même à supporter le fardeau journalier de la vie par tous les moyens que ses propres

ressources pécuniaires mettaient à sa disposition. Il considérait évidemment que la reconnaissance demandait sa protection en faveur de celui qui, plusieurs années auparavant, à une époque où le père était généralement reputé riche et même cotté comme valant $300,000, lui avait fait don de propriétés foncières valant une trentaine de mille piastres, qui étaient encore à son avoir soit en nature ou en argent. Il n'y a pas un mot de preuve et il n'est pas même allégué que le père fut insolvable lorsqu'il fit ces dons et d'ailleurs l'appelant n'était pas créancier à cette époque. (1) L'insolvabilité allégué ne remonte pas plus loin que la date du bail. Enfin depuis quelques années, le fils avait fait des affaires prospères ayant été le gérant d'une fabrique importante aux Trois-Rivières, et ayant acquis d'autres immeubles. Bref, il n'eut aucune difficulté à réaliser ou emprunter les fonds nécessaires pour acheter plusieurs jugements et propriétés de son père vendues par le shérif. Qui prétendra que son but n'était pas même louable ? Mais il y a plus.

L'article 1033 du Code Civil dit que même s'il y a intention de frauder, il faut en sus que l'acte dont on se plaint ait l'effet de nuire au créancier. Où pouvait être le préjudice dans l'espèce qui nous occupe, savoir le bail de l'Académie de Musique qui est la seule transaction attaquée par la contestation comme entachée de fraude ? Le père loue une propriété, d'une grande valeur il est vrai, que l'assuré estima dans sa réclamation contre la Commercial Union à $25,000 ; mais n'était pas louée ni louable vu qu'elle avait besoin de réparations urgentes et considérables. Le père ne la vend pas pour argent comptant qu'il aurait pu empocher ; il la loue pour neuf ans, non pas pour un loyer en argent qu'il aurait peut-être pu transporter, mais moyennant des réparations nécessaires et durables que

(1) C. C. art. 1039.

1903

LANGELIER v. CHARLEBOIS.

Girouard J.

le fils locataire s'engage de faire, en sus du paiement des taxes municipales, à raison de $700 par année, le montant total ne devant pas dépasser celui du loyer, savoir $6,300. Il fut même stipulé au bail que

Any sum over this amount which may be expended by the said lessee to be at his own cost and risk, and for which he shall have no recourse against the lessor.

Le locataire se mit de suite en frais de faire d'abord les réparations urgentes, couvrir l'édifice à neuf, puis il renouvela les boiseries, la plomberie, les peintures et décorations, etc., et finalement dépensa la première année une somme d'environ $10,000, sur laquelle $4,000, étaient encore dues aux ouvriers, à l'époque de la saisie arrêt de l'appelant. Cette somme de $10,000 est donc venu augmenter la valeur de la propriété et le gage des créanciers loin de le diminuer. Les réparations étaient presque terminées lorsque, le 3 janvier 1900, les héritiers d'un nommé Hough qui avait un jugement contre l'appelant firent saisir l'Académie de Musique sur Charlebois père, comme débiteur de ce dernier et le firent vendre par le shérif le 6 février suivant, L'appelant ne se plaint pas que la procédure n'a pas été régulière et que les avis nécessaires n'ont pas été publiés. Il n'a jamais songé à attaquer la validité du décret. Naturellement, Charlebois fils se porta adjudicataire pour la somme de $6,000 qu'il paya au moyen d'un emprunt fait au Trust and Loan. Devenu propriétaire, il termina ses améliorations et pris une nouvelle police d'assurance pour $2,250 et se fit reconnaître par la même compagnie comme étant le bénéficiaire de celle qui existait avant pour $3,500, peu importe le nom de l'assuré, que ce fut Charlebois père ou une autre personne. Charlebois fils avait, à l'époque de l'incendie, seul intérêt dans l'immeuble. En supposant que le bail fut frauduleux, la vente du shérif a nécessairement mit fin à toutes plaintes de ce chef. Dès

ce moment la compagnie d'assurance devait payer au fils qui solda de ses deniers toutes les primes et qui seul peut la libérer. Il avait ces deux polices d'assurance lorsque l'incendie détruisit tout l'édifice et son contenu, le 18 mars 1900, plus une autre police de la Royale, pour $4,500 et une quatrième de l'Atlas pour $2,500, en tout $12,500. Le dépôt en cour de la somme que la Commercial Union doit encore ne peut changer les relations et les droits des parties.

Et puis si le fils n'était que le prête-nom du père, si tous ces procédés n'étaient qu'une conspiration et un plan gigantesque pour frauder ses créanciers sous le manteau de la justice et les apparences de la légalité tramés depuis des années,—ce qui n'est ni allégué ni prouvé,—non seulement la première police pour $3,500 serait la propriété du père, ainsi que l'appelant le prétend, mais aussi la dernière pour $2,250, et les polices de la Royal et de l'Atlas. Il n'attaque cependant que la première, et il a laissé les compagnies payer le montant des trois autres polices à l'intimé. Sa position n'est pas logique, ni soutenable.

Enfin, s'il y a un créancier qui ne peut attaquer le bail en question pour cause de fraude, c'est bien l'appelant. Il a laissé le shérif vendre l'immeuble sujet au bail en question. Il était partie dans la cause même de Hough où il fut décrété. Il n'a pas porté opposition ni fait d'objection, et le laissa adjuger à Charlebois fils sujet au bail. Il ne peut maintenant se plaindre de ce bail et de ses conséquences. L'appelant jure que la vente du shérif a eu lieu hors sa connaissance. Mais c'est son malheur, sinon sa faute, s'il n'a pas mieux surveillé ses droits. Il avait d'autant plus raison d'être vigilant qu'il avait antérieurement pratiqué une saisie sur le même immeuble, qui n'eut pas de suite, parcequ'il demandait que l'immeuble fut vendu sans être sujet au bail et que Chalebois fils s'y oppo-

1903

LANGELIER v. CHARLEBOIS.

Girouard J.

sait. Lui qui est avocat, se rappelle sans doute la maxime : *Vigilantibus et non dormientibus jura subveniunt.*

Pour ces raisons, nous sommes d'avis de renvoyer l'appel avec dépens.

DAVIES and NESBITT JJ. concurred in the judgment dismissing the appeal with costs.

KILLAM J.—At the close of the arguments in this case, I was inclined to the views indicated by Mr. Justice Hall, in the Quebec Court of Appeal. To my mind the case turns upon the acceptance of the intervenant's evidence as reliable proof of a real, *bonâ fide* lease to him of the theatre property and of a real agreement by the defendant to insure for the protection of the intervenant's independent expenditure. Having reference to the strong opinion of my learned brothers that his evidence should be accepted, I do not now dissent from their conclusion.

Appeal dismissed with costs.

Solicitors for the appellant: *Gouin, Lemieux & Brassard.*

Solicitor for the respondent: *H. Pelletier.*

ELIZABETH AGNES HILL.....APPELLANT; 1903

* Oct. 6, 7, 8.
* Oct. 20.

AND

MARGARET EWING HILL *et vir*.....RESPONDENTS.

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

Action for account—Partition of estate—Requête civile—Amendment of pleadings—Supreme Court Act, sec. 63—Order nunc pro tunc—Final or interlocutory judgment—Form of petition in revocation—Res judicata.

On a reference to amend certain accounts already taken, a judgment rendered on 30th September, 1901, adjudicated on matters in issue between the parties and, on the accountant's report, homologated 25th October, 1901, judgment was ordered to be entered against the appellant for $26,316, on 30th January, 1902. The appellant filed a *requête civile* to revoke the latter judgments within six months after it had been rendered, but without referring to the first judgment in the conclusions of the petition. It was objected that the first judgment had the effect of *res judicata* as to the matters in dispute and was a final judgment *inter partes.*

Held, that whether the first judgment was final or merely interlocutory, the petition in revocation must be taken as impeaching both former judgments relating to the accounts upon which it was based, that it came in time as it had been filed within six months of the rendering of the said last judgment and that it virtually raised anew all the issues relating to the taking of the accounts affected by the two former judgments.

A motion to amend the petition so as to include specifically any necessary conclusions against the judgment of 30th September, 1901, had been refused in the court below and was renewed on the appeal to the Supreme Court of Canada.

Held, that, as the facts set forth in the petition necessarily involved a contestation of the accountant's reports dealt with in the first

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

1903

HILL
v.
HILL.

judgment, the case was a proper one for the exercise of the discretion allowed by section 63 of the Supreme Court Act and that the amendment to the conclusions of the petition should be permitted *nunc pro tunc*.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montreal, and dismissing the petition in revocation of judgment upon which a new trial had been ordered in an action *en reddition de compte et partage*.

On 16th June, 1902, the appellant presented a petition in revocation of a judgment rendered 30th January, 1902, based on the report of an accountant, dismissing her action as against the executor and condemning her to pay respondents $26,316.34, and declaring the remaining undivided assets of the estate in question to belong to the respondents, on the grounds that the final judgment had been rendered on false documents, which had only subsequently been discovered to be false, and also the discovery of new evidence. The Superior Court, Archibald J., on 10th January, 1903, maintained the petition, revoked the final judgment and replaced the parties in the position they were occupying before the judgment. The respondent appealed to the Court of King's Bench, which on 28th April, 1903, by a judgment of a majority of judges reversed the judgment of the Superior Court and dismissed the petition in revocation of judgment. The plaintiff now appeals.

The questions raised on the present appeal are stated in the judgment now reported.

T. Chase Casgrain K.C. and *Farquhar S. Maclennan K.C.* for the appellants.

The plaintiff was not guilty of want of diligence in not having the new evidence at the original trial, but exercised reasonable diligence in procuring all

known evidence pertinent to the issue. The law does not require extraordinary diligence. *Wilson* v. *Clancy* (1); *Broadhead* v. *Marshall* (2); *Shields* v. *Boucher* (3).

The word 'false' in art. 1177 C. P. Q. must be given its natural ordinary meaning of untrue or erroneous, which has been placed upon it by the Court of Review, and in the case of *Durocher* v. *Durocher* (4). Upon that construction, the judgment, without doubt, has been based upon false documents and should be set aside. 4 Carré & Chauveau, Quest. 1759; 1 Pigeau, pp. 550, 555; D. P. 54-2-182; 68-2-79; Dalloz Supplement vol. 15, vo. *Requête Civile, nn.* 74-77: Labori, vol. 11, vo. *Requête Civile, n.* 165; *Laflamme* v. *St. Jacques* (5). Even a slight irregularity in procedure may give rise to a *requête civile; Eastern Townships Bank* v. *Swan* (6); *Neil* v. *Champoux* (7); *Glazier* v. *Kotzan* (8).

The judgment of 20th September, 1901, cannot be held to be *chose jugée* or *res judicata* with respect to the issues raised on the petition in revocation. The issues are not the same. In the judgment of September there is no *dispositif* of the issues which respondent now claims were finally decided in her favour. In the original case the plaintiff claimed to be discharged from the *bon* and draft because the advances on them were gifts under the will; but the contention in the petition was on the ground of payment and surrender of titles. In the original case, plaintiff claimed to be discharged from the Winning, Hill and Ware liability by a deed of composition and a judgment of discharge from court; but in the petition, that the liability had been extinguished by novation and entirely independent of

(1) 6 App. Div. N. Y. 449.
(2) 2 W. Bl. 955.
(3) 1 DeG. & S. 40.
(4) 27 Can. S.C.R. 634.
(5) 3 Rev. de Jur. 21.
(6) 29 Can. S. C. R. 193.
(7) 7 Q. L. R. 210.
(8) 1 Que. P. R. 71.

1903
HILL
v.
HILL.

the deed of composition to which he never became a party. The two issues in each proceeding were entirely distinct, and different evidence was applicable to each. The September judgment did not pass upon the issues presented in the petition and, therefore, the defence of *chose jugée* must fail. The test of identity is found in the inquiry if the same evidence would support both proceedings. It is clear it would not. 24 Am. and Eng. Encycl. of Law, 2ed., 780, 781; *Township of Stanstead* v. *Beach* (1) per Hall J. at p. 282 of the Queen's Bench Reports; 7 Larombière, art. 1351, sec. 18. The September judgment did not dispose of the entire controversy between the parties. It was necessary to have the accounts of the parties before the court in order that a further judgment should be rendered, dividing the property and finally disposing of the action on the demand for partition. The judgment appointing the accountant originally did not order the accounts of the parties to be made up. That order was given by the September judgment, and it was necessary, because the September judgment did not fix the amount of the share of each party, nor how much was to be divided, nor of what the property to be divided consisted, whether monies, bank shares, stocks or real estate, nor whether the property was such as could be conveniently divided in kind. All these details and particulars appear in the final judgment of 30th January, 1902, based upon the supplementary report filed in pursuance of the September judgment. Moreover, the plaintiff did not get the benefit of the reduction of interest made in his favour by the September judgment, as the accountant undertook to reduce the overcharge of interest by a different amount. See *Thompson* v. *Mylne* (2). A preliminary decree, prescribing the manner of proceeding deemed

(1) Q.R. 8 Q.B., 276; 29 Can. S.C.R. 736. (2) 4 La. Ann. 206.

necessary by the court to arrive at a final decision, cannot have the force of *res judicata*. It remains under the control of the court, subject to its revision, until a final decision.

In so far as the September judgment can be held to determine the principle on which the supplementary report was to be made in order to arrive at the rights and shares of the parties, it was an interlocutory judgment contemplating further proceedings in court and subject to revision on the final judgment disposing of the prayer in the conclusions of the action asking for a partition of the property in question. See *Tate* v. *Janes* (1); *Wardle* v. *Bethune* (2); *Lottinville* v. *McGreevy* (3); *Crane* v. *McBean* (4); *Budden* v. *Rochon* (5); *Bayard* v. *Dinelle* (6).

When the petition in revocation was presented, the contention of the plaintiff was that if the final judgment of 30th January, 1902, disposing of the action, and the judgment of 25th October, 1901, homologating the supplementary report were revoked and set aside, the whole case would be re-opened in such a manner that effect could be given to the new evidence and that the case could then be disposed of in the light of the whole evidence then before the court. The plaintiff, accordingly, did not pray for the revocation of the judgment of 20th September, regarding it as an interlocutory judgment. At the trial the plaintiff moved for leave to amend the prayer of the petition by including in the paragraph of the conclusions asking for the revocation of the judgments of January 30th, 1902, and October 25th, 1901, the interlocutory judgment of September 20th, 1901, and that application is now renewed before your lordships and under the

(1) 1 L. C. Jur. 151.
(2) 6 L. C. Jur. 220.
(3) 4 Q. L. R. 242.
(4) Q. R. 4 S. C. 331.
(5) Q. R. 13 S. C. 322.
(6) Q. R. 7 Q. B. 480.

1903
HILL
v.
HILL.

provisions of arts. 513 to 526 C. P. Q. and sec. 63 of the Supreme Court Act. The plaintiff is entitled to the amendment if it is necessary to do justice between the parties.

The plaintiff asked to be permitted to plead as part of the contestation of the accountant's report the facts set out in the petition in revocation, which related not only to the supplementary report but also to portions of the original report, and would not in any manner change the nature of the demand, but merely allow the plaintiff to ask for the revocation of the September judgment as well as of the two subsequent judgments. *Poulin* v. *Langlois* (1); *Walker* v. *St. Maurice* (2); *Seery* v. *St. Lawrence Grain Elevating Co.* (3); *Haight* v. *City of Montreal* (4). In *Voligny* v. *Corbeille* (5), an amendment was allowed to a *requête civile*. See also *Dugas* v. *Marineau* (6). *Perrault* v. *Simard* (7); *Bressler* v. *Bell* (8). The Privy Council in *Kent v. La Communauté des Sœurs de Charité de la Providence* (9), granted leave to amend the pleadings after refusal of the motion in the court below, and referred the case back to the Superior Court for judgment on the merits. We also refer to *Lambe* v. *Armstrong* (10); *Russell* v. *Lefrançois* (11); and *City of Montreal* v. *Hogan* (12).

Béique K.C. and *Lighthall* for the respondents. The judgment of 20th September, 1901, is *chose jugée* between the parties and cannot now be annulled, reversed or modified; Art. 1241 C. C. It was a final judgment; *Shaw* v. *St. Louis* (13); *Singster* v. *Lacroix* (14): Fuzier-Herman, Rep. *vo.* "Jugement" nn. 41, 134, 141, 150,

(1) 10 L. C. R. 322.
(2) 1 Que. P. R. 65.
(3) 5 Legal News 403.
(4) 33 L. C. Jur. 13.
(5) 1 Legal News 130.
(6) 1 Rev. de Jur. 159.
(7) 6 L. C. R. 24.
(8) 4 L. C. R. 101.
(9) [1903] A. C. 220.
(10) 27 Can. S. C. R. 309.
(11) 8 Can. S. C. R. 335.
(12) 31 Can. S. C. R. 1.
(13) 8 Can. S. C. R. 385.
(14) Q. R. 14 S. C. 89.

212 *bis*, 213, 232, 233, 235, 282 *et seq.*, 406. See also *Barry* v. *Rodier* (1); *Mercier* v. *Barrette* (2); *Forest* v. *Heathers* (3); *Budden* v. *Rochon* (4); *Plenderleath* v. *McGillivray* (5); *Benjamin* v. *Wilson* (6). Conversely, the judgment of September 20th is not in any sense an interlocutory judgment of a nature subject to revision by the judgment of 30th January, 1902, and still less by that on the petition. It is not even mentioned in the petition.

The missing books and documents had been seen by the plaintiff and their non-production cannot correspond to the discovery of "documents" of a conclusive nature withheld owing to circumstances contemplated by the law. All the alleged "new documents" and "new evidence" are *choses jugées* under the judgments of 20th September and 11th November, 1901. Hence even if petitioner were put back to the position of 25th October, 1901, the ultimate result would not be changed, for he would still be blocked by these judgments. Hence the provisions of art. 505 § 1 C. P. Q. are not complied with.

In short, to go back to the position before 25th October, 1901, would be useless and illegal.

Were the alleged facts true the great lack of diligence alone works an estoppel after so many years of opportunity for a regular trial. The alleged excuse is only the neglect to make ordinary searches. *Fairbanks* v. *Barlow* (7); *Benoit* v. *Salvas* (8); *Daoust* v. *Paquet* (9).

The Supreme Court has settled the jurisprudence of this case in *Shaw* v. *St. Louis* (10), and we submit also

(1) Q. R. 14 S. C. 372.
(2) 25 Can. S. C. R. 94.
(3) 11 R. L. 7.
(4) Q. R. 13 S. C. 322.
(5) Stu. K. B. 470.
(6) 6 L. C. Jur. 246.
(7) Q. R. 5 S. C. 382,
(8) 1 Rev. de Jur. 261.
(9) Q. R. 5 S. C. 471.
(10) 8 Can. S. C. R. 385.

1903

HILL
v.
HILL.

that in a question of provincial procedure the decision of the provincial court of appeal should be left undisturbed.

The judgment of the court was delivered by

The CHIEF JUSTICE.—This appeal is from a judgment of the Court of Appeal at Montreal reversing a judgment of the Superior Court which had granted the conclusions of a petition in revocation of judgment filed by the present appellant. It arises from an unfortunate quarrel between brother and sister over the division of their father's estate.

Upon an action *en reddition de compte et partage*, the accountant duly appointed by the court made a report by which he found the appellant to be indebted to the respondent in a very large amount. The parties both filed a contestation of that report. The case having gone to trial on these two contestations, the court by a judgment of the 20th September, 1901, adjudicated upon the various contentions of the parties, but referred the report back to the accountant to have it altered according to the said adjudication, with order to return it as so altered within ten days, costs of the whole case to be paid out of the estate. The said altered report having been duly filed, the court, upon motion by the respondent, homologated it on the 25th of October, 1901. By that report the appellant was found to be indebted to the respondent in a sum of $26,316; and upon inscription by the respondent for judgment accordingly, the court, on the 30th January, 1902, gave judgment for that amount in favour of the respondent against the appellant, as it could not but do.

The appellant subsequently, in June following, presented a petition in revocation of judgment under article 1117 of the Code of Procedure, alleging that since the said condemnation against him he had discovered new

evidence, of which he had no prior knowledge whatever, which new evidence, as he alleges, would establish that instead of his being the respondent's debtor, he is her creditor in a substantial amount. His conclusions are:

1. That the present petition in revocation of judgment be received by this court.

2. That an order be forthwith made and promulgated to suspend the execution of said judgment of 30th January, 1902.

3. That the said judgment of 30th January, 1902, and all proceedings had thereon, and the interlocutory judgment rendered on 25th October, 1901, homologating said supplementary report, be revoked, annulled, set aside, rescinded, cancelled, declared void and of no effect; and that said parties be restored and replaced in the same positions occupied by them respectively prior to the rendering of the said judgments.

4. That the plaintiff petitioner be permitted to plead as part of his contestation of the said accountant's report the facts herein above set forth.

Upon issue joined by respondent upon the said petition, the case went on to trial upon this new incident thereof, and ultimately judgment was given by the Superior Court granting the conclusions of the petition, the court finding that its essential allegations of fact had been proved. Upon an appeal by the respondent, the Court of Appeal reversed that judgment exclusively upon the ground that as the petition did not ask the revocation of the judgment dated the 20th September, 1901, the appellant's petition could not be allowed, the court holding that the judgment revoking only those of the 25th October, 1901, and of the 30th January, 1902, as prayed for, which were but the necessary consequence of that of September, 1901, and in execution thereof, without revoking this last one which to all intents and purposes was a final judgment, was inoperative and of no effect.

The findings of fact of the trial judge were not interfered with, and I may at once say that I cannot see

1903

HILL v. HILL.

The Chief Justice.

that we would be justified in interfering with them here.

The case, under these circumstances, that is presented for our determination is, to me, a plain one. The petition has been dismissed by the Court of Appeal simply upon the ground that by inadvertence the petitioner has omitted in his conclusions to include with the other two judgments the one of the 20th September, 1901. Now all the allegations of the petitioner are directed against that judgment. That is the one by which he is aggrieved, assuming his allegations of fact to be well founded. His demand would be nonsensical if it did not attack that judgment as well as the others.

The contestation of the accountant's supplementary report that he specifically asks to be allowed to make upon the facts he has since discovered necessarily includes a contestation of his first report, as the second is, of course, based entirely on the first. He asks that the accounts between him and the respondent be opened up *de novo*, and that could not be done without revoking the said judgment of September, 1901. It is patent that the omission to include it specifically in the conclusions of the petition is due to a clerical error and nothing else.

Now, the Supreme Court Act decrees expressly, section 63, that at any time during the pending of an appeal this court may, with or without any application, make all such amendments as are necessary for the purpose of determining the real question or controversy between the parties as disclosed by the pleadings, evidence or proceedings.

I am of opinion that here we should exercise the discretion that the statute so confers upon us and order that the necessary amendment *nunc pro tunc* be made in the conclusions of the said petition, by adding therein,

as if included in the petition as filed, the said judgment of the 20th September, and that the parties be restored to the position they respectively occupied before the rendering of the said last judgment. If the appellant fails to prove the facts that he now says he is able to prove, the respondent will not suffer; the judgment in his favour will remain. If, on the conrary, these facts are proved a gross injustice will have been prevented.

The respondent herself, I may add, in her plea to the appellant's petition renounced to the large sum of $15,679 and interest from the 30th of September, 1901, much more than half of the judgment that she had recovered against the appellant Now that sum had been taken by the court from the accountant's first report, antecedent to the judgment of September, 1901, as item No. 57 thereof. This shews clearly, first, that, notwithstanding the respondent's reserves and without determining what may be the consequence of that retraxit, if the appellant had not asked for the revocation of these judgments against him, he would have been forced to pay the $15,679 and interest from which that plea of the respondent purports to relieve him. And, secondly, that the respondent herself pleaded to the said petition as impugning the judgment of September, 1901, since it is by that judgment that the court determined the contestation as to that item 57.

I do not think it necessary to consider the question argued at bar whether the said judgment of September, 1901, was a final or an interlocutory one. I must say that it seems to me, without determining it however, that the Court of Appeal was right in holding it to have been a final one. *The Queen* v. *Clark* (1). But this is of no consequence as I view the case.

(1) 21 Can. S. C. R. 656.

1903

HILL v. HILL.

The Chief Justice.

The petition virtually attacked it, must be read as attacking it, and that petition was filed within the six months given to attack a final judgment.

I would allow the appeal and restore the judgment of the Superior Court with the addition of the judgment of September, 1901, in the *dispositif* thereof.

As to the costs, under the circumstances, I would give none to either party in the Court of Appeal nor in this court.

Appeal allowed without costs.

Solicitor for the appellant: *Farquhar S. Maclennan.*

Solicitors for the respondents: *Lighthall, Harwood & Stewart.*

1903

*Oct. 8, 9.
* Oct. 26.

FÉRÉOL A. MELOCHE *et al.* (DEFENDANTS) ..... } APPELLANTS;

AND

THÉOPHILE DÉGUIRE *et al.* (PLAINTIFFS) ..... } RESPONDENTS.

AND

ALEXANDRE ROBERT *et uxor* ..... MIS-EN-CAUSE.

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

Conveyance of land—Description of property sold — Partition—Petitory action—"Quebec Act, 1774"—Introduction of English criminal law —Champerty—Maintenance — Affinity and consanguinity — Parties interested in litigation — Litigious rights — Pacte de quotâ litis — Contract — Illegal consideration — Specific performance — Retrait successoral

The heirs of M. induced several persons related to them either by consanguinity or by affinity to assist them as plaintiffs in the

* PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

prosecution of a lawsuit for the recovery of lands belonging to the succession of an ancestor and, in consideration of the necessary funds to be furnished by these persons, six of the respondents and the *mis en cause*, entered into the agreement sued on by which said plaintiffs conveyed to each of the seven persons giving the assistance one-tenth of whatever might be recovered should they be successful in the lawsuit. In an action *au petitoire et en partage*, by the parties who furnished such funds, for specific performance of this agreement;

Held, reversing the judgment appealed from, (Q R. 12 Q. B. 298) Davies J. dissenting, that the agreement could not be enforced as it was tainted with champerty, notwithstanding that the consanguinity or affinity of the persons in whose favour the conveyance had been made might have entitled them to maintain the suit without remuneration as the price of the assistance.

Held, further,

1°. That there could be no objection to the *demande au pétitoire* being joined in the action for specific performance.

2°. That the defence of *retrait de droits litigieux* could not avail in favour of the defendants as it is an exception which can be set up only by the debtor of the litigious right in question. *Powell* v. *Watters* (28 Can. S C. R 133) referred to.

3°. That as the conveyance affected a specified share of an immoveable the exception of *retrait successoral* could not be set up under art. 710 C. C. *Baxter* v. *Phillips* (23 Can. S. C. R. 317) and *Leclere* v. *Beaudry* (10 L. C. Jur. 20) referred to.—Moreover, (affirming the judgment appealed from) in the present case, the controversy does not relate to the succession and, in any event, the assignor cannot exercise the *droit de retrait successoral*.

Semble, however, that the retention of a fractional interest in the property might have the effect of preserving the right to *retrait successoral*.

4°. That the laws relating to champerty were introduced into Lower Canada by the "Quebec Act, 1774," as part of the criminal law of England and as a law of public order the principles of which and the reasons for which apply as well to the Province of Quebec as to England and the other provinces of the Dominion of Canada. *Price* v. *Mercier* (18 Can. S. C. R. 303) referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of the Superior Court, sitting in review at Montreal, by

(1) Q. R. 12 Q. B. 298.

1903

MELOCHE v. DÉGUIRE.

which the judgment of the Superior Court, District of Montreal, at the trial (Curran, J.) had been reversed and the plaintiffs' action maintained with costs.

The case is fully stated in the judgments now reported.

Beaudin K.C. and *Martin K.C.* for the appellants. The contract sued upon is, on its face, champertous illegal and void under the laws of England prohibiting such contracts which laws became part of the criminal law of Quebec by force of the conquest and of "The Quebec Act, 1774." *Power* v. *Phelan* (1); *Hopkins* v. *Smith* (2). Although in some special cases maintenance is now permitted, there is a distinction to be made when the transactions amount to champerty and are tainted with illegality as against the public policy. *Bradlaugh* v. *Newdegate* (3); *Harris* v. *Brisco* (4); *Hutley* v. *Hutley* (5); *In re Cannon* (6).

The respondents might not have been guilty of unlawful maintenace by simply paying out their money or giving security for the costs of the appeal, to enable their relatives to secure their rights. This is not what is charged. What made the contract illegal and champertous was bargaining for division of the spoils should the action, in which respondents had no personal interest, prove successful. The appellants alone had an interest in these lands and were declared by the judgment of the Supreme Court to be the owners of the Dorval Islands (7).

This valuable property has buildings and other improvements upon it and the revenues ($3,250) claimed by the action are several times greater than the whole amount contributed by respondents in costs. Can it be urged that respondents' motive was

(1) 4 Dor. Q. B. 57.
(2) 1 Ont. L. R. 659.
(3) 11 Q. B. D. 1.
(4) 17 Q. B. D. 504
(5) L. R. 8 Q. B. 112.
(6) 13 O. R. 70; Cout. Dig. 234.
(7) *Meloche* v. *Simpson* 29 Can. S. C. R. 375.

only a desire to benefit the appellants, and not self-interest, when they stipulated for seventy-five per cent of this valuable property? They stipulated for a division of the field (*campum partire*); the lion's share for themselves. Their relationship does not prevent such a contract from being champertous. There is in *Hutley* v. *Hutley* (1) a full discussion of the question of collateral interest. Every contract or agreement into which champerty enters as a consideration is illegal and void and champerty is a good defence. Neither party can enforce it while it remains executory, but where it has been executed and money received in pursuance of it no action will lie to recover it 5 Am. and Eng. Encycl. of Law (2 ed.) p. 822 n. 3; *Ritchot* v. *Cardinal* (2); *Dussault* v. *La Compagnie du Chemin de fer du Nord* (3), and authorities there cited; *O'Connor* v. *Gemmill* (4); *Carr* v. *Tannahill* (5); *Brady* v. *Stewart* (6); *Cholmondeley* v *Clinton* (7).

In order to render an agreement void on the ground that it is in the nature of champerty, it is not necessary that it should amount strictly to champerty as a punishable offence. *Rees* v. *De Bernardy* (8); *Canadian Pacific Railway Co.* v. *Birabin* (9); arts. 889, 990, 1582, 1533 C. C.

The appellants moreover are entitled to succeed on the plea invoking *retrait successoral* under the provisions of the Civil Code, art. 710. The property in question was the only property which they acquired from the estate of their grandfather and they retained a fractional interest in the property under the alleged champertous agreement, and having such interest, they

(1) L. R. 8 Q. B. 112.
(2) Q. R. 3 Q. B. 55.
(3) 12 Q. L. R. 50.
(4) 29 O. R. 47; 26 Ont. App. R. 27.
(5) 30 U. C. Q. B. 217; 31 U.C. Q. B. 201.
(6) 15 Can. S. C. R. 82.
(7) 4 Bli. 1.
(8) 65 L. J. Ch 656.
(9) Q. R. 4 Q. B. 516.

1903

MECOCHE v. DÉGUIRE.

are entitled to invoke the provisions of article 710 C. C., and to exclude the respondents from partipation in the division of this property. Fuzier-Herman under article 841, C. N. *nn.* 22-23-24-25-27-28-163-164-165-167-169; *Baxter* v. *Phillips* (1); 10 Laurent No. 357.

The contract does not give the right to exercise an *action en partage*. It contains no description of any immovable property, nor does it state that any immovable property or rights therein are conveyed. What the respondents sought to acquire under the agreement was an undivided interest in what came to appellants out of their lawsuit with the Simpsons and under that contract, even if valid, they acquired no proprietory rights to the immovables in dispute, nor can they exercise the *action en partage* in any event—their recourse, if any, being an action *en reddition de compte*.

Béique K.C. and *Robertson* for the respondents. The defence of *retrait litigieux* was abandoned in the court below, and is clearly unfounded. Under article 1582 C. C., such a defence is never open to any but the debtor of the litigious right (the Simpson estate), and not even to him when the right "has been made clear by evidence and is ready for judgment." (Art. 1584 C. C., par. 4). When the agreement in question was entered into the right of the present appellants was apparent upon the record, it being merely necessary to apply the law to undisputed facts.

There is no *retrait successoral*. Art. 710 C. C. applies only to property which has devolved by succession. The appellants claim title by gift *inter vivos*. This gift divested the donor of the property, in his lifetime, and the first donee (whose succession appellants renounced) had only a life interest. Further, the *retrait successoral* is not open to the assignor but only to co-

(1) 23 Can. S. C. R. 317.

heirs not parties to the assignment. 16 Demolombe, No. 48; 10 Laurent, Nos. 358, 386, 388; 6 Aubry & Rau, p. 523, par. 621 *ter*. (text and note 27): Dalloz, "*Successions*," No. 1860; Beaudry-Lacantinerie, 2 "*Successions*," No. 3386; 5 Huc, No. 330. Nor does it lie in respect of the assignment of specific property. 10 Laurent, No. 364; 16 Demolombe, No. 83; 2 Aubry & Rau, p. 567, note 15; Dalloz, 1870-1, 422; Fuzier-Hermann, C. N., art. 841, Nos. 30, 32, 34.

Art. 1025 C. C. removes all difficulty as to the form of the action. The subject matter of the contract was certainly a thing certain and determinate, being undivided shares of whatever might be awarded by the judgment in *Meloche* v. *Simpson* (1), which as the parties well knew could be nothing else than a lot of land in the Parish of Lachine. The mutual consent to alienate and acquire that lot, consequently, made the respondents owners and the ownership being undivided, the action in partition lies.

The insufficiency of the description for purposes of registration is irrelevant. Registration does not affect rights of contracting parties *inter se*. The only consequence of non-compliance with art. 2168 C. C. is that the registration does not affect the lands. Between the parties all that is necessary is that the thing be certain and determinate. Provided it be so, any description whatever will suffice.

The plea of champerty is equally unfounded. The agreement sued upon was not opposed to but, on the contrary, was in furtherance of public policy. Upon this point we refer to the *dictum* in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (2) at page 210. The claim against the Simpson estate was believed by both appellants and respondents to be just, and in fact was so. Although just, it had been disallowed

(1) 29 Can. S. C. R., 375. (2) 2 App. Cas. 186.

1903

MELOCHE v. DÉGUIRE.

by the first two judgments, which, if allowed to stand, would have had the effect of oppressing appellants and as they had no sufficient means, apart from the property itself, they were compelled to ask for help to carry the case further. The agreement was not extortionate but fair. There was no possibility of injuring or oppressing the adverse party, nor of misleading justice. The agreement was in aid of suitors who had a just title and no adequate means, apart from the property itself, whereby they could further prosecute their just claim, and being fair between the parties and not injurious or oppressive, was in furtherance of right and justice and necessary.

The judgment *a quo* must therefore be confirmed unless such an agreement is a criminal offence and there cannot be any pretence that it is forbidden by the civil law of the Province of Quebec where there is no such offence known as that of champerty under the laws of England. It was not specially introduced at the time of the conquest nor by any subsequent legislation. The English law was directed against evils of a local and political nature, has been long obsolete there and inapplicable to the altered state of society and property and it is unsuited to the special conditions of Quebec, inhabited by different races of people and where contracts are governed by local law.

The respondents are related to the appellants by consanguinity and by affinity, and a person who has no pecuniary interest in the result of a suit but is related to the suitor, may lawfully "maintain" such suit in a proper way. The legality or illegality of such a contract depends upon the circumstances of the individual case, the test being whether the contract viewed as a whole is consistent with justice and public policy. In this case the parties called upon to give

assistance could lawfully maintain the suit taken by their relatives. *Guy* v. *Churchill* (1); *Fischer* v. *Kamala Naicker* (2); *Dessault* v. *Compagnie du Chemin de Fer du Nord* (3); *Hutley* v. *Hutley* (4); *Findon* v. *Parker* (5); *Harris* v. *Brisco* (6); *Bradlaugh* v. *Newdegate* (7).

The purchase of litigious rights in Quebec has the sanction of the law except where certain specified persons become purchasers; arts. 1484, 1485, 1582-1584 C. C. The object of the champerty laws is the protection of the adverse party. The interests of the parties to the alleged champertous contract are not taken into account any further than in any other contract. In a contract of alleged champerty, the agreement to divide directly affects the contracting parties only, and only affects the adverse party indirectly by increasing the probability that the suit will be unlawfully maintained. Therefore, where unlawful maintenance is impossible, the agreement to divide does not affect the adverse party at all.

The authorities cited by appellants are neither in point nor binding upon this court. *Hutley* v. *Hutley*, already discussed, is favourable to respondents. In *Power* v. *Phelan* (8) the persons held to be champertors were perfect strangers to the persons whose rights they acquired and had no antecedent interest in their suit. In *O'Connor* v. *Gemmill* (9) the contract was made by a solicitor, and in Quebec it would have been void under art. 1485 C. C. *Brady* v. *Stuart* (10) was not a case of champerty at all.

(1) 40 Ch. D. 481.
(2) 8 Moo. Ind. App. 170.
(3) 12 Q. L. R. 50.
(4) L. R. 8 Q. B. 112.
(5) 11 M. & W. 675.
(6) 17 Q. B. D. 504.
(7) 11 Q. B. D. 1.
(8) 4 Dor. Q. B. 57.
(9) 29 O. R. 47; 26 Ont. App. R. 27.
(10) 15 Can. S. C. R. 82.

1903

MELOCHE v. DÉGUIRE.

We refer also to *Attorney General* v. *Stewart* (1); *Mayor of Lyons* v. *East India Co.* (2); and *Jephson* v. *Riera* (3).

The judgment of the majority of the court was delivered by:

THE CHIEF JUSTICE.—The respondents' action is one *au pétitoire et en partage*, claiming from the appellants the portions of certain property near Montreal which were ceded to them by the appellants, as they allege, by an agreement of the 19th of October, 1896, entered into between them by a notarial deed of that date under the following circumstances:

The appellants (defendants) were the plaintiffs in the case of *Meloche* v. *Simpson*, reported in this court at page 379, vol. 29. It appears from the evidence that after having been defeated twice in their action in that case (in the Superior Court and the Court of Appeal), the appellants were disheartened and had expressed their intention to give up the fight with Simpson and not to take any further appeal. Théophile Deguire (now one of the respondents) and one of the appellants' co-plaintiffs in the action against Simpson, succeeded however in getting them to bring the case to the Supreme Court upon the respondents' signing the agreement now sued upon. By that writing it is stipulated that the three appellants

ayant résolu d'en appeler d'un certain jugement (viz. that rendered by the Court of Queen's Bench in the cause in question) ont sur la demande (of six of the respondents and of the mis-en-cause) cédé et transporté sans aucune garantie quelconque à chacun de ces derniers, un dixième indivis de tout ce qu'il reviendra dans la dite poursuite au cas où ils obtiendraient jugement en leur faveur, c'est-à-dire que le jugement de la cour d'appel serait renversé par le jugement à intervenir à la cour suprême.

(1) L. R. 14 Eq. 17 (2) 1 Moo. Ind. App. 175.
(3) 3 Knapp P. C. 130.

The consideration was that each of the said transferees was to bear one-tenth of the costs and disbursements to be incurred by reason of the appeal, and that five of them should each be jointly and severally liable to the appellants for the payment of five-tenths of such costs and disbursements

de plus ces derniers seront tenus de contribuer aux déboursés qui pourront etre exigés par leurs avocats.

Alphonse Meloche by the same deed transferred one-half of his remaining one-tenth share to the respondent Lucien Deguire, in consideration of the latter bearing the whole of his (Meloche's) share of the costs and disbursements. It was further agreed that if Antoine Meloche should be unable to contribute his share of the expenses, the other parties (except Alphonse Meloche) should bear it equally.

The respondent Théophile Deguire thereupon procured the required sureties and the appeal was taken, resulting, as appears by the report, *ubi suprâ*, in the reversal by this court of the judgment which had dismissed the appellants' action and the recovery against Simpson of the property in dispute. It is the performance of the aforesaid covenant entered into by the appellants that the respondents now ask by this action.

To the respondents' demand, the appellants pleaded, 1st. Champerty. 2ndly. A right to the *retrait successoral* under Art. 710 C. C., and the *retrait de droits litigieux* under Art. 1582 C. C. 3rdly. That as the agreement in question contained no description of the land ceded to the respondents, their action as taken *au pétitoire et en partage* could not be maintained.

This last ground has not been given countenance to in any of the three courts through which this case has passed, and rightly so. Assuming that, as regards third parties, the description of the property ceded to respondents in the writing in question would not be

1903

MELOCHE v. DÉGUIRE.

The Chief Justice.

sufficient in a case where the question of the respective rights of the parties came in conflict as to the ownership of the property, I do not see that, between the contracting parties themselves, there is the least room for any of them to doubt what was the property, or the undivided part thereof, that the appellents agreed to transfer to the respondents. Art. 1025 C. C. enacts that:

> A contract for the alienation of a thing certain and determinate makes the purchaser owner of the thing by the consent alone of the parties, although no delivery be made.

And according to Art. 1087, when this obligation has been contracted under a suspensive condition, the debtor is bound to deliver the thing which is the object of it, upon the fulfilment of the condition. Here upon the reversal by the Supreme Court of the judgment that had dismissed their action, the appellants were bound to fulfil the contract they had agreed to, were it lawful. And this action is nothing but a demand by the respondents of the specific performance of that obligation. As to the partition, there is nothing objectionable in the respondents adding it to their conclusions *au pétitoire*. It could hardly be contended that the respondents were obliged to take two actions, first, one *au pétitoire*, and secondly, after succeeding *au pétitoire*, one *en partage*.

As to the plea of *retrait de droits litigieux*, the appellants do not reiterate their contentions in their factum, and it might be taken as abandoned. Art. 1582 of the Code, upon which it was based, has no application whatever. Assuming that it extends to anything else than to sales of debts and choses in action, it is exclusively to the debtor, the party against whom the litigious right is claimed, that the right *de retraire* is given. *Powell* v. *Watters* (1).

(1) 28 Can. S. C. R. 133.

1903

MELOCHE v. DÉGUIRE.

The Chief Justice.

As to the *retrait successoral* art. 710 of the Civil Code gives no right to it when the assignment or sale is as here of a specific share in an immoveable property. *Baxter* v. *Phillips* (1); *Leclere* v. *Beaudry* (2). Moreover, as held in the Court of Review and the Court of Appeal, there is no succession in controversy here. These courts add, as another reason on this point against the appellants' contentions, that the assignor himself has not the right to the *retrait successoral*. It was, however, strenuously urged before us by counsel for the appellants that as they had retained a fractional interest in the property they are entitled to this right, citing 10 Laurent, No. 357, and Fuzier Herman, C. C. under Art. 841, Nos. 22 *et seq.* 163 *et seq.* There would seem to be some foundation for their contention on this point. But assuming it to be well founded, the two first objections against the said plea cannot be got over.

Now, as to the appellants' plea of Champerty upon which the Superior Court (Curran J.) dismissed the respondents' action. The formal judgment of that court is as follows:

> Considering that it appears on the face of the deed, upon which the present action is based, that the present plaintiffs undertook to furnish and become sureties for moneys, to enable the said suit to be carried before the Supreme Court of Canada, and that the considerations of such advances and surety were, that the lands and proceeds of revenues thereof should be divided in shares between the parties to said deed in the event of such appeal being successful. That such agreement was distinctly one of *campum partire* and being champertous was illegal and could not produce any civil effects, and cannot form the basis of an action at law for the enforcement of the provisions thereof.
>
> Considering that in view of the champertous nature of such agreement, forming the basis of the present action, the same cannot be maintained, doth dismiss the present action as champertous with costs.

The Court of Review upon an appeal by the plaintiffs reversed the judgment of the Superior Court, dis-

(1) 23 Can. S. C. R. 317. (2) 10 L. C. Jur. 20.

1903

MELOCHE v. DÉGUIRE.

The Chief Justice.

missed the plea of champerty and granted the conclusions of the action for the following reasons:

Considérant que le dit acte du 19 octobre 1896, n'est pas entaché de champerty ; qu'il ne viole aucune loi d'ordre public ; qu'il a été consenti de part et d'autre de bonne foi et pour valeur et considération licites, entre membres d'une même famille désireux de s'entr'aider de se protéger et de se réunir dans le but de faire entrer dans le domaine familial un bien de famille venant de l'ancêtre commun ; qu'il n'a été passé ni dans un but de spéculation malhonnête ni pour persécuter la partie adverse, ni pour atteindre un résultat injuste, mais qu'au contraire il n'a eu pour but et pour conséquence que de faire reconnaître par la plus haute cour du pays des droits de propriété longtemps méconnus, grâce aux efforts réunis et aux ressources combinées des parties au dit acte, que sous l'empire du droit commun, tant criminel que civil de la Grande-Bretagne, tel qu'interprété par la jurisprudence de ce royaume, un tel contrat n'est pas considéré comme entaché de vice et délit de champerty, qu'ainsi la dite première défense des défendeurs aurait dû être renvoyée au lieu d'être maintenue, par la cour de première instance.

Upon an appeal from that judgment by the defendants to the Court of King's Bench, the judgment of the Court of Review was affirmed. Hence the appeal to this Court by the same parties.

I am of opinion that the judgment of the Superior Court should be restored. The judgment appealed from seems to have lost sight of the distinction between maintenance and champerty. That the contract in question is one by which the appellants agreed to cede to the respondents a part of the land in dispute between them and Simpson, in the event of their succeeding in recovering it from Simpson, upon condition that the respondents were to share with the appellants in the disbursements required for the appeal and pay seven-tenths of the costs of the appeal should it fail, cannot be doubted. That is the agreement in unequivocal terms. Now this clearly was maintenance, striking out of it the stipulation of "*campum partire.*" Then, an agreement that if the suit in which the mainten-

ance takes place succeeds the property in dispute shall be divided between the plaintiff and the maintainor, or in other words, to bargain with a plaintiff to pay the expenses of a suit wholly or in part on condition that the plaintiff will divide with the party who so shares in the expenses the land or other matter sued for, if successful in such suit, is undeniably champerty. Now it is as undeniable, I take it, that every contract into which champerty enters as a consideration is null and void, *à nullité d'ordre public*, and that an action founded upon such a contract cannot be maintained.

The respondents contended that the interest they had in the suit against Simpson, remote as they had to admit it to be, entitled them to the stipulation that they would "*campum partire*" if the "*campum*" was recovered. But that contention cannot prevail. That might have been sufficient to justify them in coming to the assistance of the appellants, without being guilty of maintenance, but did not entitle them to stipulate the "*campum partire*" as the price of their assistance. Maintenance is lawful under certain circumstances, but maintenance in consideration of an interest in the subject matter of the action to be maintained cannot receive the sanction of a court of justice. Any one for instance even not interested at all, may, if he acts only from philanthropic motives, lawfully give money to a poor man to enable him to carry on a suit; but the stipulation on his part that if the poor man succeeds he will share in the proceeds, is prohibited and illegal as champertous. The respondents here evidently did not think that their interest in the suit in question was alone large enough to induce them to share in the costs of the appeal. What prompted them was not the interest they would now invoke; it was the expectation to "*campum partire*" with the appellants. It

1903

MELOCHE v. DÉGUIRE.

The Chief Justice.

was only upon the promise of getting seven-tenths of the field, if recovered, that they agreed to come to the appellants' rescue. Such an agreement cannot be enforced.

It was contended by the respondents at the argument, as it had been in the courts below, that champerty does not form part of the Criminal Law of the Province of Quebec, as introduced therein by the Imperial Act of 1774. I cannot treat that contention as a serious one. It has never been doubted anywhere that the law on this point is the same in that province as it is all over Canada, and the respondents have been obliged to concede that their contention was entirely a novel one. The valuable treatise on the criminal law of the province published as far back as 1842 by the learned Jacques Crémazie, includes maintenance and champerty as in force therein and the jurisprudence of the courts of the province is without a single exception in that sense. This court itself, in *Price* v. *Mercier* (1) has considered that the law on the subject is the same in the Province of Quebec as in England. There are cases, no doubt, as argued by the respondents, where it has been held that certain special civil and criminal laws of England did not extend to its subsequently acquired possessions. But the reasons upon which these decisions have been given have no more application to the Province of Quebec in relation to the law of champerty than they have to the rest of the Dominion. The offence has always been considered as "one against public justice, in that it tends to keep alive strife and contention," and the object of the law is to hinder the "perverting of the remedial process of the law into an engine of oppression." It is a law of public order, the principles of which and

(1) 18 Can. S. C. R. 303.

the reasons for which apply as well to Quebec as to England or the other parts of this Dominion.

The respondents seem to rely strongly on the fact that the appellants eventually succeeded (and this, they say, because of their assistance) in their suit against Simpson. But I fail to see that the result of the suit in any way justifies *post hac* what the law prohibited. They are asking to be rewarded for having committed a breach of the law instead of being made to suffer the consequences attached to that offence in the courts of civil law, that is to say, the privation of the right to derive any benefit from their champertous contract. The respondents' contention on this point, if it prevailed, would lead to the result that when a plaintiff recovers, the champertous agreement was lawful and the champertor is entitled to the share covenanted for, but that it is only if the plaintiff fails in his action that the agreement to share with him was unlawful. Or in other words that, where there is nothing to divide, the agreement to divide gives no right of action, but where there is something to divide, then the champertor would have an action. That cannot be so. The result of the case against Simpson does not affect the question.

I would allow the appeal with costs and dismiss the action with costs in all the courts against the respondents.

DAVIES J. (dissenting.)—In this case I understand there is no difference of opinion amongst the members of this court as to the application to the Province of Quebec of the laws relating to Champerty and Maintenance. The majority of the court is however of the opinion that while the circumstances of the case and the relationship of the parties were such as might have justified the respondent in directly assisting the

1903

MELOCHE v. DÉGUIRE.

Davies J.

appellants in their lawsuit without incurring the penalties of maintenance, nevertheless the provision in the agreement for a division of the subject matter of the litigation amongst the parties renders the agreement a champertous one which the courts will not enforce.

Champerty is defined to be a species of which maintenance is the genus. It is said to be a more odious "form of maintenance" but is only a form or species of that offence. The gist of the offence both in maintenance and champerty is that the intermeddling is unlawful; that it is officious and in a suit which in no way belongs to the intermeddler, but it is the same in each the difference being only in the mode of compensation.

An interference or an intermeddling by a mere stranger which would amount to maintenance or champerty is excusable if it comes from persons who either have a real interest in the litigation maintained by them or who act in the *bonâ fide* belief that they have. 5 A. & Eng. Enc. of Law, p. 819.

In this case the assistance given to the appellants in their lawsuit against the Simpson estate by the respondents would, it is conceded, have been perfectly legitimate but for the stipulation that the compensation they were to receive was to consist of part of the fruits of the litigation if successful. The parties were related to each other within the degrees of relationship which justify or excuse interference and assistance in the prosecution of litigation. They were either brothers-in-law or nephews of the plaintiff litigants, and their interest either through their wives or their mother in the subject matter of the litigation was a real interest and not an imaginary one. At any rate there cannot be any doubt, in my opinion, that they acted in a *bonâ fide* belief that they had such an

interest. Apart from the amount of the share they were to receive if the litigation was successful, on which I express no opinion one way or the other, as the point was not argued, the agreement in the case so far from being an unlawful or officious intermeddling was a commendable interference. The agreement when viewed in the light of all the circumstances connected with the title to the lands being litigated and the relation of the Meloche family to these lands, was really a family arrangement. The sisters had a right to assume that under the power of appointment contained in the deed from their grandfather they would receive some substantial portion of the property and with this belief their interference and that of their husbands to assist in maintaining their brothers' claim to the property unless clearly contrary to law should be aided and not frustrated by the courts. I see nothing against good policy and justice, nothing tending to promote unnecessary litigation, nothing that could be called immoral or permeated with a bad motive either in the agreement to assist or in the stipulation that in the event of success the property gained should be divided amongst the family including the respondents.

The action had been already through two courts; the highest court in the province had declared against the appellants' claim and it had either to be abandoned or carried to this court. With the assistance of the present respondents it was so carried and was successful, and with their further assistance an application for leave to appeal to the Judicial Committee of the Privy Council was successfully resisted. Having with the assistance of their sisters' husbands and their nephews successfully vindicated their rights to the property the appellants are now seeking the aid of the courts to repudiate their contract because it contains pro-

1903

MELOCHE v. DÉGUIRE.

Davies J.

visions for remunerating those who gave the necessary assistance, by assigning them a share in the property recovered.

The Judicial Committee of the Privy Council in the case of *Fischer* v. *Kamala Naicker* (1), composed at the time as was said by Coleridge C. J. in the case of *Bradlaugh* v. *Newdegate* (2) of a

> collection of perhaps as great lawyers as in the year 1860 could be brought together

expressed their opinion that the qualities attributed by English law to Champerty or Maintenance

> must be something against good policy and justice; something tending to promote unnecessary litigation; something that in a legal sense is immoral and to the constitution of which a bad motive in the same sense is necessary.

This definition of the law was entirely accepted as correct by the Lord Chief Justice in *Bradlaugh's Case* (2), and renders it therefore necessary in each case to look at the substance of the transaction.

In the case at bar, as I have already stated, I look upon the substance of the transaction, namely, the division of the fruits of the litigation, as a commendable family arrangement, the only point upon which I refrain from expressing any opinion being as to the fairness of the allotment of the shares, a question not argued.

In *Finden* v. *Parker* (3), Abinger C. B. said:

> The law of maintenance as I understand it upon the modern constructions is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others to bring actions or to make defences which they have no right to make.

And in *Bradlaugh* v. *Newdegate* (2), Lord Coleridge C. J. speaking of the common interest in the result of

(1) 8 Moo. Ind. App. 170-187. (2) 11 Q. B. D. 1.
(3) 11 M. & W. 675.

litigation which would justify the interference and assistance of third persons, says at p. 11:

As a general rule there is no doubt that such a common interest believed on reasonable grounds to exist will make justifiable that which would otherwise be maintenance.

And after referring to this qualification upon the doctrine laid down in all the older authorities, he goes on to say:

But then the instances they give show the sort of interest which is intended, a master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law, &c.

In the case we are considering there is no doubt in my opinion, and I do not understand that in the judgment of this court there is any doubt, that the relationship of the parties, their interest in the subject matter of the suit, and the peculiar circumstances of the case, all fully justified the respondents in interfering and giving assurance to the present appellants in carrying on their former appeal. The sole ground upon which their agreement is to be declared void is because of the provision to divide the subject matter in litigation in case of success. The case of *Hutley* v. *Hutley* (1) is relied upon to support this conclusion. There are, it is true, some strong observations in the reasons given by some of the learned judges in that case which can fairly be held to lend countenance to that contention, but they were mere *obiter dicta* and in no sense necessary for the decision of the case. In the subsequent case of *Guy* v. *Churchill* (2), Chitty J. reviews all the authorities and concludes that both maintenance and champerty are founded on the same principle or policy of law, namely, the tendency of the transactions to prevent the course of justice and concludes as follows:

The case of *Hutley* v. *Hutley* (1) forms no exception to what I have stated in reference to the parties having a common interest. The

(1) L. R. 8 Q. B. 112. (2) 40 Ch. D. 481.

1903

MELOCHE v. DÉGUIRE.

Davies J.

case was one of maintenance and champerty, and it was held that the existence of what was termed a collateral interest was not sufficient to justify the transaction. In that case there were two wills, and the plaintiff, being himself interested under the first will, sought to enforce against the defendant, the heir and one of the next-of-kin, an agreement to assist the defendant in upsetting the second will on the terms of his giving the plaintiff an interest in the property which would pass to the defendant on an intestacy. The agreement was based on the assumption of the plaintiff having no interest, the first will being obviously treated as a nullity. I know of no case where, the actual interest of the parties being sufficient to justify maintenance, the transaction has been avoided merely because they agreed to divide the subject matter of the litigation among themselves in a manner not in accordance with their actual title.

After a careful review of the authorities, and applying the rule to be deduced from them as I understand it to the facts of this case, I have reached the conclusion that the agreement does not contravene the law of champerty as understood at the present day, and that the appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellants: *Foster, Martin, Archibald & Mann.*

Solicitors for the respondents: *Béique, Turgeon, Robertson & Dessaulles.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS)..... } APPELLANTS;

1903
*Oct. 9,12,13.
*Nov. 10.

AND

MARY MILLER *és qual.* (PLAINTIFF)..... } RESPONDENT

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

Railways—Negligence—Braking apparatus—Railway Act, (1888) s. 243—Sand valves—Notice of defects in machinery—Liability of Company—Provident society—Contract indemnifying employer—Indemnity and satisfaction—Lord Campbell's Act—Art. 1056 *C.C.—Right of action.*

The "sander" and sand-valves of a railway locomotive, which may be used in connection with the brakes in stopping a train, do not constitute part of the 'apparatus and arrangements' for applying the brakes to the wheels required by section 243 of the Railway Act of 1888.

Failure to remedy defects in the sand-valves, upon notice thereof given at the repair-shops in conformity with the company's rules, is merely the negligence of an employee and not negligence attributable to the company itself; therefore, the company may validly contract with its employees so as to exonerate itself from liability for such negligence and such a contract is a good answer to an action under article 1056 of the Civil Code of Lower Canada. *The Queen v. Grenier*, (30 Can. S. C. R. 42.) followed.

Girouard J. dissented on the ground that the negligence found by the jury was negligence of both the company and its employees.

APPEAL from the judgment of the Court of King's Bench, appeal side (1) affirming the judgment of the Superior Court, sitting in review, at Montreal, (2) in favour of the plaintiff, on the finding of the jury at the trial.

*PRESENT:— Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) Q. R. 12 K. B. 1. (2) Q. R. 21 S. C. 346.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Actions were brought by the plaintiff, personally and as tutrix of her minor children, for damages sustained through the death of Richard Ramsden, her husband and the father of her children, alleged to have been caused by the negligence of the defendants. Deceased had been employed by the railway company, defendants, for a number of years and was killed while engaged in the performance of his duties as conductor of one of the company's freight trains at St. Henri Junction near Montreal. The causes were consolidated upon motion and tried before Doherty J. with a jury. The jury answered the questions submitted to them, and assessed the plaintiff's personal damages at $6,000 and those of the children at $4,000.

The accident which resulted in Ramsden's death was caused by a local passenger train of the company failing to stop when the semaphore was against it and coming in collision with the rear of the freight train which was standing on the tracks.

The questions submitted to the jury and their answers, so far as the issues on this appeal are concerned, were as follows:—

"2. Was the death of the said late Richard Ramsden caused,—

"(A.)—By the fault of the company defendant and its employees?—Yes.

"(*a.*) In running the Lachine train which struck the train upon which the said Richard Ramsden was employed, at a highly imprudent and dangerous speed when approaching the train-yard and switch, where the train which was struck was standing?—No.

"(*b.*) In running the locomotive of the said Lachine train with the tender in front?—No.

"(*c.*) In displaying no head light upon the said locomotive?—No.

"(*d.*) In allowing the coal in the tender of the said locomotive to be piled so high that the engine driver could not obtain an unobstructed view of the line in front of him?—Contributed to some extent.

"(*e.*) In approaching the distant semaphore inside of which Richard Ramsden's train was standing at a high rate of speed?—No.

"(*f.*) In neglecting to stop the said Lachine train before reaching said semaphore?—Yes.

"(*g.*) In allowing the locomotive of the said Lachine train to be used while in an unsafe and dangerous condition?—Yes.

"(*h.*) In the fact of the sand-valves used in connection with the brakes of the said locomotive being out of order and useless?—Yes.

"(*i.*) In failing to repair the defects in the said locomotive after the defects had been specially brought to the notice of the said company?—Yes.

"(*j.*) In not whistling and giving no warning whatever of the approach of the said Lachine train?—No.

"Or,—

"(B.)—By the fault of the said Richard Ramsden:—

"In failing to protect his train under and in accordance with the rules and regulations of the company defendant?—No.

"3. Were the said rules and regulations well known to the said late Richard Ramsden, and had his attention been specially directed thereto immediately before the accident?—Yes.

"4. If not the determining cause of the accident, did said failure of said Richard Ramsden contribute to bring about said accident?—No.

"5. Was the said Richard Ramsden from the 30th of May, 1885, up to the time of his death a member of the G. T. R. Insurance and Provident Society, having

1903

GRAND TRUNK RWAY. CO. v. MILLER.

made and signed the application for membership in the said society, defendant's exhibit No. 3, on or about the 20th of April, 1885, and received the certificate of membership, defendant's exhibit No. 4, on the 30th of May, 1885?—Yes.

"6. Did defendant annually contribute a proportion, and what proportion, to the fund and society aforesaid?—Yes. From 1885 to 1888 inclusive, $10,000; after 1888, $12,500 per annum, and for additional services contributed by company $10,000 to $15,000, as per evidence.

"7. Is defendant's exhibit No 2. a true copy of the rules and regulations and by-laws of said society in force at the time of the death of the said Richard Ramsden and during the whole period of his employment by defendant?—Yes."

The trial judge reserved the case for the consideration of the Court of Review and stated that:—

"By their answers to questions 5, 6 and 7, the jury found that the late Richard Ramsden was at the time of his death a member of the G.T.R. Insurance and Provident Society, that defendant annually contributed to the said fund and society, and that defendant's exhibit No 2 is a true copy of the rules and regulations of said Society.

"By the last-mentioned answers, the jury find substantially the facts alleged in defendant's second plea to have been established. By interlocutory judgment rendered on the 5th March, 1900, dismissing an inscription in law of plaintiff, said plea was declared well founded in law, and, if established by the evidence, a good answer to plaintiff's action.

"Under these circumstance, and in view of the importance of the question of law raised by said plea, to wit, as to the binding effect upon plaintiff *ès nom et qualité*, of by-law No. 15 of the said society, which

reads as follows :—' In consideration of the subscription of the Grand Trunk Railway Company to the society, no member thereof or his representatives shall have any claim against the company for compensation on account of injury or death from accident,' as relieving the company, defendant, from all liability in consequence of the death of said late Richard Ramsden, and whether the amount contributed to the said society by defendant, as found by the jury, constitutes its proper proportionate contribution as required by law, and of the fact that the questions of the effect of said by-law, and in what proportion, if any, the company defendant is by law, in order to claim the benefit thereof, bound to contribute to said society, are already under advisement before the Superior Court, sitting in Review, in this district, in a cause of *Ferguson* v. *The Company*, (1) defendant, I have reserved the case for the consideration of the Court of Review."

In the Court of Review the plaintiff moved for judgment for the damages assessed by the jury, and the defendants moved, on the findings, for dismissal of the action. The court dismissed the motion for dismissal and ordered judgment to be entered for the plaintiff, personally and *ès qualité*, with costs as of one action only (2). By the judgment appealed from (3) the judgment of the Court of Review was affirmed.

Lafleur K.C. and *Beckett* for the appellants. The jurisprudence settled by the case of *The Queen* v. *Grenier* (4) deprives the plaintiff of any right of action whatsoever against the said defendants. A workman may so contract with his employer, as to exonerate the latter from liability for negligence, and such renunciation is an answer to an action by his

(1) *See* (Q. R. 20 S. C. 54)
(2) Q. R. 21 S. C. 346.
(3) Q. R. 12 K. B. 1.
(4) 30 Can. S. C. R. 42.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

widow and her infant children to recover compensation in the event of his death. The Court of Review, at Montreal, in *Ferguson* v. *The Grand Trunk Railway Co.* (1), and the Court of Appeal for Ontario, in *Holden* v. *The Grand Trunk Railway Co.* (2), applied the rule laid down in *The Queen* v. *Grenier* (3) to the same by-law of the Grand Trunk Railway Insurance and Provident Society. The decision in *Robinson* v. *The Canadian Pacific Railway Co.* (4), merely related to the plea of prescription, but did not declare that indemnity could not be secured by special contract. In this case the by-law and regulations made for valuable consideration constitute a binding contract for indemnity against any action under arts. 1053 and 1056 C. C.

There is no finding by the jury that the company failed to provide the best known appliances for applying the brakes to the wheels as specified by sec. 243 of the Railway Act, 1888. They are silent on that point. The finding as to the defective sand-valves has nothing to do with the requirements of that section. The sand-valves do not form part of any "apparatus or arrangements" for applying brakes to the wheels in any way whatever. This is not the kind of negligence contemplated by that section. Then if they were defective, it was the duty of the employees to have put these sand-valves in order upon notice given at the repair-shops. This is not a case where negligence can be attributed to the company as distinct from its employees and there is no prohibition against making a contract to relieve them from liability in such case.

R. C. Smith K.C. and *Montgomery* for the respondent. The provisions of art. 1056 C. C. are laws of

(1) Q. R. 20 S. C. 54. (2) 30 Can. S. C. R. 42.
(4) [1892], A. C. 481.

public order and cannot be contravened or set aside by a private agreement; art. 13 C. C.

The society referred to is a continuation of the Grand Trunk Railway Superannuation and Provident Fund established by the Act of 37 Vict. ch. 65, in 1874. The portions of that Act relating to the fund are the preamble and sections 11, 12, 13 and 14. In 1878, by 41 Vict. ch. 25, sec. 2, *et seq.*, the company was authorized to make, either separately or in connection with the Superannuation and Provident Fund, provision for insurance against accident to its employees, including insurance in case of death. Sec. 3 provides that the company shall contribute to such fund annually any amount not exceeding one hundred and fifty per cent of the amount which may be subscribed annually to such fund by the members thereof. By sec. 4, the provisions of the Act of 1874 are made applicable to the fund created by the Act of 1878. The Great Western Superannuation and Provident Fund Act of 1880, established a similar fund for the Great Western Railway, and in 1884, by 47 Vict. ch. 52, sec. 17, the provisions of the Acts of 1874 and 1878 are made applicable to the whole Grand Trunk system. A similar provision is found in the Act of 1888, 51 Vict. ch. 58, par. 9. In none of these Acts is the slightest suggestion to be found of any such provision as is contained in by-law 15; therefore, this by-law is *ultra vires* and in excess of any powers, expressly or implied conferred upon the management. It is unreasonable and contravenes the civil laws of Quebec. See sec. 288 of the Railway Act, 1888, and arts. 13, 1053, 1056 C. C.; *Roach* v. *Grand Trunk Railway Co.* (1).

It is invalid as a contract, as appellants were not parties to it and no consideration was given. When the fund was formed, the appellants were ordered to

(1) Q. R. 4 S. C. 392.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

contribute to it not less than one-half nor more than three-halves of the amount contributed by the employees. When subsequently they were authorized to make, either separately or in connection with the fund, provision for insurance against accident or death, they were authorized to contribute not more than 150 per cent of the amount contributed by the employees, but no minimum was fixed. They elected to make this provision for insurance in connection with the fund, and the amalgamated funds were thereafter known under their present name, viz., "The Grand Trunk Insurance and Provident Society," so that since that time the appellants have been continually under a statutory duty to contribute to the funds of the society an amount representing at least one-half of the amount contributed by the employees to the superannuation and provident branch of the society, in addition to the contribution to the insurance fund.

It appears that the contribution of the appellants has been made generally without any distinction as to the different branches There is nothing to shew that this contribution would be even sufficient to cover the amount which the company is bound by law to contribute to the provident fund of the society; on the contrary, the contribution has not been increased since 1888, although great increases have been made, both in their system and in their number of employees since that time. The defence rests entirely upon this contribution, and the burden of proof was upon them to shew that they had at least contributed their proper proportion in order to bring the by-law into effect, which they have failed to do. The by-law creates an exception to the law and the evidence of the fulfilment of the conditions must be strictly scrutinized. The rules and regulations submitted to Parliament provided for an entirely distinct

consideration for the contribution of the company, *vide*, Rule 66 :—" The Grand Trunk Railway Company will, each half year, contribute, out of the revenues of the company, a sum in aid of the sick benefits and allowances of the Society, and in consideration thereof these rules and all alterations which may be made in them shall be subject to the approval of the directors of the Grand Trunk Railway Company." From the absence of any such evidence, only one inference can be drawn, that is, that absolutely no new consideration was given. A contribution already ordered by statute to be subscribed could not form the consideration for an agreement with individual members. As a contract it is void *ab initio*, for lack of a consideration. Such an agreement is contrary to public order, art. 13 C. C.; because it permits the appellant to contract itself, by anticipation, out of the consequences of its own gross negligence and not merely that of its employees. As regards gross or personal negligence, the French law, from which we derive our doctrine, is clear and indisputable. Nouveau Denisart " Fautes," p. 441; Demangeat, " Revue Pratique de Droit Français, vol. 55, p. 558."

Menus-Moreau, de la Responsabilité des Patrons, Clause de non-garantie; 1 Sourdat " Responsabilité," p. 679; 24 Demolombe, *n.* 406; 16 Laurent, No. 230; Sainctelette, p. 18, No. 5; Desjardins, Tr. de Droit Comm. et Marit., t. 2, No. 276; 1 Fuzier-Herman, art. 6, par. 13, 14; vol. 3, art. 1381, 1383, par. 1365, 1368, 1372-1375. See also 14 Am. & Eng. Encyc. of Law, p. 910; *Lake Shore & Michigan Southern Railway Co.* v. *Spangler* (1); *Kansas Pacific Railway Co.* v. *Peavy* (2); *Farmer* v. *The Grand Trunk Railway Co.* (3); *Brasell* v. *Grand Trunk Railway Co.* (4); *Glengoil*

(1) 28 A. & E. Rd. Cas. 319.
(2) 11 A. & E. Rd. Cas. 260.
(3) 21 O. R. 299.
(4) Q. R. 11 S. C. 150.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Steamship Co. v. *Pilkington* (1) per Taschereau J. at page 157.

The right of action given by art. 1056 C. C. is not a representative one. That article is not merely an embodiment of Lord Campbell's Act, but differs from it in several very material respects. The clause, "without having obtained indemnity or satisfaction," is added; the clause as to the right of action in the case of a duel is also added. Under the civil law and under the French law the right of action of the relatives has always been distinct from that of deceased. Sourdat, vol. 1., Nos. 55 and 56. The same might be said of the jurisprudence of the Province of Quebec at least up to the time of the ruling in the *Grenier Case* (2). See *Ruest* v. *Grand Trunk Railway Co.* (3). The point has been clearly decided in *Robinson* v. *Canadian Pacific Railway Co.* (4). While it is true that the Judicial Committee had only to deal with the question of prescription, they laid down in the clearest possible terms the following principles:—(1.) That the action given by art. 1056 C. C. is not merely an embodiment in the Civil Code of Lord Campbell's Act, but that it differs substantially from it in its provisions; (2.) That this right of action given to the persons mentioned in art. 1056 C. C. is an independent and not a representative right; (3.) That the right of action given to the persons mentioned in that article is not barred by any conditions affecting the personal claim of the deceased other than those specified in the article, viz.:—(*a*) that the death was caused by the defendant; (*b*) that the deceased had not obtained indemnity or satisfaction. *Vide* remarks of Lord Watson at p. 487 of the report. The English decision in *Griffiths*

(1) 28 Can. S. C. R. 146.
(2) 30 Can. S. C. R. 42.
(3) 4 Q. L. R. 181.
(4) [1892] A. C. 481.

v. *Earl Dudley* (1), on which the judgment of the Supreme Court in the *Grenier Case* (2) relies, was cited by counsel for respondent before the Judicial Committee, but was evidently regarded as inapplicable to our law, as it was distinctly overruled.

The indemnity or satisfaction referred to in art. 1056 C. C. must have been obtained by the person injured between the date of injury and the date of death. S.V. 74, 2, 285.

Even if valid, the by-law does not exclude or affect the action of the wife personally. The by-law reads:— "In consideration of the subscription * * * *no member thereof nor his representatives* shall have any claim, etc." The respondents are not the representatives of the deceased, they did not succeed to his rights nor have the children even accepted his succession. The provision is an exceptional one derogating from the civil law, and must be interpreted with the greatest possible strictness—*exceptio est strictissimæ interpretationis.* The appellants are, moreover, the stipulating parties and, if any ambiguity exists as to the meaning of the word "representatives," it must be interpreted against them. Art. 1019 C. C.

Even if such a by-law could create an agreement barring any claim and binding not only upon the deceased, but also upon his widow and children, it must be disregarded in the present case, since the accident was the result of the company's failure to use the best appliances for stopping the train which brought about the collision. 51 Vict. ch. 29. sec. 243. The defective brakes and sand-valves were responsible for bringing about the accident, and it is to this cause that the jury attributed the accident in their verdict. The engine had originally been equipped with steam-brakes, but air-brakes had been substituted, the old

(1) 9 Q. B. D. 357. (2) 30 Can. S. C. R. 42.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

cylinders, however, being retained. Consequently, the air-cylinders were in a leaky condition and incapable of exerting a sufficient pressure to apply the brakes properly. Furthermore, the sand-valves were not of an approved type and were continually clogged up so completely as to prevent any sand being thrown upon the rail for the purpose of bringing about a quick stop. Both of these defects had been frequently brought to the notice of the company, but they had not been remedied.

The CHIEF JUSTICE.—The Court of Review's first *considerant* grounded upon section 243 of The Dominion Railway Act of 1888 was sufficient by itself alone to solve the controversy between the parties and to support the court's judgment in favour of the respondent. And, had I been able to come to the same conclusion upon that point, I would have refrained from considering the other questions raised in the case, the solution of which would then have been quite unnecessary for the determination of the appeal.

But I am unable to see that the sand-valves are or form part of

> apparatus and arrangements as best afford means of applying by the power of the steam-engine or otherwise the brakes to the wheels of the locomotive or tender, or both, or of all or any cars or carriages comprising the trains,

so as to bring the case under that section.

I therefore have to consider the other points involved in the appeal.

The first one, as to the legality of the stipulation by the company that they would not be responsible for injuries or death resulting from accidents, is concluded by our decision in *Glengoil* v. *Pilkington* (1), and *The Queen* v. *Grenier* (2).

(1) 28 Can. S. C. R. 146. (2) 30 Can. S. C. R., 42.

The accident in question must necessarily have been caused by the carelessness or negligence of some of the employees of the company, assuming that would make a difference. The jury, it is true, found that the accident was caused by the fault of the company and their employees. But I take it that in doing so they merely assumed that the company were responsible for the acts and omissions of their employees. That is why as one of the causes of the accident they found "in neglecting to stop the said train before reaching said semaphore." Had they intended to find as a fact that the company, *otherwise than through their employees*, were the cause of the accident, there would be no evidence to support such a finding. The negligence of Broadhurst, the engineer of the train in question, is clearly the proximate cause of it. He knew the defects of his engine, but failed to act accordingly.

Then, what the company really did was to limit their liability, not to stipulate non-liability. They admitted it, even in cases where in law their employee would have no claim against them by stipulating that the amount of the insurance would cover all the damages that he might suffer in case of accident, even if *that accident was due to his own fault or negligence.* So that, it is not merely the amount of insurance that the deceased agreed to accept as indemnity and satisfaction for any injury he might sustain in cases where the act of the company would have been the cause of the accident, but also, as part of that indemnity or satisfaction, the insurance against his own acts of negligence, where he would have had no claim at law against the company. The wife in such a case is entitled to the insurance even if her husband was exclusively the cause of his own death.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

The Chief Justice.

The other material point argued before us presents some difficulty, as I view it.

Has the deceased ever received *indemnity or satisfaction* for the injury in question in the sense to be given to those words in art. 1056 C. C.? If so, by the *ratio decidendi* and the opinion delivered by their Lordships of the Privy Council in *Robinson* v. *Canadian Pacific Railway Co.* (1), the respondent's action fails. It is no doubt singular that any one can receive indemnity or satisfaction so as to bar an action which belongs to another. But that is the state of the law.

Here, were I unfettered by authority, I would be inclined to doubt if the deceased can be said to have received any indemnity or satisfaction, but I am bound by the authority of *The Queen* v. *Grenier*, (2) to hold that he has. The word *renunciation* used by the learned Chief Justice who delivered the judgment of the court in that case means nothing else, it is clear, than release in consideration of the indemnity or satisfaction that an employee under such circumstances agrees to have received in lieu of any further claim against the company in the case of his meeting any injury in the course of his employment. It was argued there, as it was at bar in this case, that an employee cannot stipulate in advance with his employer so as to defeat, in case of his death, the action of his wife and children; and that such a stipulation was not the indemnity or satisfaction required by art. 1056. But that contention did not prevail. We were of opinion that the words "without having obtained indemnity or satisfaction" of the article of the Code would be meaningless if the construction contended for by the plaintiff in that case, as it is by the plaintiff here, prevailed, that an indemnity or satisfaction which would have barred an action by the deceased, had he

(1) [1892] A. C. 481. (2) 30 Can. S. C. R. 42.

survived, does not also bar the action by the consort and children. That cannot be. That would be reading out of the article the words "without having obtained indemnity or satisfaction." In other words, by the decision of the Privy Council in the *Robinson Case* (1), the survivors have an action under the Code though the deceased, when he died, had lost his right of action, *except* when it is because the deceased had obtained indemnity and satisfaction that he had lost his right of action. In such a case, by exception, the law is the same under the Code as it is in England under Lord Campbell's Act. However small the indemnity accepted by the deceased may have been, in whatever form or shape he may have accepted it, at what time he has accepted it, makes no difference.

In that Robinson case, the Privy Council held that the prescription of the action of the deceased was not an indemnity or satisfaction, and that in that case the wife had an action under the Code though the deceased when he died had none, conceding however in unequivocal language that indemnity or satisfaction to the deceased is a bar to the survivor's action. And in the *Grenier Case*, (2) we were bound, I need hardly say, by that decision and held in strict accordance with it, that there having been indemnity or satisfaction by the deceased in that case, the survivor's action did not lie, though it did lie in the *Robinson Case* (3) because the deceased there had not in his lifetime received indemnity or satisfaction.

I am of opinion that the appeal should be allowed with costs, and the action dismissed with costs in all the courts against the respondent.

SEDGEWICK J. concurred in the judgment allowing the appeal with costs.

(1) [1892] A. C. 481.
(2) 30 Can. S. C. R. 42.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Girouard J.

GIROUARD J. (dissenting)—On the 29th January, 1900, respondent issued two actions against the appellants, one in her own name and the other in her quality as tutrix to her minor children, each action for $15,000 damages for the death of her husband while in the service of the company, at St. Henri, on the 2nd of January, 1900, through an accident which occurred on their line of railway, in consequence, it is alleged, of gross negligence on the part of the company and its servants and employees.

On motion of the respondent, these actions were combined by a judgment of the Superior Court of the 2nd November, 1900, but the question of costs was reserved.

The case was tried by a judge and a jury who found the following facts :—

2. Was the death of the said late Richard Ramsden caused.

(*a.*) By the fault of the Company Defendant and its employees ?—Yes.

(*f.*) In neglecting to stop the said Lachine train before reaching said semaphore ?—Yes.

(*g.*) In allowing the locomotive of the said Lachine train to be used while in an unsafe and dangerous condition ?—Yes.

(*h.*) In the fact of the sand-valves used in connection with the brakes of the locomotive being out of order and useless ?—Yes.

(*i.*) In failing to repair the defects in the said locomotive after the defects had been specially brought to the notice of the said company ? Yes.

Both parties moved for judgment upon the verdict, the respondent for the amount at which the damages were assessed, and the appellants for the dismissal of the action. The unanimous judgment of the Court of Review dismissed appellants' motion and maintained respondent's with costs as in one action only, and this judgment was unanimously confirmed by the Court of King's Bench.

The Court of Review was composed of the Acting Chief Justice, Sir Melbourne Tait, Mr. Justice

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Girouard J.

Pagnuelo, and Mr. Justice Curran, who gave judgment for the plaintiff on the verdict, although they do not entirely agree as to the reasons of judgment.

The Acting Chief Justice held the company responsible under section 243 of The Dominion Railway Act, 1888. Mr. Justice Pagnuelo and Mr. Justice Curran appear to have been against the company on all the points.

Appellants submit that under the judgment rendered in the case of *The Queen* v. *Grenier* (1) plaintiffs have no right of action whatsoever against the said defendants. It has been submitted on the other hand that *The Queen* v. *Grenier* (1) conflicts with *Robinson* v. *The Canadian Pacific Railway*, (2) decided by the Privy Council. I think that neither both contention is well founded.

I fail in the first place to see any such contradiction. In the *Robinson Case* (2), the point in issue was one of prescription under Articles 1056 and 2262 of the Civil Code. That prescription differs essentially from the prescription known to the French law, whether under the French code or the old law. It is not based upon a presumption of payment, but solely upon grounds of public policy, so much so that the judge in Quebec is bound to take notice of it *ex officio*. A judge in France never can do so.

It cannot be seriously pretended, it seems to me, that prescription is equivalent to the indemnity or satisfaction mentioned in article 1056 of the Civil Code. This point is clearly settled by the Privy Council in the *Robinson Case* (2). Lord Watson said .

That prescription is not, within the meaning of the Code, equivalent to indemnity or satisfaction is made perfectly clear by a reference to art. 1138. (2)

(1) 30 S. C. R. 42.

(2) [1892] A. C. 481.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Girouard J.

In *The Queen* v. *Grenier* (1) there was no question of prescription; the point raised by the pleadings and decided by us was not whether the widow or children had a representative or an independent action—which no doubt they always had—but whether the deceased had obtained indemnity or satisfaction within the meaning of article 1056 of the Code, and we held that he had, by becoming a member of an insurance association, similar to the one now under consideration, which was composed of the employees on the Intercolonial Railway. As in this instance, they were all compelled, before entering the service, to join it and to make certain contributions to its funds in order to enable the association to provide certain pecuniary allowances to be paid to them or their families in cases of accident, in accordance with certain by-laws, rules, conditions and regulations, signed by each of them. The railway proprietors had annually contributed to this insurance fund large sums of money in consideration of which it was made a rule or by-law of the association agreed to by all the members that the railway proprietors should be relieved of all claims for compensation for injuries and even death of a member. The respondent has quoted several French decisions to establish that such an arrangement cannot cover a case of negligence. But they have no application here, where the law in this respect is different. Article 1056 of our Code cannot be found in the French Code. France is only governed by the general principles laid down in articles 1382, 1383, 1384 and 1385 of the French Code, corresponding to arts. 1053, 1054 and 1055 of our Code. Art. 1056, as far as "indemnity or satisfaction" is concerned is new law, not to be found in Lord Campbell's Act, as I presume these words under the common law of England were unnecessary, not even

(1) 30 Can. S. C. R. 42.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Girouard J.

in the Canadian statutes, where probably the same impression prevailed in the legislature. The codifiers offer no explanation for art. 1056. It is not even alluded to in their reports and although it seems to me it was enacted with the view of making the jurisprudence of Quebec agree with that of Ontario, I do not see any change in the old French maxim which declares that no one can contract against his own negligence.

With regard to the railway insurance clause, the present case is the same as in *The Queen* v. *Grenier*. (1) I am bound by that decision, and I am yet of opinion that it was correctly decided. The opinion of the learned judge who delivered the judgment of this court may contain some unnecessary statements which may be considered as *obiter dicta*. It cannot be denied that the only question raised in that case was whether indemnity or satisfaction had been obtained within the meaning of article 1056 of the Civil Code. Following *Glengoil Steamship Co.* v. *Pilkington* (2) we held that the deceased had contracted with his employer so as to exonerate the latter from liability for the negligence of his servants and employees, and that the payment of the large annual contributions by the employer to the insurance fund, and accepted by the deceased under the by-law, was indemnity and satisfaction as to all parties, within the meaning of the article of the Code. I think the language of the Code is clear and comprehensive enough to cover an arrangement such as the one made by the railway proprietors with their employees. So we held at all events.

But this case is very different from *The Queen* v. *Grenier* (1). The death was due not to the negligence of the employees and servants only, but as the jury

(1) 30 Can. S. C. R. 42.) (2) 28 S. C. R. 146.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Girouard J.

found—and their findings are not attacked—to the negligence of both the company and the employees. I do not feel disposed to go behind these findings to ascertain the position of the company; the language of the jury is plain enough; they give their reasons which are satisfactory to my mind at least. I do not intend to substitute myself for the jury. I accept their verdict.

If the law of Quebec was like the law of England, I would not hesitate to apply *The Queen* v. *Grenier* (1) to a case of negligence of the employer like the present one. But in Quebec, although one can validly contract for exemption from liability for the negligence of his employees and servants, no one can free himself from responsibility for his own fault. This point we declined to decide in the *Glengoil Case*. (2) It must be observed that the latter case was decided not upon English authorities, but upon what we considered to be now the jurisprudence of France. Taschereau J. delivering the opinion of the court said:

> The jurisprudence in France, though perhaps formerly not uniform now sanctions the validity of such a contract (1).

The learned judge quoted a long array of *arrêts* and commentators. But I venture to say that upon the other more difficult question, as he says, as to the validity of a similar stipulation for one's own fault, no authority can be quoted in its favour; I have not been able at least to find one, and in face of that well settled jurisprudence I cannot agree to the contrary doctrine. It is held as contrary to an elementary maxim of law and it is expressly condemned by all the authorities which will be found collected in the respondent's factum, as contrary to public morals and public order, whatever may be the law of England under similar circumstances.

(1) 30 Can. S. C. R. 42. (2) 28 S. C. R. 146, 157.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Girouard J.

Our attention has been called to the last words of section 243 of The Railway Act 1888, which gives an action in certain cases of negligence "notwithstanding any agreement to the contrary with regard to any such person." If I understand these words correctly, they simply mean that the company may protect itself against certain acts of negligence, not mentioned in the clause, in the provinces where such an agreement can be made. But they cannot possibly mean to legalize what would be contrary to law in any province. I have therefore come to the conclusion that the agreement to an indemnity or satisfaction such as alleged by the appellants is null and void at common law with regard to the company's own negligence. Arts. 13, 990 C. C.

Taking this view of the case, it may not be necessary to examine the effect of clause 243 of The Railway Act. Speaking for myself, I cannot conceive that the answers of the jury do not bring the case within the exceptions of section 243 of The Railway Act. Such is also the opinion of the other judges in the courts below. Upon this branch of the case I cannot do better than quote the remarks of Acting Chief Justice Tait, in which I fully concur:

> Now the defendants, as shown by the question put to the jury with their consent, evidently considered the sand-valves as part of the apparatus or arrangements, or of the good and sufficient means which the statute requires them to provide, and the question admits that they were used in connection with the brakes of the locomotive. The jury found, as already pointed out, that Ramsden's death was caused by the fault of the company defendant and its employees, in the fact of the sand-valves used in connection with the brakes of the said locomotive being out of order and useless, and in failing to repair the defects in the locomotive after such defects had been specially brought to the notice of the company.
>
> Now it seems to me that to give this section such interpretation as would best insure the attainment of its object regarding the stopping of trains, we are justified in saying that the company has failed to

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Girouard J.

conform to its provisions, and that the accident in question resulted from such failure.

I am of opinion therefore, that notwithstanding the agreement between Ramsden and the society, the defendants are responsible under this section of the Railway Act.

Mr. Justice Pagnuelo also concludes:

L'obligation de placer et de maintenir des freins effectifs est imposée à la compagnie, quoiqu'elle n'agisse que par ses préposés. Le défaut d'accomplir cette obligation est une faute de la compagnie elle-même, et toute convention faite avec les passagers ou ses employés pour la soustraire à sa résponsibilité civile est frappée de nullité absolue; la compagnie sera résponsable de sa faute prouvée envers toute personne blessée et ses représentants, malgré toute convention contraire.

Je ne vois donc pas comment la compagnie peut, avec un semblant de raison, invoquer l'article du règlement de la dite societé pour se libérer de son obligation d'indemniser Ramsden, sa femme et ses enfants, suivant le cas. La cour suprême ne s'est pas prononcée sur cet article du statut, et la cause de *Grenier* (1) n'a rien qui ressemble à celle-ci.

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

DAVIES J.—This appeal seems to be in some respects on all fours with the case of *The Queen* v. *Grenier* (1) in which this court held that an employee on the Intercolonial Railway who became a member of the Intercolonial Railway Relief & Assurance Association, and thereby assented to its rules and to the arrangement by which the Crown contributed $6,000 annually to the funds of the association, had by virtue of one of these rules contracted that the Crown

should be relieved of all claims for compensation for injuries to or for the death of any member of the association.

We are bound by this decision so far as it goes and also by the decision of this court in the case of *The Glengoil S. S. Co.* v. *Pilkington* (2) where it is held that an express agreement between carriers and ship-

(1) 30 Can. S. C. R. 42. (2) 23 Can. S. C. R. 146.

pers that the former should not be liable for negligence on the part of the masters or mariners or their servants or agents is not contrary to public policy nor prohibited by law in the Province of Quebec.

It was not determined in this latter case whether such an agreement if made expressly exempting carriers from their own negligence would in the Province of Quebec be illegal, nor does the *Grenier Case* (1) decide that point. In the case at bar it was contended that the by-law in question relieving the defendants from liability must be construed as extending only to the negligence of employees and not to that of the company itself; and that the answers of the jury to the questions put to them amounted to a finding that the negligence which caused the death of Ramsden was that of the company itself. I am unable to place this construction upon these findings of the jury, and am therefore relieved of the duty of determining whether the true construction of the by-law exempted the company from the consequences of its own negligence, and if so, whether such a by-law would be legally effective in the Province of Quebec. The jury was asked, among other things:

Was the death of the late Richard Ramsden caused (*a*) by the fault of the company defendants and its employees? to which they gave the general answer "Yes."

Then followed ten sub-questions of this main one pointing to some specific act of negligence, and among them the two following questions and answers:

Q. (*h*). In the fact of the sand valves used in connection with the brakes of the said locomotive being out of order and useless?—A. Yes.

Q. (*i*). In failing to repair the defects in the said locomotive after the defects had been specially brought to the notice of the company? —A. Yes.

To each question the affirmative answer was given. But such affirmative answer does not by any means

(1) 30 Can. S. C. R. 42.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Davies J.

involve the finding of a neglect of duty on the part of the company as distinct from the neglect of its employees.

No question is raised here as to any failure of duty on the part of the company to provide and maintain proper and suitable plant, works and machinery or suitable materials to repair daily defects, or competent servants to control and operate their railway. The question rather is whether having made proper provision for all of these things the company would be liable for the negligence of some of its employees in not repairing defects arising in the daily use of one of the engines and whether as to the latter their contract with Ramsden did not exempt them from liability.

I am unable to discover in these answers of the jury to the questions put to them any finding which directly charges the company as distinct from its officials, with any breach of common law or statutory duty. All the findings are consistent with neglect or breaches of duty by officials as against liability for whose negligence the defendant company has contracted exemption. The evidence shows that the repairs to the locomotive were reported at the round house, and that it was the duty of the workmen there to attend to these repairs. There is no evidence of any special bringing of these defects to the notice of the company or its executive officers as implied in question (*i*) submitted to the jury as distinct from the ordinary reports of defects made daily with regard to engines and locomotives by the engineer in charge of them. I am unable, therefore, to attach the meaning and weight to that finding which the counsel for respondent contended for.

It was strongly contended that the provisions of sec. 243 of The Railway Act, 1888, applied to the facts as found by the jury with regard to the sand-valves; and

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Davies J.

I confess I was at the argument impressed with the contention. But a critical examination of the section has convinced me that so far as the sand valves are concerned neither their presence nor their state of repair are covered by the section. Omitting those parts of the section which admittedly do not apply to the facts as proved herein, I think its true meaning is to oblige the company to provide and cause to be used on passenger trains such known apparatus and arrangements as best afford good and sufficient means of applying *the brakes to the wheels* of the locomotive or tender or both. The sand-valves are not necessary and do not contribute in any way to this purpose and their presence or state of repair cannot be said to effect a breach of or a compliance with the section.

Holding, as I do therefore, that the negligence found as the proximate cause of Ramsden's death was not that of the company as distinct from its officials and servants, and that as regards the latter the company had, under the authority of *Grenier's Case* (1), exempted itself from liability by its contract, and being also of the opinion that the negligence found was not within the 243rd section of The Railway Act, I think the appeal must be allowed.

I entertained doubts as to whether there was any such privity of contract between Ramsden and the Railway Company as would discharge the latter from liability in cases where that liability was found to exist. There was no express contract between Ramsden and the railway company. The contract between them must be gathered from the facts of Ramsden becoming a member of the insurance society one of whose by-laws provided for the exemption of the railway company from all claims by members of the society for damages caused by accident on the company's railway and the statutory annual payment by the railway company

(1) 30 Can. S.C.R. 42.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Davies J.

to the funds of the society. In the *Grenier Case* (1), however, the facts were precisely similar and that decision is binding on us.

KILLAM J.—This is an appeal from a judgment of the Court of Review of the Province of Quebec, pronounced under art. 494 of the Code of Civil Procedure, in a case which was tried by a jury and in which the trial judge reserved for the consideration of the court, under art. 491 of the Code of Civil Procedure, the question of the judgment to be entered upon the answers to certain questions submitted to the jury. The circumstances of the case and the answers of the jury have, for the most part, been sufficiently stated by the other members of the court.

For the purposes of this appeal, we must take the findings of the jury as absolutely correct. They establish that Richard Ramsden came to his death through such fault and negligence of the defendant and its employees as would have given him a cause of action for his injuries if he had lived, unless he was barred by the rules and regulations of the Grank Trunk Railway Insurance and Provident Society and his acceptance of them; and, under art. 1056 of the Civil Code of Quebec, the present plaintiffs have a similar right of action, unless it is barred in the same way.

In considering whether they are so barred, I think that we should start upon the assumption that we are bound by the decision of this court in *The Queen* v. *Grenier* (1) in so far as it is based upon similar facts. I accept the conclusion in that case, without intending to indicate any opinion upon the questions involved.

The rules of this particular society and the position of its members were considered by the Court of Review in Quebec, in *Ferguson* v *Grand Trunk*

(1) 30 Can. S. C. R. 42.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Killam J.

Railway Co. (1) and held to be practically the same, for the purposes of the question now arising, as in the case of the association of which Grenier was a member. I deem it sufficient upon this point to refer to the reasoning in that case.

But the circumstances of the present case raise some further questions of importance, first, upon the construction and application of section 243 of The Railway Act of Canada, 51 Vict. ch. 29; and, secondly, upon the special terms of the jury's findings.

For the purpose of applying the statute in the present instance, I would adopt the paraphrase indicated by the learned Chief Justice of the court below, thus:

> Every railway company which runs trains upon the railway for the conveyance of passengers, shall provide and cause to be used in and upon said trains such known apparatus and arrangements as best afford * * * good and sufficient means of applying by the power of the steam engine or otherwise, at the will of the engine driver or other person appointed to such duty, the brakes to the wheels of the locomotive or tender, or both, or of all or any cars or carriages composing the trains. * * * And every railway company which fails to comply with any of the provisions of this section shall * * * be liable to pay to all such persons as are injured by reason of non-compliance with this provision, or to their representatives, such damages as they are legally entitled to, notwithstanding any agreement to the contrary with regard to any such person.

But with all respect, I am unable to agree with the learned Chief Justice as to the effect of the clause. So far as it is now important, it deals only with the means of applying the brakes to the wheels. Of course, this again is a method of stopping the train, as a speedy stopping of the train may be a means of ensuring the safety of passengers or others in certain contingencies. But it appears to me quite as fallacious to apply the clause to every means of stopping the train as to every means of ensuring safety. It

(1) Q. R. 20 S. C. 54.

1903

GRAND TRUNK RWAY. CO. v. MILLER.

Killam J.

is directed to certain specific devices and means expressly mentioned, and there is nothing to indicate a purpose to enact anything more than the words express.

There is no direct finding by the jury that the accident was due to any defect in the apparatus or arrangements affording means of applying the brakes to the wheels.

The use of the sand-pipes is given by the witness Broadhurst as being to

> put sand on the rail in order to cause the wheels to grip the rail and stop the train.

It is evident that the object is to increase the friction along the rails and not in any way to assist the application of the brakes to the wheels or to increase the power of the brakes. In the light of the evidence, it is clear that the sand-valves are in no sense apparatus or arrangements affording means of applying the brakes to the wheels, and that the jury's answer to the question referring to the sand valves as "used in connection with the brakes" does not involve a finding that they are such apparatus or arrangements or any part thereof.

The case under the statute seems to me to fail entirely.

It is upon the other part of the case that I have found the greatest difficulty. In the Grenier case the negligence was that of a co-employee of the injured man, and it is argued that the jury's answers in the present instance involve a finding that the accident was due to negligence personal to the company itself, as distinguished from its employees, against liability for which, by the law of the Province of Quebec, the company could not contract.

In the *Glengoil Steamship Co.* v. *Pilkington* (1) this court held valid a stipulation relieving the company owning a steamship from liability for negligence of the master, and the master of a steamship would seem to stand as high in the representation of the company owning it as any superintendent or manager of a division of a railway in the representation of the railway company.

Looking at the evidence in the case before us, it appears that any defaults were those of subordinate officials. At least, they are not traced to any others. The evidence certainly did not warrant any finding of negligence on the part of the company, as distinguished from its employees.

In none of the particulars in which default is found is there clearly shown to have been a breach of any duty of the company as an employer to its employees. It is consistent with each that it was due to some official or officials. All are in matters ordinarily relegated to subordinate officials. Indeed, the neglect to stop the train, specified as one cause of the accident, could only be the neglect of those having actual control of it.

A finding of default by a person charged does not necessarily mean personal default; it may be based solely on the default of one for whom he is responsible.

I think, then, that there was not sufficient in the answers to warrant a judgment on the basis that the death was caused by gross negligence on the part of the company itself, as distinguished from its employees. For that purpose there should be a clear and unambiguous finding by the jury, just as in *Brasell* v. *La Compagnie du Grand Tronc* (2) it was pointed out by Pagnuelo J. that the burden is upon an employee who has agreed to assume the risks of the defaults of

(1) 28 Can. S. C. R. 146. (2) Q. R. 11 S. C. 150.

1903

GRAND TRUNK RWAY. Co. v. MILLER.

Killam J.

his co-employees to show that injury has come to him from the gross negligence of the employer himself.

On the ground, then, that the facts do not sufficiently raise a case for the purpose, I refrain from discussing the question of the company's power to contract itself out of liability for its own defaults.

I would allow the appeal and direct the entry of judgment for the defendant with costs here and below.

Appeal allowed with costs.

Solicitor for the appellants: *A. E. Beckett.*

Solicitors for the respondent: *Smith, McKay & Montgomery.*

1903

*Nov. 11, 12.

*Nov. 30.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS)... } APPELLANTS;

AND

THOMAS JOSEPH BLAIN (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway company—Assault on passenger—Duty of conductor.

If a passenger on a railway train is in danger of injury from a fellow passenger, and the conductor knows, or has an opportunity to know, of such danger it is the duty of the latter to take precautions to prevent it and if he fails or neglects to do so the company is liable in case the threatened injury is inflicted. *Pounder* v. *North Eastern Railway Co.* ([1892] 1 Q. B. 385) dissented from. Judgment of the Court of Appeal (5 Ont. L. R. 334) affirmed.

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

PRESENT:—Sir Elzéar Taschereau, C. J. and Sedgewick, Girouard Davels and Killam, J. J.

(1) 5 Ont. L. R. 334.

1903

CANADIAN PACIFIC RWAY. CO. v. BLAIN.

The facts of the case are stated by Moss C. J. O., in giving judgment for the Court of Appeal, as follows:

"The plaintiff was a passenger on one of the defendants' trains as holder of a ticket issued by the defendants, entitling him to be carried as a first class passenger from the city of Toronto to the town of Brampton. While on the train in question, on the night of the 10th of October, 1901, he was thrice assaulted and beaten by a fellow passenger. The injuries inflicted were severe, permanently impairing his hearing, and otherwise affecting his health. The action is for the recovery of damages for the negligence of the defendants or their servants, in failing after due notice to properly guard and protect the plaintiff against the assaults of which he complains.

"The defendants deny liability, allege that they did, through their servants and agents to the best of their ability preserve order on their train, and as far as they were able to do so, protected the plaintiff from being beaten or assaulted, and further, that if plaintiff suffered any damage by reason of the assaults of which he complained, such assaults were induced by his own conduct.

"The last allegation may be disposed of at once by the observation that no evidence was given or tendered at the trial to show that there was anything in the plaintiff's conduct on the train, before or at the time of the several assaults, calculated to provoke them. He appears to have conducted himself throughout in a peaceable and lawful manner. He was guilty of no act, while at the station, or on the train, which could in any manner justify the assaults made upon him. The defendants did tender evidence with a view of showing that the relations between the plaintiff and his assailant were of a hostile and unfriendly nature,

1903

CANADIAN PACIFIC RWAY. CO. v. BLAIN.

and they complain that this evidence was improperly rejected.

"At the trial, it was shown that the plaintiff and his wife boarded the train at the Union Station, at Toronto, shortly before the hour of the night at which it was timed to depart; that amongst other passengers was one Anthony, by whom the assaults were committed; that Anthony was drunk and quarrelsome, and that before he first struck the plaintiff, he violently assaulted another passenger named Noble without any provocation whatever, seizing him by the throat and swearing he would choke him.

"Very soon after this he assaulted the plaintiff, striking him from behind so that he fell forward among the seats of the car, and repeating his blows until the plaintiff escaped. During the scuffle, Anthony struck Mrs. Clendenning, and another passenger a violent blow on the arm, and he also used violent and threatening language towards one Thorburn, another passenger.

"The plaintiff left the car to seek a constable, and during his absence Anthony assaulted one Beatty, another passenger. Soon after the conductor entered the car and spoke to Anthony warning him against making a disturbance. The plaintiff having failed to find a constable, returned to the train just as it was about to move off, apparently after having been already started and drawn up again. Before getting upon the train again he told the conductor, in the presence of the brakesman and others, that he had been assaulted in the car, and that two or three others had also been assaulted, and that he wished the man arrested and put off the train. He told the conductor that he would not go on if the man was allowed to go on, that he was drunk and had assaulted him and two or three others.

1903

CANADIAN PACIFIC RWAY. CO. v. BLAIN.

"The conductor said the man had a ticket, and had as much right as the plaintiff had to go on, but finally told the plaintiff to go on, that 'we will have a constable at Parkdale.' Plaintiff thereupon entered the train and it proceeded to Parkdale. At Parkdale the plaintiff renewed his request to the conductor to get a constable. He told him that he had been informed that the man intended to attack him again, to which the conductor replied that the plaintiff was the only man creating a row.

"The plaintiff continued urging the conductor to get a constable, but the latter signalled the train to start and told the plaintiff to get on board or he would be left. His wife was in the car, he had no means of communicating with her, and he got on. Not long after he was again assaulted by Anthony, and received very serious injuries. He again complained to the conductor, who took the position that he could do nothing unless he saw the man strike the plaintiff, to which the plaintiff not unnaturally replied that it was very unfair if he was not to be believed until he was killed. The conductor refused to do anything and went away, and shortly after Anthony renewed the assault. In consequence of this and of his wife's fright, the plaintiff and his wife left the train at Streetsville and passed the remainder of the night there.

"The conductor was not called as a witness at the trial, but portions of his depositions taken on examination for discovery were put in by the plaintiff. He would not deny that the plaintiff complained to him of Anthony at the Union Station and Parkdale. Asked how many passengers spoke to him that night about Anthony, he replied that he did not know, there might have been twenty, there might have been forty for all he knew. He admitted that after the second assault the plaintiff complained to him and wanted him to

1903

CANADIAN PACIFIC RWAY. CO. v. BLAIN.

put Anthony off. He was told of the assault by a great many other people, but did not think it as bad as the plaintiff tried to make out. He told Anthony he would put him off. Asked, 'then you did think it was your duty to put the man off?' he answered 'No, I did not think it was my duty to put the man off. He was not in a fit state to be put off.'

'Q. Then he was drunk? A. Yes.

Q. He was too drunk to be put off? A. Yes, I think he was.'

And again question 135. 'And you were going to put him off? A. I told him I would put him off if he did not behave?

'Q. And he got hold of the seat and was hanging on to the seat and you let him go? A. Something like that, I would not be positive. I think when the train was stopped we were closing the switch.' He was then speaking of a time after the third assault and before the train reached Cooksville, a station just east of Streetsville."

The verdict of the jury was in favour of the plaintiff and the damages were assessed at $3,500. The Court of Appeal having sustained the verdict the defendant company appealed to this court.

Johnson K.C. and *Denison* for the appellants. The duty of a carrier of passengers is not that of insurer as in the case of a carrier of goods; he is liable only for negligence. *Christie* v. *Griggs* (1); *Sutherland* v. *Great Western Railway Co.* (2).

A railway company owes no such duty to a passenger as is contended for in this case and decided by the judgment appealed from. *Pounder* v. *North Eastern Railway Co.* (3); *Cannon* v. *Midland Railway Co.* (4).

(1) 2 Camp. 79.
(2) 7 U. C. C. P. 409.
(3) [1892] 1 Q. B. 385.
(4) 6 L. R. Ir. 199.

1903

CANADIAN PACIFIC RWAY. CO. v. BLAIN.

The American decisions are not founded on any rule of our common law but on a state of affairs not existing either in England or Canada. *Putnam* v. *Broadway, & Seventh Ave. Railroad Co.* (1).

Riddell K.C. and *D. O. Cameron* for the respondent. Both the Criminal Code and the Railway Act empower a conductor to preserve the peace on his train.

Pounder v. *North Eastern Railway Co.* (2), is not good law and was seriously questioned in *Cobb* v. *Great Western Railway Co.* (3).

It is the duty of a railway company to provide a sufficient staff to maintain order and to protect passengers from injury; *Metropolitan Railway Co.* v. *Jackson* (4); and this duty is strictly enforced in the United States. *New Orleans, St. Louis & Chicago Railroad Co.* v. *Burke* (5); *Lucy* v. *Chicago Great Western Railroad Co.* (6); *Putnam* v. *Broadway & Seventh Ave. Railroad Co.* (1).

The learned counsel referred to *Smith* v. *Great Eastern Railway Co.* (7).

The judgment of the court, Davies J. taking no part, was delivered by:

SEDGEWICK J.—The learned Chief Justice has asked me to shortly express the grounds upon which our decision on this case is based. We are of opinion that the following statement in 5 Am. & Eng. Ency. 553, embodies the correct rule upon the question in controversy:

> Whenever a carrier through its agents or servants knows or has the opportunity to know of the threatened injury, or might reasonably have anticipated the happening of an injury, and fails or neglects to take the proper precautions or to use the proper means to prevent or mitigate such injury, the carrier is liable.

(1) 55 N. Y. 108.
(2) [1892] 1 Q. B. 385.
(3) [1894] A. C. 419.
(4) 2 C. P. D. 125; 3 App. Cas. 193.
(5) 53 Miss. 200.
(6) 64 Minn. 7.
(7) L. R. 2 C. P. 4.

1903

CANADIAN PACIFIC RWAY. CO. v. BLAIN.

Sedgewick J.

It appears to us that this principle or rule of duty was violated by the appellant company's conductor in so far as the third assault upon the respondent is concerned. If the case of *Pounder* v. *North Eastern Railway Co.* (1), is in conflict with the doctrine now propounded we cannot assent to it, and in that view we are to a large extent supported by the doubt which was thrown upon it in the case of *Cobb* v. *Great Western Railway Co.* (2), where Lord Selborne and Lord McNaughton doubted that that case was properly decided, and the other learned law Lords refrained in terms from expressing any opinion in regard to it.

Attention may be called to an admirable article by a learned text writer in 18 Law Magazine and Law Review, 449.

Then upon the measure of damages. It seems clear from the evidence that the jury in assessing these at the sum of $3,500 took into consideration the second assault. It does not appear to us that the appellant company is liable for any injury caused to the respondent on that occasion. Neither he nor the conductor anticipated that attack. They both thought there was no necessity then to eject the passenger who was the cause of the trouble. But after the second assault it was the conductor's duty to eject him. The damages caused by the third assault were comparatively slight and we think justice will be done by directing that the appeal be allowed and a new trial ordered, unless the plaintiff agrees to accept $1,000, together with costs, in full of his claim against the company. There will be no costs in the court below nor in this court.

Appeal allowed without costs.

Solicitor for the appellants: *Angus MacMurchy.*

Solicitor for the respondent: *D. O. Cameron.*

(1) [1892] 1 Q. B. 385.

(2) [1894] A. C. 419.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

JOSEPH McKAY (PLAINTIFF)..... ...RESPONDENT.

1903
*Nov. 12, 13, 14.
*Dec. 1.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway company—Negligence—Rate of speed—Crowded districts—Fencing —50 & 51 V. c. 29 ss. 197, 259 (D)—55 & 56 V. c. 27, ss. 6 and 8 (D).

In passing through a thickly peopled portion of a city, town or village a railway train is not limited to the maximum speed of six miles an hour prescribed by 55 & 56 Vict. c. 27 sec. 8, so long as the railway fences on both sides of the track are maintained and turned into the cattle guards at highway crossings as provided by sec. 6 of said Act. Judgment of the Court of Appeal (5 Ont. L. R. 313) reversed, Girouard J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1), maintaining the judgment entered on the verdict at the trial in favour of the plaintiff.

This was an action brought by the respondent against the appellants for damages sustained owing to the negligence of the appellants, causing the death of the wife and two children of the respondent, serious personal injury to the respondent, the killing of his horse and the destruction of his buggy.

The accident out of which these injuries arose occurred on the evening of the 9th day of October, 1901, at Main Street in the town of Forest, in the county of Lambton, at the point where the said street or highway is crossed by the appellants' railway.

PRESENT:—Sir Elzéar Taschereau C. J. and Sedgewick, Girouard, Davies and Killam JJ.

(1) 5 Ont. L. R. 313.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

The statement of claim charged statutory negligence in running the trains faster than six miles an hour without proper fencing and common law negligence in proceeding at a reckless rate of speed without warning or precautions against injury to the public.

The action was tried before the Honourable Mr. Justice McMahon and a jury at Sarnia on the 2nd and 3rd days of April, 1902, when the learned trial judge submitted certain questions to the jury, which with the answers are as follows:

1st. Was the whistle blown before reaching the Main Street crossing, and if so, at what distance from the crossing was it first sounded?

Yes. At the whistling post.

2nd. If the bell was rung, where did it first commence to ring, and was it ringing continuously or at short intervals until the engine crossed the street where the accident happened?

Bell started to ring east of Main Street eight or ten rods, and rang continuously.

3rd. Is the Main Street crossing at Forest in a thickly peopled portion of the village?

Yes.

4th. At what rate of speed was the engine running at the time it crossed Main Street?

About twenty miles an hour.

5th. Was such a rate of speed, in your opinion, a dangerous rate of speed for such locality?

Yes.

6th. Was the death of Mrs. McKay and the injury to Joseph McKay caused in consequence of any neglect or omission of the company? If so, what was the neglect or omission, in your opinion, which caused the accident?

(*a*) Yes. (*b*) Neglect in running too fast and for the neglect of a flagman or gates.

6*a*. Was any warning given by Hallisey to Mrs. McKay of the approach of the engine?

Not sufficient.

7th. Could Joseph McKay, had he used ordinary care, have seen the engine in time to have avoided the collision?

No.

8th. Was the plaintiff, in your opinion, guilty of any want of ordinary care and diligence which contributed to the accident? If so, state in what respect?

No.

9th. If you find the plaintiff is entitled to recover, at what do you assess the damages?

(*a*) By reason of the death of his wife?

Eight hundred dollars.

(*b*) By reason of the injuries suffered by himself?

Four hundred dollars.

(*c*) For the horse and buggy?

One hundred dollars.

No negligence was attributed by the jury from failure to whistle or ring the bell so that nothing turned on the first two findings. Judgment was entered for the plaintiff for $1,300, which was maintained by the Court of Appeal. The company then appealed to this court.

Riddell K.C. and *Rose* for the appellants. The plaintiff was guilty of contributory negligence in not looking out for the train. The rule of "stop, look and listen" which prevails in the United States, *Pennsylvania Railroad Co.* v. *Weber* (1) should be adopted in Canada.

There is no common law obligation on a railway company to fence its road; *Grand Trunk Railway Co.* v. *James* (2); and the requirements of the Act having been complied with there was no restriction as to the rate of speed in this case.

(1) 76 Pa. St. 177.

(2) 31 Can. S. C. R. 420.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Hellmuth K.C. and *Hanna* for the respondent. The negligence of the defendants was established to the satisfaction of the jury and contributory negligence on plaintiff's part negatived. A second Court of Appeal will not set these findings aside. *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery* (1).

Even if defendants complied with the statutory requirements then common law obligation to exercise due care and caution remained. *Canadian Pacific Railway Co.* v. *Fleming* (2); *Lake Erie and Detroit River Railway Co.* v. *Barclay* (3).

The CHIEF JUSTICE.—I concur in my brother Davies' reasoning and agree that the appeal should be allowed and the respondent's action dismissed.

SEDGEWICK J.—The appellant company run a railway through the Town of Forest, in the County of Lambton, Ontario. Its line runs practically east and west, and at a certain point is crossed by Main Street, a public highway running north and south. To the east of this crossing the line is straight for several miles and a clear view can be had towards the east down the track for at least a mile from a distance north of the track of more than 60 feet.

At the point in question there are three lines of rails, the middle one being the main track, and it was upon this main track that the accident took place.

On the 9th of October, 1901, at about half past six o'clock in the evening, the plaintiff, with his wife and two children, were in a buggy driving southward on Main Street, towards the railway crossing. A collision took place between the buggy and a locomotive engine

(1) 3 App. Cas. 1155.
(2) 31 N. B. Rep. 318; 22 Can. S. C. R. 33.
(3) 30 Can. S. C. R. 360.

of the defendants going west drawing their regular train, the result of which was the death of his wife, some personal injury to the plaintiff himself and the killing of his horse and destruction of his buggy. Suit was brought and the trial came on before Mr. Justice McMahon and a jury at Sarnia on the 2nd April, 1902. Questions were submitted to the jury which, with the answers, are as follows:

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

1st. Was the whistle blown before reaching the Main Street crossing, and if so, at what distance from the crossing was it first sounded? A. Yes at the whistling post.

2nd. If the bell was rung, where did it first commence to ring, and was it ringing continuously or at short intervals until the engine crossed the street where the accident happened? A. Bell started to ring east of Main Street eight or ten rods and rang continuously.

3rd. Is the Main Street crossing at Forest in a thickly peopled portion of the village? A. Yes.

4th. At what rate of speed was the engine running at the time it crossed Main Street? A. About twenty miles an hour.

5th. Was such rate of speed, in your opinion, a dangerous rate of speed for such locality? A. Yes.

6th. Was the death of Mrs. McKay and the injury to Joseph McKay caused in consequence of any neglect or omission of the company? If so, what was the neglect or omission, in your opinion, which caused the accident? A. (*a*) Yes; (*b*) Neglect in running too fast and for the want of a flag-man or gates.

6*a*. Was any warning given by Hallisey to McKay of the approach of the engine? A. Not sufficient.

7th. Could Joseph McKay, had he used ordinary care, have seen the engine in time to have avoided the collision? A. No.

8th. Was the plaintiff, in your opinion, guilty of any want of ordinary care and diligence which contributed to the accident? If so, state in what respect? A. No.

9th. If you find the plaintiff is entitled to recover, at what do you assess the damages? (*a*) By reason of the death of his wife? A. Eight hundred dollars. (*b*) By reason of the injuries suffered by himself? A. Four hundred dollars. (*c*) For the horse and buggy? A. One hundred dollars.

In order to understand these questions and answers it may be mentioned that Hallisey, therein named, was not a servant of the company but was employed

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

by the corporation of Forest as a watchman, and was stationed at the crossing on the day in question. He saw the plaintiff coming and warned him of his danger but without effect.

Judgment was entered for the plaintiff upon the finding of the jury for $1,300, and an appeal from that judgment was dismissed by the Court of Appeal. Hence this appeal.

It will be observed that the first answer is not in favour of the company; that the second is against the company, but that is immaterial, as, assuming the answer to be correct, the failure in starting to ring the bell was not found to be the cause of, or to contribute to, the accident, and besides, the evidence, in my judgment, proves to a demonstration that the bell rang continuously from the time the train left Toronto until after the accident. It may also be stated that the railway all through the Town of Forest was properly fenced on both sides as required by the Railway Act; that there was no guard (*i. e.* a gate) at the crossing, and that the train was running on schedule time. The case therefore rests upon the consideration of the answers to the 3rd, 4th, 5th and 6th questions. This clearly raised two questions: First, as to whether the railway company is limited as to the speed of its trains, and, secondly, as to the necessity for fencing by gate or otherwise across the highway. As to the speed, in my view one of the chief objects of a railway system is to attain a high speed of travel; the interests of the public in saving time and the increase of productive power form reasons for holding as it has been held that railway companies are permitted to establish their undertakings for the express purpose of running trains at high speed along their lines, (*per* Halsbury, L. C. (1).)

(1) *Wakelin* v. *London & South Western Ry. Co.* 12 App. Cas. 41 *at page* 46.

The legislature has permitted railways to cross highways on the level provided

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

and this plainly refers us to the Act itself as to the "manner prescribed." The provisions are to be found in sections 194 and 197. Section 194 deals with the case of a railway running through a township; section 197 is as follows:

At every public road crossing at rail level of the railway the fence on both sides of the crossing and on both sides of the track shall be turned into the cattle guards so as to allow the safe passage of trains.

This seems to me to make it plain that the fencing in the manner prescribed by the Act must be fencing as described in section 197. The Act also creates a tribunal which shall have the right to regulate the speed of the trains. By section 10 the Railway Committee may,

(a) Regulate and limit the rate of speed at which trains and locomotives may be run in any city, town or village, or in any class of cities, towns or villages described in any regulation; limiting, if the said Railway Committee thinks fit, the rate of speed within certain described portions of any city, town or village, and allowing another rate of speed in other portions thereof,—which rate of speed shall not in any case exceed six miles an hour, unless the track is properly fenced.

I am of opinion that the track should be properly fenced according to the regulations laid down in the Railway Act, which regulations are contained, so far as this case is concerned, in section 197, viz., fenced at the crossing at right angles to the railway fence prescribed by section 194.

In my view the right of a railway upon the highway itself depends entirely upon legislation. The position of a railway company in respect of a highway is quite different from its position as regards

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

other lands belonging to individuals, over which it passes. In the latter case the land may be expropriated, and is expropriated, and becomes the absolute property of the railway; but as regards the highway, the fee or right of ownership in any part of the highway is not required by the railway company, nor acquired by it, nor does the railway company ask or expect to acquire the exclusive right to use any part of it, but merely to use it in common with the public generally.

It is the right of all His Majesty's subjects to go upon any part of the highway, so long as it is not occupied by other passengers or occupants. While, of course, no person has the right to be along the line of the railway upon the highway during the time that the train of the railway company is passing, every person has a right upon such place at any other time, and every person has a right upon any other part of the highway at all times, except so much as is actually occupied by the passing train. No person has a right to prevent any other person from driving his horse or from himself going up to within a foot of a passing train; and certainly no one has the right to prevent any one going upon that part of the highway which is opposite to the unoccupied portion of the railway grounds. If the railway company without express statutory authority were to erect gates opposite to its side fences, and lower those gates at any time, any person prevented from driving or walking towards the line of rails by such gates would be interfered with in his legal common law rights. It must be apparent then, that there must be some authority given to a railway company before it can assume to erect gates upon a highway. This authority is to be found in the Railway Act, 51 Vict. c. 29, s. 187; and it will be seen that it was in the view of the Parliament of Canada

necessary to give express authority, when we look at the wording of the section:

> And the Railway Committee, if it appears to it expedient or necessary for the public safety, may, from time to time, with the sanction of the Governor in Council, *authorize* or require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman or *by a watchman and gates or other protection.*

This is made apparent as well by looking at the English statute. In the year 1845 was passed the first of the Railway Clauses Consolidation Acts, and this is still in force, being 8 & 9 Vict. c. 20.

Section 47 provided as follows:

> If the railway cross any turnpike or road or public carriage road on a level, the company shall erect *and at all times maintain good and sufficient gates across such road, on each side of the railway* where the same shall communicate therewith and shall employ proper persons to open and shut such gates.

The legislature in passing the General Railway Act had before it not only the General Railway Acts previously passed but also the Imperial Railway Clauses Consolidation Act I have referred to, and I have no doubt that the different policy which has been adopted as to railways in this country was adopted in view of the different conditions of the two countries, and the consideration that if a gate watchman were required at every level crossing throughout the country it would impose altogether too heavy a burden on a young and only partially developed territory. This is more apparent when the previous legislation is considered because the language "unless the track is fenced in the manner prescribed by this Act" followed by way of amendment some opinions which indicated that it was necessary for a railway company to fence at each highway crossing. I think, therefore, there is no limitation to speed unless it is prescribed by the Railway Committee. The same

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

observations, I think, apply to a flagman. I think the legislature has fixed a tribunal to determine not only the rate of speed, but when and where watchmen shall be placed. I adopt the language of Allen J. in *Weber* v. *New York Central and Hudson River Railroad Co.* (1).

> A railroad company must so operate its trains and use and occupy its railway, in the enjoyment of the right of way which it has in common with the ordinary traveller, as not to injure others in the exercise of their right of way, provided the latter are guilty of no want of care on their part. But the rule which imposes the obligation of care and prudence upon a railway corporation, and measures its liability to others liable to receive injury from moving cars or locomotives, does not call for any act *outside of or disconnected with its actual operations and the use of the railway.* The duty of *posting flagmen* or having servants and agents, or placing gates or other obstructions, or of giving *special or personal notice to travellers at railway crossings,* can only be *imposed by the legislature.*

Railroads are authorized by statute to construct their road, and run their trains across streets and highways. The same statute provides that they shall give certain signals for the purpose ef warning travellers of their approach and presence; such signals being, in the judgment of the legislature, sufficient to protect the public from injury in the use of the crossings. Keeping a flagman at the crossings, or any of them, is not required by statute; nor does the statute require the company to give warning to travellers otherwise than as therein provided. The question is, whether the common law requires the company to warn travellers of approaching trains by other and more effective means than those the statute requires. The claim that it does is based on the maxim that every one must so use his own as not to injure another. In applying the maxim to the present case, it must be borne in mind that the traveller and railroad company have

(1) 58 N. Y. 451.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

each an equal right of way in the crossings, derived from the same authority; the former for the purpose of travel, and the latter for running its trains. A collision is somewhat dangerous to the trains, but vastly more so to the traveller. The law imposes upon both the duty of observing care to avoid them. But the care imposed upon the company is in operating its trains; in so transacting its business, in the exercise of its right of way, as not to injure others in the exercise of their similar right, provided the latter exercise due care on their part. This relates to the mode of operating the trains, and all other things done by the company in the transaction of its business. It does not require the company to employ men to keep travellers off the track, nor to serve notices upon them that trains were approaching. Should the company do this, it would relieve the traveller from all necessity of exercising care in this respect; and it would, indeed, be safe for him to go upon the track, having received no express warning. If the exertions of the flagmen were, in any particular case inadequate to prevent injury to a traveller, upon the same principle it might be submitted to a jury whether ordinary prudence did not require gates to be closed at certain crossings, while trains were passing, or something else done to protect the traveller; and, if, in their judgment, it did, to instruct them that such omission was negligence.

Instead of the power of giving directions as to the management and running of the railway being in the hands of the Parliament of Canada or the Railway Committee of the Privy Council, it would be in the hands of a jury. The jury would have higher power in that regard than even the Provincial Legislatures.

Upon the powers even of a Provincial Legislature see *Madden* v. *Nelson and Fort Sheppard Railway Co.* (1).

(1) [1899] A. C. 626 at p. 628.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

The Provincial Legislature have pointed out by their preamble that in their view, the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the Provincial Legislature, the Dominion Parliament ought to have made; and they thereupon proceed to do that which they recite the Dominion Parliament has omitted to do. It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the Provincial Parliament were to be permitted to enter into such a field of legislation.

Compare *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* (1).

The rules and decisions of the Railway Committee have the force of law and can be so enforced (The Railway Act, 1888, ss. 17, 25, 289). Is or can there be any other body which may override or differ from such decisions or orders, or give additional, supplementary, or perhaps contradictory orders?

It is to be observed that the speed was the usual schedule speed fixed by the company in its statutory powers, Railway Act, 1888 (2).

I am of opinion that the negligence found by the jury was conduct authorized by the statute in the lawful running of the company's trains, and the neglect of duties were duties which could only be imposed by the proper tribunal created by the statute. I refer to various sections which indicate that an examination of the Railway Act will show that it intended to deal with the whole subject of the management and operation of railways. Sections 10, 11, 173, 177, 189, 190, 194, 199, 214, 256, 260, 271, 274. These are merely cited as showing some of the matters dealt with by the legislature. In view of the opinion now expressed it is unnecessary to discuss the other positions advanced by Mr. Riddle and elaborated in

(1) [1899] A. C. 367, at pp. 372-373.

(2) ss. 214 *a* & *b*.

1903

GRAND TRUNK RWAY. CO. v. McKAY.

Sedgewick J.

the voluminous and very able factum of the appellants.

The result is the appeal should be allowed, and the action dismissed, the whole with costs.

GIROUARD J (dissenting)—In my opinion this appeal involves a simple question. Sec. 259 of the Railway Act, as amended in 1892 by 55 & 56 Vict. c. 27, sec. 8, says :

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

The respondent contends that the Railway Act nowhere requires that public highways should be fenced, and that consequently railway trains may be run at full speed "through any thickly peopled portion of any city, town or village," as Forest, an incorporated town, certainly was. I cannot accept this interpretation of sec. 259. If the alternative of fencing be impossible, if, in fact, the Act has no provision upon the matter, then the rule laid down in the first part of the clause as to slow speed must be enforced. But is it correct to say that the statute does not provide for the fencing of streets through these localities? "Fencing" here cannot have the meaning it has in clauses dealing with rural districts where the fencing or closing of the highways is not intended. Sec. 194. Sec. 259 provides for a special case, that of thickly populated towns or villages, and fencing, within the meaning of that clause, is something besides the fencing of the tracks outside of streets. It means the closing of the streets or highways also. This can be done under sec. 187. The Railway Committee may authorize the company

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Girouard J.

to protect such streets or highways by a watchman, or by a watchman and gates, or other protection, for instance a flagman, and no doubt the jury had this clause in view when, being asked whether the death of the wife of the respondent and the injury to his son were caused by any neglect or omission of the company, answered: "Yes, negligence in running too fast, and for the want of a flagman or gates."

The company did not deem it necessary to take advantage of this section and to provide for any protection in the Town of Forest; they made no application to the Railway Committee, and they continued to run their trains as if they were in townships, at a rate prohibited by the statute. They are therefore guilty of negligence and must take the consequences. This appeal should be dismissed with costs.

DAVIES J.—The questions for decision in this appeal are important involving the rights of the travelling public on the one hand and those of the Chartered Railway Companies of Canada on the other. They depend for their solution mainly, if not entirely, upon the proper construction to be given to the clauses of "The Railway Act," 1888, and its amendments.

The action was for negligence by the defendants in the operation of one of their trains while crossing over one of the streets of the Town of Forest on the evening of October 9th, 1901. The learned judge who delivered the judgment of the Court of Appeal for Ontario, now under consideration, states the material facts of the accident as follows:

On the evening in question, about 6 o'clock, the plaintiff, a farmer, with his wife and two very young children, were driving home from an agricultural fair at the Town of Forest which they had been attending. The evening was inclined to be wet and the plaintiff had in consequence put up the sides of the covered buggy in which he and his family were driving, which interfered to some extent with his seeing and hearing. He left the hotel on King Street, drove to Main

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Davies J.

Street, and then along Main Street to the crossing in question where the collision took place by which the plaintiff himself was severely injured, his wife and two children were killed, and his horse and buggy destroyed. The track crosses Main Street, a leading street in the town, on the level and is not protected by any gate or by a watchman; although on the day in question one Hallisey, employed by the town corporation, was stationed at this crossing as watchman owing to the number of people who would likely cross to attend the fair.

The jury found in answer to questions put to them that the whistle was sounded at the whistling post; that the bell commenced to ring eight or ten rods east of the crossing and rang continuously; that Main Street crossing is in a thickly peopled portion of the village; that the train was running at the rate of twenty miles an hour when it crossed Main Street; that such rate of speed was a dangerous rate for such locality; that the neglect or omission of the company which caused the accident was "*neglect in running too fast and for the want of a flagman or gates*"; that the warning given by Hallisey (the watchman stationed on that particular day at that crossing by the town authorities) was not sufficient; and that the plaintiff was not guilty of contributory negligence.

The question of contributory negligence on the plaintiff's part does not, in the view I take of the case, require consideration, and the finding as to the time when the bell began to ring, even if sustained by the evidence, which I do not stop to inquire, is not material as it is not found by the jury to have led or contributed to the accident. The negligence which did cause or lead to the accident was found by the jury to be the speed at which the train was running over the street crossing and the absence at such crossing of a flagman or gates.

The contention of the plaintiff is that the speed at which the train was running was a violation of the statutory provision of the Railway Act because it was

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Davies J.

of greater speed than six miles an hour through a thickly peopled portion of the town of Forest, the railway track at the crossing of the street not being fenced as he contended in the manner required by the Act. The plaintiff further says that even if the Act has been complied with as regards fencing, the rate of speed in the absence of gates or watchman at the crossing was a matter at common law open to the jury to pass upon, and if they found it, under the circumstances, a dangerous rate and a cause of the accident the defendant company would be liable.

The Court of Appeal reached the conclusion that the proper construction of the statutory provisions with regard to the fencing prescribed at the crossings and the rate of speed at which a train could run though a thickly peopled portion of any city, town or village, requires either a fencing across the highway at the crossing, so retaining the travelling public in a place of safety while the train is passing or the stationing of a watchman or the maintenance of a reasonable fence sufficient for the purpose, or the reduction of the speed of the train to the permitted maximum of six miles an hour. As the company had not adopted any of these precautions which the court decided were obligatory by statute they held it liable under the findings of the jury and dismissed the appeal.

A careful reading and consideration of the whole Railway Act and its general scheme and purpose has led me to the conclusion that the construction placed upon these sections by the Court of Appeal in this case was not the proper one and that the sections relied upon by that court in its judgment do not either require or authorize railway companies, without the previous order of the Railway Committee of the Privy Council, to fence highways or place gates across them where they are crossed at the level by the railway, or compel

them to place flagmen at these crossings to warn the public when trains are crossing.

In my judgment Parliament has by the 187th section of the Railway Act vested in the Railway Committee of the Privy Council the exclusive power and duty of determining the character and extent of the protection which should be given to the public at places where the railway track crosses a highway at rail level. The exercise of such important powers and duties requires the careful consideration of many possible conflicting interests and the fullest powers to enable this committee to bring all such interests before them and determine all necessary facts, are given by the Act in question. Similar powers to enable this tribunal effectively to enforce any order it may make in the premises are vested in the committee. It is quite open to any municipality through which a railway runs at any time it thinks proper, or to any interested person or corporation, or, indeed, to any one of the travelling public to invoke the exercise of this jurisdiction. The composition of the tribunal, the simplicity and ease with which its powers can be invoked, and the completeness with which it can carry out the intentions of Parliament and the scope and extent of its powers, all combine to convince me that Parliament designed to establish and has established a tribunal which while fairly guarding the interests of the railway corporations would at the same time provide the fullest necessary protection to the travelling public. I cannot think that these powers, so full, so complete, and so capable of being made effective, can if exercised be subject to review either as to their adequacy or otherwise by a jury, nor do I think that failure to invoke the exercise of the powers is of itself sufficient to take the matter away from the jurisdiction to which Parliament has committed it and vest it in a jury.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Davies J.

If no such statutory powers had been given by Parliament a jury must *ex necessitate* determine in each case as a question of fact whether with regard to level foot crossings or highway crossings the proper precautions with regard to speed and warnings had been adopted and followed. In a thickly settled country like Great Britain, Parliament has thought fit explicitly to provide that wherever a railroad crosses a highway on a level it shall maintain good and sufficient gates across the road on each side of the railway and employ proper persons to open and shut them. In a country such as Canada such a provision would seriously impede railway development and Parliament instead of adopting it has provided instead that certain signals and warnings such as the blowing of whistles and the ringing of bells should be given before the trains cross the level highways, and has constituted a tribunal specially qualified and equipped for determining what additional safeguards shall be provided for the public protection and safety at these crossings. In some cases such protection is deemed to be sufficiently secured bv a watchman alone, in others by a watchman and gates or other suitable protection deemed necessary by the tribunal, while in other cases the highway is required to be carried over or under the railway by means of a bridge or arch instead of crossing the same at rail level. The determination is to be reached after thorough inquiry, and ample powers are conferred upon the tribunal effectively to enforce its conclusions and orders

I think the proper construction to be placed upon these sections of the Act is that the powers therein given are exclusive and intended to vest in the tribunal selected plenary statutory powers the exercise of which, excepting as otherwise provided, is final. The exceptions embrace the power of reviewing its

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Davies J.

own decisions from time to time by the tribunal as circumstances may change and the power of appeal to the Governor General in Council, as provided by section 21.

The main question decided by the Court of Appeal, namely, the meaning of the sections relating to fencing and speed at level crossings in or through any thickly peopled portion of any city, town or village, has yet to be considered. An elaborate factum giving the history of Canadian legislation on the subject was submitted to us by the defendants, but I do not think it necessary for me to do more than refer to the Consolidated Railway Act of 1888 and its amendments. The 197th section of that Act as amended by the Act of 1892, chapter 27, reads as follows:

> At every public road crossing at rail level of the railway the fence on both sides of the crossing and on both sides of the track shall be turned into the cattle guards so as to allow of the safe passage of trains.

Then the 259th section of the Act of 1888 as amended by the Act of 1892, reads as follows:

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

Whatever doubts there may have been as to the meaning of those two sections as they were originally framed in the Act of 1888 have been removed since their amendment by the Act of 1892 as I have set them out above. The manner of "fencing prescribed by the Act" is by turning in "the fences on both sides of the crossing and on both sides of the track to the cattle guards." Unless and until this is done the limitation upon the speed at which the trains are to cross the highway, namely, six miles an hour, prevails. When it is done the limitation no longer exists. As I

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Davies J.

have already said these sections neither authorize nor empower the railway to place fences or gates across the highway, and their object was not to provide for the protection of the public travelling along the highway, which was provided for by the 187th section of the Act, but for the "safe passage of trains" and to secure that safe passage as far as possible by the exclusion of animals from the track either by way of the highway or from the adjoining lands.

Then the 10th section of the Railway Act which authorizes the Railway Committee

> to regulate and limit the rate of speed at which trains may be run in any city, town or village

was invoked, and it was pointed out that this power given to the committee was clogged with a limitation that

> the rate of speed shall not in any case exceed six miles an hour unless the track is properly fenced.

But I again point out that this language cannot be held to cover or authorize the fencing of the highways but only the fencing of the track along the lands of the railway company. It is to be regretted that the language had not been changed by Parliament at the time the 259th section was amended and the words "properly fenced" changed to "fenced in the manner prescribed by this Act" as was done in that section. But the words as they stand can mean that and nothing more. They cannot, in my opinion, be construed to take away from the Railway Committee the power of sanctioning a greater speed than six miles an hour unless the track is fenced as a jury may think proper. The Act must be construed with the substituted sections 197 and 259 read into it and the phrase "unless the track is properly fenced" still retained

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Davies J.

in the 10th section construed as meaning fenced as prescribed by the Act and especially by the 197th section, at the highway crossings. No negligence was found or proved with regard to the fencing and if my construction of the Act is correct there was none, it being admitted that on this construction the fences were all right. That being so the rate of speed at which the train could run across the level highway crossing was a matter solely for the determination of the Railway Committee, as was also the determination of the kind, character and extent of the protection which either by gates, watchman or otherwise, should be provided for the travelling public. As a matter of fact it was proved and found by the jury that the rate of speed of the train in question at this highway was considerably below the schedule rate.

Such being the law, as I construe it, I do not think the plaintiff entitled under the findings of the jury to have judgment entered for him.

We were pressed with the decision of this court in the case of *Lake Erie and Detroit River Ry. Co.* v. *Barclay* (1), but there is little analogy between the two cases. The learned judge who delivered the judgment of the court in that case expressly disclaimed any intention of deciding the broad questions which we have been called upon here to determine and the judgment went upon the special facts of that case. It by no means follows from the present judgment of this court that railway companies might not be properly adjudged guilty of actionable negligence in cases arising out of shunting cars across highway crossings apart altogether from questions relating to the speed of trains and the legality of their fencing at highway crossings. These cases must be dealt with on their merits as they arise.

(1) 30 Can. S. C. R. 360.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Killam J.

The appeal should be allowed.

KILLAM J.—I concur in the above opinion of Mr. Justice Davies.

Appeal allowed with costs.

Solicitor for the appellants: *John Bell.*

Solicitors for the respondent: *Hanna & McCarthy.*

1903

*Oct. 16.

*Nov. 10.

L'HONORABLE SIMEON PAGNUELO (PLAINTIFF)..... } APPELLANT;

AND

HORMIDAS CHOQUETTE (DEFENDANT)..... } RESPONDENT;

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Vendor and purchaser—Misrepresentation—Fraud—Error—Rescission of contract—Sale or exchange—Dation en paiement—Improvements on property given in exchange—Option of party aggrieved—Action to rescind—Actio quantum minoris—Latent defects—Damages—Warranty—Agreement in writing—Formal deed.

An action will lie against the vendor to set aside the sale of real estate and to recover the purchase price on the ground of error and of latent defects, even in the absence of fraud.

In such a case, the purchaser alone has the option of returning the property and recovering the price or of retaining the property and recovering a portion of the price paid; he cannot be forced to content himself with the action *quamtum minoris* and damages merely, upon the pretext that the property might serve some of his purposes notwithstanding the latent defects.

Where the vendor has sold, with warranty, a building constructed by himself he must be presumed to have been aware of latent defects and, in that respect, to have acted in bad faith and fraudulently in making the sale.

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*PRESENT: Sir Elzéar Taschereau, C. J., and Girouard, Davies, Nesbitt and Killiam, J.J.

1903

PAGNUELO v. CHOQUETTE.

The vendor, defendant, in the agreement for sale, represented that a block of buildings which he was selling to the plaintiff, had been constructed by him of solid stone and brick and so described them in formal deeds subsequently executed relating to the sale. The walls subsequently began to crack and it was discovered that a portion of the buildings had been improperly built of framed lumber filled in and encased with stone and brick in a manner to deceive the purchaser.

Held, that the contract was vitiated on account of error and fraud and should be set aside, and that, as the vendor knew of the faulty construction, he was liable not only for the return of the price, but also for damages.

Held also that the nature of the contract depended upon the intentions of the parties as disclosed by the last instrument signed by them, in relation thereto.

Held, further, that the action *quantum minoris* and for damages does not apply to cases where contracts are voidable on the grounds of error or fraud, but only to cases of warranty against latent defects if the purchaser so elects; the only recourse in cases of error and fraud being by rescission under art. 1000 of the Civil Code.

In the present case, the sale was made in part in consideration of vacant city lots given in payment *pro tanto*, and, during the time the defendant was in possession of the lots he erected buildings upon them with his own materials.

Held, that, even if the contract amounted to a contract of exchange, it was subject to be rescinded in the same manner and for reasons similar to those which would avoid a sale, and, if the contract be set aside for bad faith on the part of the defendant, the plaintiff has options similar to those mentioned in articles 417, 418, 1526 and 1527 of the Civil Code, that is to say, he may either retain the property built upon, on payment of the value of the improvements, or cause the defendant to remove them without injuring the property, or compel the defendant to retain the property built upon and to pay its value, besides having the right to recover damages according to the circumstances.

The judgment appealed from was reversed.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal (Lynch J.), dismissing the plaintiff's action, in so far as the *demande* for rescission of the contract of sale was concerned.

The action was for the rescission of a deed of sale of a block of buildings and reimbursement of moneys paid in consequence of the sale and for certain damages, including taxes and the cost of necessary repairs to

1903

PAGNUELO v. CHOQUETTE.

the buildings occasioned on account of their faulty construction by the defendant himself. The reasons urged for the annulment of the contract were false and fraudulent representations made by the defendant to the plaintiff, at the time of the sale, that the buildings he was selling, which he had constructed himself, had been solidly constructed of stone and brick, whereas, to the knowledge of the defendant, they were partly constructed of wooden frames encased in brick and stone, hidden from view so as to mislead and deceive the plaintiff, and which hidden defects subsequently caused the walls of the buildings to crack.

The pleas denied misrepresentation or fraud, declared that there were no hidden defects but that the buildings were, as represented, first class buildings of their kind, that their quality and construction were visible and apparent, and all responsibility for the work done on repairs and for taxes paid was disclaimed.

The Superior Court, while sustaining the contentions of the plaintiff, granted him only partial relief as to the repairs he had been obliged to make, but dismissed the *demande* for the rescission of the sale on the ground that, in consequence of the buildings erected by the respondent on the vacant lots, it had become impossible to replace the parties in their original positions. On appeals by both parties, the Court of Review affirmed the judgment of the Superior Court with the addition of some special taxes paid by the plaintiff. From the latter judgment the present appeal is asserted by the plaintiff.

The questions raised upon the appeal are fully stated in the judgment of the court delivered by His Lordship Mr. Justice Girouard.

Duclos K.C. for the appellant. 1. The plaintiff, appellant alleged two grounds of annulment namely: 1st, fraud; 2ndly, hidden defects. We claim that he

has established his pretensions on both grounds. Arts. 991, 992, 993, 1000, 1522, 1524, 1526, 1527, 1529 C. C. See also arts. 417 and 418 C. C. The appellant has clearly proved; (*a.*) That he purchased in error; (*b.*) That he had been deceived; (*c.*) That the respondent secured the plaintiff's consent by means of fraud and trickery; (*d.*) That, had it not been for that fraud, the appellant would not have purchased.

We refer to the authorities cited, under the articles above mentioned, by the codifiers of the Code Civil, vol. 7, de Lorimier, "Bibliothèque du Civil Code," Larombière, Obligations, has specially treated this subject in his 1st vol. at pp. 40, 41, 79 and 80. See also 6 Toullier, No. 95; Merlin, Rep. *bis*, Dol. et Escroqueries; Bigot, Préameneu, Exposé des Motifs, No. 10; 6 Locré, p. 150; Domat, Lois civiles, liv. 1, tit. 18, sect. 1, No. 6, p 140; 15 Laurent, Nos. 486 (dol, Nos. 522, 4, 6, 530); 24 Demolombe, Nos. 84, 8, 4.

The contract in this case was a contract of sale, purely and simply; Nouvelles Pand. Fr. "Exchange," *nn.* 21, 206. If instead of an exchange reciprocal sales are made, it is a sale. A confusion of matter in such a case as this cannot alter the contract. Article 1592 C. C. defines the *dation en paiement.* 'The giving of a thing in payment is equivalent to a sale of it and makes the party giving liable to the same warranty.'

The defendant never actually owned the lands that he received from the plaintiff. If he improved them, he did so at his own risk. He was merely in possession and his rights are governed by the articles of the Civil Code making special dispositions on such questions. Arts. 417, 418, 1047, 1049, 1050, 1052 C. C. The courts below reserved to the plaintiff any recourse which he might have according to law. He has the option of exercising any of the actions without restriction or dictation of any kind from the defendant.

1903

PAGNUELO v. CHOQUETTE.

Even if there had been an exchange, the principles are the same. The defendant cannot take advantage of his fraud or trickery, but he may be made to suffer the consequences. *Barnard* v. *Riendeau* (1); *Greene* v. *Mappin* (2).

H. St. Louis K.C. for the respondent. There was no conventional warranty. The warranty is only legal as to latent defects, if any there be. There are no *latent* defects in the property transferred to the plaintiff, nor are there any defects of a nature to give rise to appellant's claim.

Notwithstanding the deed of sale given, the transaction was an exchange between the parties. The action was tardy and could not be entertained. The contract being one of exchange, appellant could not succeed unless he offered to restore and effectively did restore the defendant to the same position as he occupied prior to the contract. This he did not do, having allowed too long a time to elapse without attacking the contract. The plaintiff's redhibitory conclusions were, therefore, rightly dismissed. Arts. 1506, 1507, 1523, 1530 C. C.; 6 Toullier, *nn.* 24, 27; 11 Pothier (ed. Bugnet) p. 10; Dalloz Rep. "Vices Redhibitoires," *nn.* 67, 68, 69; Dal. 65, 1, 261; 72, 1, 629; 61, 1, 261; 2 Troplong "Vente" *nn.* 587, 588; 4 Aubry et Race p. 391, par. 355 *bis*; Fuzier-Herman, Code Civile, arts. 1641, 1642, *nn.* 12, 13.

The judgment of the Court was delivered by

GIROUARD, J.—Je crois que cet appel doit être accordé. Le 2 avril 1898, l'appelant acquiert par échange ou vente—peu importe le mot pour le moment—un pâté de cinq maisons que l'intimé, qui est entrepreneur, avait bâties à Westmount. L'appellant prétend

(1) 31 Can. S. C. R. 234. (2) 20 R. L. 213.

que l'intimé lui a cédé des maisons de première classe, en pierre et brique, tandis que tous les arrière murs et la moitié des pignons de trois de ces maisons sont en bois lambrissé de briques et pierres. Ce n'est qu'en 1900 qu'il connut ce qu'il appelle ce défaut caché ou son erreur produite par la fraude même de l'intimé. Il proteste de suite et sans délai intente une action demandant la rescision du contrat.

Il est vrai que dans le titre notarié et définitif du 2 avril 1898, l'intimé ne paraît céder que trois lots de terre, "avec les bâtisses dessus construites". Mais cette vague description est susceptible d'explication entre les parties, et même s'il n'y avait pas d'autre description écrite, pas même de mention des bâtisses, l'acheteur peut toujours établir l'erreur et la fraude à ce sujet par la preuve testimoniale.

D'abord, dans la promesse de vente ou d'échanger, écrite de la main de l'intimé et signée sous seing privé par les deux parties le 10 mars 1898, il cède à l'appelant "un bloc de cinq maisons en pierre et brique". Il faut bien remarquer que ces mots ont été ajoutés par lui-même afin de mieux faire connaître à l'appelant la classe ou qualité de la construction. La preuve fait voir qu'en toutes occasions il représentait ces maisons comme étant de première classe, en pierre et brique, ajoutant, même quelquefois le mot "solide". Enfin, au milieu de nombreuses contradictions et hésitations, pressé dans son examen comme témoin, il s'avoue coupable :

"Q. J'aimerais bien à avoir une réponse précise à des questions précises, je vous demande si vous aviez l'habitude de représenter ces trois maisons-là comme étant construites en pierre et brique ?

"R. Je les ai représentées cette fois-là ; quand j'ai vendu, le demandeur. . . . . "

C'est toute sa réponse.

En face de cette preuve, il n'est pas surprenant que la cour supérieure et la cour de revision soient arri-

1903

PAGNUELO v. CHOQUETTE.

Girouard J.

vées à la conclusion que l'intimé, dans le cours de cette transaction, a usé de dol et fraude qui ont induit le demandeur en erreur ; car invariablement le dol inspire l'erreur et c'est pour arriver à ce résultat que l'on y a recours. Le demandeur jure que s'il eût connu le défaut caché ou la fraude, il n'aurait pas acheté ces maisons. Les témoins ne manquent pas qui déclarent qu'ils en auraient fait autant, s'ils avaient été dans la même position. Ce n'étaient plus des misons de première classe que l'intimé cédait, mais de seconde, bien moins durables et exigeant plus fréquemment des réparations grosses et ordinaires. Comme sources de revenu que recherchait l'appelant, elles étaient bien inférieures aux maisons de pierre et brique. Il y a donc eu erreur sur la substance de l'objet du contrat, sur quelque chose qui fut une considération principale capable d'engager l'appelant à le faire. Cela suffit pour annuler le contrat, même en l'absence de fraude (1). Ces articles du Code Civil suffiraient probablement pour tenir le vendeur garant des vices cachés. Mais le Code a sauvegardé la position de l'acheteur par des dispositions particulières.

L'article 1522 déclare :

Le vendeur est tenu de garantir l'acheteur à raison des défauts cachés de la chose vendue et de ses accessoires.....qui diminuent tellement son utilité que l'acheteur ne l'aurait pas achetée.

C'est ce que jure l'appelant et son témoignage sur ce point est corroboré par plusieurs témoins. Or quelle est alors la position du vendeur même de bonne foi ? C. C. Art. 1524. L'intimé répond qu'il doit subir une diminution du prix ; voilà tout. Mais il oublie que ce n'est pas lui qui peut déterminer la nature de l'action qui appartient à l'acheteur. L'article 1526 est formel :

L'acheteur a *le choix* de rendre la chose et de se faire restituer le prix ou de garder la chose et se faire rendre une partie du prix suivant évaluation.

(1) C. C. 991, 992, 1000.

1903

PAGNUELO v. CHOQUETTE.

Girouard J.

Baudry-Lacantinerie, commentant l'article correspondant du code français en son Traité du Droit Civil, *Vente et Echange* (1) dit :

L'acheteur est d'ailleurs maître absolu de son choix ; s'il exerce l'action redhibitoire, on ne peut pas l'obliger à se contenter de l'action *quantum minoris* sous le prétexte que la chose, malgré ses défauts, lui donnera une partie des utilités sur lesquelles il comptait.

Voir aussi Guillouard, *Vente et Echange.* (2)

L'intimé devait savoir que cet article du code s'applique à une vente comme la sienne, même faite de bonne foi. La jurisprudence de la province de Québec s'était prononcée dans ce sens dans une cause décidée en 1890, par le juge Loranger, confirmée en appel par Dorion J. C., Baby, Bossé et Doherty JJ. (3)

Dans l'espèce qui nous occupe, la position du vendeur est bien moins favorable. Il connaissait les vices cachés ; il est lui-même le constructeur de ces maisons ; il est donc de mauvaise foi et coupable de fraude. Placé dans cette position, l'article 1527 ajoute qu'il est tenu,

outre de restituer le prix, de tous les dommages-intérêts soufferts par l'acheteur.

Le code civil, après avoir défini le dol en l'article 993 et nous avoir dit en l'article 991 qu'il est une cause de nullité des contrats, ajouté en l'art. 1000, que la fraude et l'erreur ne sont pas cause de nullité *absolue.* Elles donnent seulement un droit d'action ou une exception pour faire annuler ou rescinder les contrats qui en sont entachés. Il n'y a pas à choisir. Ces articles imposent au juge le devoir d'annuler le contrat. Ici, les deux cours ont constaté la fraude, bien qu'elles soient d'avis qu'il n'y a pas lieu d'appliquer les principes du code sur l'erreur ou les défauts cachés. Ils constatent cependant que ces maisons n'étaient pas de première

(1) n. 435 1 ed. (2) T. 1er n. 455, p. 469.
(3) 20 R. L. 213 ; 34 L. C. Jur. 306.

1903

PAGNUELO v. CHOQUETTE.

Girouard J.

classe, ainsi que l'intimé les représentait, à raison du genre de construction de certains murs. Elles avaient donc des défauts cachés. Au reste ce point n'est pas d'une grande importance. La fraude est établie par les deux cours ; alors le résultat est le même, comme nous l'avons vu. Elles ne pouvaient refuser l'annulation. Voir Biret, Des Nullités, (1) et un arrêt de la cour suprême du 4 vendémiaire, an 7, par lui cité. Voici les considérations de la cour de première instance, Lynch J. :

Considering that plaintiff relies upon the agreement of the 10th of March, 1898, as forming part of the whole transaction between defendant and him, which he has a right to do ; and considering that defendant in that agreement described said five houses as being of stone and brick.

Considering that said representation of defendant was false to the knowledge of defendant, he himself having built said five houses; and considering that under the circumstances, no matter what may have been his motive in making it, such representation must be regarded as fraudulent and as an artifice to deceive plaintiff ;

Considering that plaintiff alleges and has supported his allegation by his own evidence, that he would not have purchased said five houses, and certainly would not have paid $40,000 for them, had it not been for said representation of defendant that they were of stone and brick, etc.

Considering that it is practically impossible to restore the parties to the same position which they respectively occupied before the contract and this through no fault imputable to defendant ; and considering that if the contract of the tenth March, 1898, is to be annulled as plaintiff asks it to be, it must be annulled in its entirety, the effect of which would be applicable to both parties.

Le savant juge, après avoir cité Larombière, (2) Pothier (Bugnet), (3) et quelques autorités anglaises, conclut :

In my opinion, if the demand of plaintiff be granted both parties must be restored to the position which they occupied before contracting ; and this has become impossible principally because defendant

(1) T. 1er p. 331. (2) T. 2e, n. 73.
(3) T. 10e, n. 748.

1903

PAGNUELO v. CHOQUETTE.

Girouard J.

cannot restore to plaintiff the two lots of land having built on them. I have arrived at this conclusion after much hesitation and after a good deal of anxious thought; for I feel that defendant, whether with a fraudulent design or through stupidity is immaterial, has wronged plaintiff, and that the latter is entitled to some redress; but I do not think it can or ought to be granted in the manner sought by the present action. I do not know that there is any occasion for my doing so; but I shall reserve to plaintiff his recourse.

Le recours réservé par la cour est évidemment l'action en diminution du prix ou en dommages. Mais ce recours n'est donné que dans les cas de défauts cachés; il n'existe pas dans ceux d'erreur ou de fraude. L'art. 1000 C.C. est formel. Il ne donne que l'action en rescision. Le savant juge, tout en réservant le recours en dommages, lui accorde cependant une somme de $234.73 pour réparations et pertes de loyer.

Les deux parties portèrent la cause en revision, qui confirma le jugement de la cour supérieure, Taschereau, Loranger et Archibald JJ., mais le montant des dommages accordés fut augmenté de $113.53 pour taxes spéciales, formant un total de $348.26. M. le juge Taschereau était néanmoins d'avis que la première somme de $234.73 devrait être refusée, vu le refus de la rescision.

L'appelant appelle de ce jugement. L'intimé le porta en cour d'appel où il est encore pendant. Je ne puis comprendre le raisonnement fait par les savants juges. Ils citent Larombière et Pothier qui, comme tous les commentateurs traitant la question, posent le principe de droit commun que par le jugement en rescision les parties sont mises au même état qu'elles étaient auparavant. Ils invoquent aussi la jurisprudence anglaise qui probablement est la même que la nôtre, quoique non fondée sur des textes de loi et peut être différente dans ses effets et son application. D'après les autorités françaises, cette règle n'est absolue que pour le demandeur qui doit être en état

1903

PAGNUELO v. CHOQUETTE.

Girouard J.

de rendre la chose ; encore faut-il qu'il n'en soit pas empêché par le fait du défendeur. Pas un des jurisconsultes cités par le juge *a quo* ne dit que si le défendeur, par son fait, surtout par sa fraude, s'est mis hors d'état de faire la restitution, la rescision ne pourra être prononcée. Notre code sur cette matière est semblable au code Napoléon. Les tribunaux et les commentateurs en ont si bien étudié les dispositions qu'il nous suffira de résumer ici ce qu'ils enseignent, sans référer aux autorités anglaises.

Observons d'abord que Larombière et Pothier ne disent pas que toutes les choses restituées doivent être identiquement les mêmes ; dans certains cas cette restitution est même impossible, par exemple si l'une des choses est sortie du commerce, ou a péri, ou ne se trouve plus entière par le fait du vendeur. Ces auteurs ne disent pas qu'alors l'équivalent ne peut être exigé de la partie en faute.

Personne ne prétendra que le contrat d'échange ne puisse être annulé comme le contrat de vente et pour les mêmes causes (1). Qu'arrive-t-il si la chose a péri par suite des vices cachés ? Est-ce que la rescision ne doit pas alors être prononcée parce que le demandeur, par le fait du défendeur, ne peut plus rendre la chose? L'article 1529 indique le mode de procéder qui varie selon que le vendeur est de bonne ou de mauvaise foi. Même si l'immeuble échangé sort du commerce, comme un terrain sur lequel on aurait bâti une église, un édifice national, la restitution serait pareillement décrétée, mais alors la partie en défaut sera tenue d'en payer la valeur. Enfin chaque fois que la restitution ne peut se faire d'une manière entière et parfaite par le fait du défendeur, sans même qu'il y ait faute ou fraude de sa part, il faut procéder par estimation et ordonner le paiement de l'équivalent ; et à plus forte raison doit-

(1) C. C. art. 1599.

il en être ainsi s'il est coupable de dol. Autrement, il suffirait à l'auteur de la fraude de se mettre dans l'impossibilité de remettre ce qu'il a reçu, pour empêcher de rendre justice. *Spoliatus, ante omnia restituendus.* Que m'importe d'avoir une diminution du prix ou des dommages-intérêts, si je suis obligé de garder une chose que je n'ai jamais eu l'intention d'acquérir et qui ne m'est venue que par le dol et la fraude? Le code veut qu'alors le contrat soit résilié et il ne reconnaît aucune excuse pour juger autrement. Il ne dit pas que si les choses ne sont pas entières par la fraude ou le simple fait de la partie en défaut, la restitution n'aura pas lieu. Elle doit se faire en autant que les circonstances le permettent, de manière à faire justice à qui de de droit. S'agit-il d'un échange d'immeubles dont l'un vacant, comme dans l'espèce, a été bâti par l'un des échangistes? Ce dernier n'est-il pas un possesseur de mauvaise foi du jour même de son acquisition? Il y a lieu alors d'appliquer les principes consacrés aux articles 417 et 418 du code civil, c'est-à-dire, si l'autre partie le demande, de le condamner à retenir le terrain en en payant la valeur suivant estimation et tous les dommages-intérêts, car il est de mauvaise foi et il ne peut profiter de sa propre fraude. Citons quelques autorités.

Larombière, au tome cité par M. le juge Lynch, (1) suppose que l'un des immeubles a été acquis par un tiers d'une manière irrévocable, par exemple par la prescription et il aurait pu ajouter par autorité de justice, observe:

> Il peut arriver que les tiers-acquéreurs ne puissent plus être évincés, parce que la prescription se sera accomplie en leur faveur. Cette circonstance n'empêche nullement la résolution, pas plus lorsqu'il s'agit d'une condition résolutoire tacite, que d'une condition résolutoire expresse. Il est vrai qu'alors celui qui a à reprendre sa chose aliénée par l'autre partie, ne la reprend pas entière et est forcé de respecter les droits

(1) T. 2, p. 428.

1903

PAGNUELO v. CHOQUETTE.

Girouard J.

acquis par la prescription. Mais celui qui a consenti l'aliénation doit, dans ce cas, en représentation de la chose prescrite, tenir compte du prix de la vente seulement, comme doit faire quiconque a vendu la chose qu'il a reçue de bonne foi, pourvu que la bonne foi soit bien établie, ce qui exclut toute faute, toute négligence dont la réparation serait due. S'il n'y avait pas bonne foi ce serait l'estimation de la chose qui devrait être payée.

Domat, (1) parlant de celui qui obtient la rescision, dit

qu'il ne profite de la rescision que le simple effet de rentrer dans les droits, sa partie rentrant aussi, de sa part dans les siens, autant que *l'effet de la rescision pourra le permettre.*

Bédarride, *Du Dol et de la Fraude* (2) :—

La partie lésée ayant seule action est, sans contredit, le meilleur juge du mode de réparation le plus convenable à ses intérêts. Elle peut donc choisir celui des deux auquel elle croit devoir s'arrêter, et ce choix est obligatoire pour la justice comme pour son adversaire...

Le débiteur serait-il fondé à se plaindre de cette détermination ? Quel grief réel lui cause-t-on en lui imposant le mode de réparation poursuivi par celui qu'il a trompé ? C'est par son fait personnel qu'est née la nécessité d'une réparation quelconque, et l'on ne saurait hésiter entre celui qui a trompé et celui qui souffre. Sans doute la rescision est le remède le plus héroïque, mais encore faut-il qu'elle entre dans les convenances de celui qui a le droit de s'en prévaloir : et si, sur l'opinion du contraire, il se borne à demander une réparation pécuniaire, l'intérêt opposé de celui qui est tenu de la fournir n'est, aux yeux de la morale et de la justice, ni une considération, ni un motif de refus. C'est à celui qui craint ce résultat à s'abstenir de se livrer à des actes pouvant le déterminer.

Il est une hypothèse où la rescision est légalement impossible, lorsqu'il s'est agi, par exemple, d'un transfert de rentes sur l'Etat. La rescision prononcée par justice serait insuffisante pour opérer la restitution et faire rentrer ces rentes dans la possession du propriétaire qui en a été spolié. Le décret du 8 nivôse, an VI, déclarant irrévocable toute opposition au paiement du créancier titulaire, la rétrocession ordonnée par justice ne pourrait produire aucun effet, à moins d'être volontairement consentie et réalisée par ce titulaire même. On devrait donc l'y contraindre par une condamnation pécuniaire, engageant sa fortune, sa liberté même.

Fuzier-Herman. *Vo. Echange n.* 83 :—

(1) T. 2e, p. 272 (éd Rémy). (2) T. 1er, *nn.* 275, 276.

Par suite la commune coéchangiste, qui excipe de la prétendue impossibilité, provenant de son fait, de restituer le terrain à elle cédé à titre d'échange, terrain par elle affecté à l'établissement d'une église, est non recevable, en se fondant sur l'annulation prononcée par justice du contrat d'échange, à revendiquer le terrain qu'elle a donné en contre-échange. Cass. 2 juin 1886, précité. Dans le même sens, Cass. 11 août 1835, préfet de l'Ain. (1)

Dalloz, *Vo. Vente n.* 1427 :—

Vu l'art. 1652 et les art. 1245 et 1500 c. civ.; Attendu que la nullité de la convention de vente entraînait la nécessité de la restitution réciproque du prix, d'un côté, et de la chose vendue de l'autre ; que les parties devant être remises au même état qu'avant le contrat annulé, chacune des deux devenait débitrice envers l'autre, l'une des sommes reçues, l'autre de la chose vendue ; qu'ainsi l'acquéreur devenait débiteur envers son vendeur du corps certain qu'il devait restituer, et qu'il ne pouvait être libéré de cette remise qu'autant que les détériorations y survenues ne seraient provenues, ni de son fait ni de sa faute ; que, dans le cas constaté par l'arrêt même, il y avait détournement, enlèvement de portion des effets et marchandises faisant l'objet de la vente de la pharmacie ; que, dans cette situation respective des parties, le défendeur avait le droit de retenir, sur le prix payé, une somme égale à la valeur des effets et marchandises disparus par le fait de l'acquéreur ; que, si la valeur ou la quotité de ces effets ne pouvait être convenablement appréciée par la cour, à défaut d'une instruction suffisante, la cour devait suspendre la restitution des 12,500 fr. jusqu'à ce qu'une instruction ultérieure eût fait connaître à quelle concurrence devait s'étendre la retenue du vendeur ; que, de plus, dans l'espèce, le vendeur se trouvant débiteur d'une partie du prix qu'il avait reçue et créancier de la valeur des effets et marchandises enlevés ou revendus, il s'opérait en sa personne confusion jusqu'à concurrence ; qu'il suit de là qu'en annulant la vente, l'arrêt devait autoriser le vendeur à retenir, sur la portion du prix par lui reçue, la valeur des objets détournés ou revendus par l'acquéreur ; qu'au lieu de cela, le vendeur a été condamné à payer de suite et en entier les 12,500 fr. reçus par lui à compte, et a été renvoyé pour le recouvrement de la somme qui lui sera due à se pourvoir à la faillite, et, par conséquent à subir des réductions dont il ne peut être tenu ; qu'en décidant ainsi, la cour de Rouen (arrêt du 22 février 1851) a violé les articles précités ; Par ces motifs casse etc.

Mais est-ce un échange que les parties ont jamais eu l'intention de faire, même le 10 mars 1898, lorsqu'elles

(1) S. V. 35, 1, 485, P. chr.

1903

PAGNUELO v. CHOQUETTE.

Girouard J.

signèrent l'écrit sous seing privé? Je ne le crois pas et si j'avais quelque doute à ce sujet—ce que je n'ai pas—je serais disposé d'en donner le bénéfice à la victime de la fraude et non à son auteur. Il est vrai qu'on trouve dans cet écrit qui a été préparé par l'intimé, un simple ouvrier, les mots *vendeur*, *échange*, mais c'est plus par l'intention des parties et le contenu de l'acte que par le nom qu'elles lui donnent, qu'on pourra en déterminer le caractère. Il est incontestable qu'il ne s'agit aucunement d'un simple échange. La propriété de l'intimé est estimée à $40,000, et celle de l'appelant à $16,500, plus de la moitié au-dessous. Comme il y avait une hypothèque sur les lots vacants, ils n'entrèrent en paiement que pour $10,500, et par conséquent, l'appelant se trouvait à payer une somme de $29,500 en numéraire, qui n'est pas d'ailleurs mentionnée comme formant une soulte. Cette somme représente donc les trois quarts de la valeur des immeubles de l'intimé et d'après l'opinion des meilleurs auteurs—car le code est silencieux—décide de la dénomination du contrat; c'est alors une vente et non un échange.

C'était le sentiment de Pothier cité par l'appelant, et il a été adopté par Bédarride, *Du Dol et de la Fraude*, T. 3, n. 993; Duvergier, T. 2, n. 406; Aubry et Rau, T. 4, par. 360; Laurent, T. 14, n. 617; Guillouard, T. 2, n. 918; Baudry-Lacantinerie, *Vente et Echange* n. 975. Tous ces auteurs entrent dans des détails assez longs qui ne changent pas la proposition générale que nous avons énoncée. Qu'il nous suffise de citer un court passage de Huc, une des lumières de la France judiciaire de nos jours (1).

Si l'opération, (dit-il), qualifiée échange par les parties comporte une soulte relativement importante, on décide généralement qu'il y aura vente ou échange, suivant la prédominance de l'un des éléments sur

(1) T. 10, n. 244, p. 331;

l'autre, sauf à tenir compte, en cas d'équivalence approximative entre la chose la moins importante et la soulte, de l'intention des parties.

Puis il cite dans ce sens un arrêt de la cour de cassation du 26 février 1883, S. V. 86. 1.66.

Non seulement la soulte est bien supérieure à la valeur des lots vacants, mais les parties n'ont voulu faire que des ventes et non un échange. C'est ce qu'elles déclarent toutes deux dans leurs témoignages et l'intimé l'admet en toutes lettres dans ses défenses à l'action :

2° Il admet l'acte mentionné au paragraphe 2, (c'est-à-dire, l'acte de vente notarié du 2 avril 1898, exhibit P-2), mais nie que cet acte n'ait été que la pharapharase authentique de l'écrit P-1 (l'écrit sous seing privé du 10 mars), dont il diffère en certains points importants et qu'il remplace absolument, le premier étant une simple pollicitation unilatérale tandis que l'acte P-2 a été préparé définitivement pour faire loi entre les parties d'après les instructions du demandeur lui-même et signé par le défendeur après avoir été ainsi rédigé par les ordres du demandeur et signé par ce dernier.

Et plus loin :

5° Le défendeur a simplement vendu au demandeur en vertu de l'acte de vente P-2 certains lots de terre situés à Westmount et désigné au dit acte, avec bâtisses dessus construites et connues du demandeur.

L'intimé veut maintenant changer sa position. La transaction, dit-il dans sa plaidoirie orale, constitue un échange et non une vente. Je suis d'avis que l'admission faite au plaidoyer est irrévocable, à moins d'invoquer une erreur de fait. Aucune n'est alléguée, ni prouvée ; C. C. art 1245. En faisant cette admission, l'intimé a cru pouvoir échapper à sa responsabilité, parce que l'acte notarié ne donne aucune description des bâtisses, ajoutant simplement à la suite de la description des immeubles, *avec les bâtisses dessus construites*. S'il n'y avait pas d'autre preuve au dossier, il aurait probablement réussi. Il s'est aperçu sans doute plus tard que, par son admission, il mettait fin à son autre prétention que, les lots vacants ayant été bâtis, les

1903

PAGNUELO v. CHOQUETTE.

Girouard J.

parties ne pouvaient plus être placées dans leur état primitif. Le juge *a quo* n'avait pas raison, à mon sens, de décider que, puisque l'appelant invoquait l'écrit du 10 mars 1898 pour prouver que les maisons étaient en pierre et brique, il devait l'accepter pour déterminer le caractère du contrat. L'appelant l'invoque comme il aurait pu invoquer une annonce de l'intimé, une lettre ou toute autre preuve tendant à établir les représentations de l'intimé au sujet de la classe ou qualité des bâtisses. Voilà tout. Cet écrit ne peut déterminer le caractère du contrat, s'il apparaît que subséquemment, quant il s'agit de donner une suite définitive aux négociations, ayant effet vis-à-vis des tiers, les parties ont manifesté clairement qu'elles entendaient faire une vente et non un échange.

Le 2 avril les parties signent deux actes de vente séparés devant notaire. Un acte notarié et enregistré était en effet nécessaire vis-à-vis des tiers, ce que les parties avaient nécessairement en vue lorsqu'elles ont signé l'écrit sous seing privé. Cet écrit n'était pas même en double et il était seulement en la possession de l'appelant. Les termes et conditions sont les mêmes dans les deux documents, excepté à l'égard de la description des bâtisses. Pas un mot d'échange ne se trouve dans l'acte notarié.

Le prix est clairement fixé dans l'acte qui transfère les immeubles de l'intimé à l'appelant, car l'acte de vente des lots vacants n'est pas au dossier. Ce sont les actes que depuis leur passation les parties ont regardés comme établissant leurs droits respectifs. Comment pouvons-nous dire que l'écrit du 10 mars, en supposant qu'il serait différent, détermine encore les droits des parties ? La jurisprudence française—car la question est nouvelle dans la province de Québec—s'est prononcée dans un sens contraire.

Nous lisons aussi dans Fuzier-Herman, Vo. *Echange* p. 466.

Il ne faut pas confondre l'échange avec la vente suivie d'une dation en paiement ; ainsi on ne devrait pas considérer comme échange le contrat par lequel une des parties s'engagerait d'abord à payer le prix de ce quelle recevrait, et stipulerait qu'elle pourrait se libérer de la somme due en livrant une chose déterminée.

Troplong. Echange, T. 1er n. 9. No. 32 :—

On ne peut non plus considérer comme un échange la double opération qui consiste à vendre un immeuble puis, par acte séparé quoique passé le même jour, à employer tout ou partie de son prix à l'acquisition d'un autre immeuble.

Agen, 10 avril 1833 ; Rodier S. 34. 2. 535. chr.

4o. Et le seul fait pour une des parties de se réserver dans un acte qualifié échange, le privilège du vendeur, ferait considérer cet acte comme une vente au point de vue de l'enregistrement—Cassation, 20 mars 1830, Labigeois et Thuret. (Sirey, 39, 1, 346 ; 39, 1, 464.

C'est d'ailleurs la doctrine que je trouve consignée en toutes lettres dans le factum de l'intimé. Nous y lisons à la page 7 :

And moreover these writings under private hand could not be the definite and culminating contract, as a notarial deed had to be passed. Such act was subsequently passed, and differed in several material points from the original writings.

The authority of Pothier is amply sufficient for this point.

See Pothier, Bugnet, No. 11, p. 10 :—

" Quoique le seul consentement des parties suffise pour la perfection des contrats consentuels, néanmoins si les parties en consentant une vente, ou un louage, ou quelque autre espèce de marché, sont convenues d'en passer un acte par devant notaire, avec intention que le marché ne serait parfait et conclu que lorsque l'acte aurait reçu sa forme entière, par la signature des parties ou du notaire, le contrat ne recevra effectivement sa perfection que lorsque l'acte du notaire aura reçu la sienne."

So that it is finally established that the contract between the parties must be held to be the deed of April 2nd, 1898 ;.....

The notarial deed was essential to the perfection of the bargain and it materially differs from the terms of the private writings.

Je suis d'avis avec l'intimé que l'acte de vente du 2 avril 1898 doit déterminer les droits des parties.

1903

PAGNUELO v. CHOQUETTE.

Girouard J.

Que cet acte comporte une vente pure et simple, cela ne peut souffrir de doute, les immeubles cédés par l'appelant ne formant qu'une dation en paiement qui équivaut à vente (1), et le dit acte établissant d'ailleurs d'une manière définitive ce qu'elles entendaient faire.

J'aurais également accordé la rescision, même si le contrat eût été l'échange; mais dès lors que c'est une vente, il n'existe plus aucune difficulté au sujet de la prétendue impossibilité de remettre les parties dans l'état où elles étaient lorsque cet acte fut passé. A mon humble avis, nous n'avons pas de discrétion à exercer. En présence des défauts des murs des maisons, de l'erreur de l'appelant sur la substance de ces bâtisses et par dessus tout de la fraude commise par l'intimé—fraude qui a été constatée par le jugement des deux cours accepté par l'intimé—nous n'avons qu'à prononcer l'annulation de l'acte du 2 avril 1898 et en autant que besoin est de l'écrit du 10 mars.

L'intimé est condamné à reprendre ses immeubles en remboursant à l'appelant le prix de vente et toutes les sommes qu'il a payées depuis, avec intérêt du jour de chaque paiement, le tout avec dépens devant toutes les cours.

Reste à faire le compte des diverses sommes que les parties se doivent réciproquement. Elles se divisent en deux catégories; 1° celles qui ont été payées et reçues avant l'institution de l'action; et 2° celles qui ne l'ont été que depuis.

Les premières, payées par l'appelant, sont admises dans la pièce du dossier qui se trouve à la page 47 de la cause. Elles sont énumérées aux paragraphes 21 et 22 de la déclaration, page 8 de la cause. Celles qu'il a reçues consistent en loyers, et il déclare dans son action qu'il est prêt à en rendre compte, " déduction

(1) C. C. 1592.

faite des dépenses d'entretien et d'administration." En faisant le compte, le Registraire trouvera les chiffres nécessaires dans ces paragraphes, auxquels le calcul des intérêts devra être ajouté à compter de la date de chaque paiement.

Outre ces sommes l'appelant a droit de répéter $32.30 qu'il a payés au notaire St. Denis, pour l'acte de vente, copie, enregistrement et protêt, et enfin la somme de $348.26 et intérêt accordé par le jugement dont est appel.

Sur l'item de $10.500, étant le prix de vente mentionné au paragraphe 21, il sera cependant fait une réduction d'une somme de $3,000, qui a été autorisée d'une manière générale par l'appelant durant la plaidoirie. Il a avoué devant nous que le prix convenu était quelque peu exagéré, ce qui dans les circonstances ne tirait pas à conséquence. La preuve de la valeur des lots, quoique contradictoire comme elle est toujours dans de pareils cas, justifie cette réduction. Cependant je dois ajouter que, sans le bon vouloir de l'appelant qui fait honneur à son esprit de justice, j'aurais été obligé d'ordonner la restitution de tout le montant stipulé à l'acte et reconnu dans une admission écrite durant le cours du procès, la lésion n'étant pas admise sous l'empire de notre code.

Quant à la seconde catégorie des sommes payées par l'appelant, savoir depuis l'institution de l'action, soit pour cause d'hypothèque ou de transport d'hypothèque ou pour assurance des bâtisses, réparations, frais d'entretien et taxes municipales ou scolaires de quelque nature que ce soit, ou pour toute autre cause à raison de la dite vente, le dit appelant en fournira au Registraire de cette cour un état détaillé (avec pièces justificative si possible), dont il donnera copie à l'intimé dans le délai de deux mois, contenant en même temps un état des loyers reçus par lui depuis la date de la

1903

PAGNUELO v. CHOQUETTE.

Girouard J.

dite vente (avec intérêt du jour de chaque paiement) et aussi des dépenses de collection et d'administration, qui en seront déduites ; et le dit Régistraire, après avoir entendu les parties et leurs témoins, procédera à établir le montant total qui est dû à l'appelant par l'intimé pour toutes ces causes, et finalement entrera jugement pour ce montant, portant intérêt de sa date, en faveur de l'appelant contre l'intimé, avec dépens du compte et débats de compte, s'il y a lieu, et aussi des frais de l'appelant devant toutes les cours, ainsi qu'il est porté plus haut. Nous sommes tous d'avis qu'il est de l'intérêt des parties d'arrêter ce compte de suite au lieu de les renvoyer à la cour de première instance, procédé que nous avons adopté fréquemment dans d'autres causes analogues.

L'appelant pourra retenir les dits immeubles et en faire assurer les bâtisses aux frais de l'intimé jusqu'au paiement intégral du dit jugement en capital, intérêts et frais ; plus l'intimé sera tenu de garantir l'appelant à raison de l'acceptation personnelle du transport de bailleur de fonds fait à Alfred Desève contre tous troubles, actions, ou réclamations qui pourraient en résulter. Sur quittance finale de l'appelant dûment enregistrée, l'intimé devra rentrer dans la possession et propriété des dits immeubles et de leurs dépendances. Voici le texte du jugement de la cour.

TEXTE DU JUGEMENT.

L'appel est accordé et l'acte de vente du 2 avril 1898, passé devant maître St. Denis, et en autant que besoin l'écrit sous seing privé signé par les parties le 10 mars 1898, sont rescindés et annulés à toutes fins que de droit. L'intimé est condamné à reprendre ses immeubles en remboursant à l'appelant le prix de vente et toutes les sommes que ce dernier aura payées depuis, avec intérêt du jour de chaque paiement, le tout avec

dépens devant toutes les cours, suivant compte qui sera fait comme suit :

Premièrement: Des sommes payées par l'appelant avant l'institution de l'action et qui sont admises dans la pièce du dossier qui se trouve à la page 47 de la cause, et énumérées aux paragraphes 21 et 22 de la déclaration, page 8 de la cause; plus de la somme de $32.30 pour coût d'actes notariés et de celle de $348.26 et intérêts accordés par le jugement dont est appel. Sur l'item de $10,500, étant le prix de vente mentionné au paragraphe 21, il sera cependant fait une réduction d'une somme de $3,000.

Secondement, quant aux sommes payées par l'appelant depuis l'institution de l'action, soit pour cause d'hypothèque ou de transport d'hypothèque, ou pour assurance des bâtisses, réparations, frais d'entretien et taxes municipales ou scolaires de quelque nature que ce soit, ou pour toute autre cause à raison de la dite vente, le dit appelant en fournira au Registraire de cette cour un état détaillé (avec pièces justificatives si possible), dont il donnera copie à l'intimé dans le délai de deux mois, contenant en même temps un état des loyers reçus par lui depuis la date de la dite vente (aussi avec intérêt du jour de chaque paiement), et aussi des dépenses de collection et d'administration, qui en seront déduites; et le dit Registraire, après avoir entendu les parties et leurs témoins, procédera à établir le montant total qui est dû à l'appelant par l'intimé pour toutes ces causes et finalement entrera jugement pour ce montant, portant intérêt de sa date, en faveur de l'appelant contre l'intimé, avec dépens du compte et débats de compte, s'il y a lieu, et aussi des frais de l'appelant devant toutes les cours, ainsi qu'il est porté plus haut.

L'appelant pourra retenir les dits immeubles et en faire assurer les bâtisses aux frais de l'intimé jusqu'au

1903

PAGNUELO v. CHOQUETTE.

Girouard J.

paiement intégral du dit jugement en capital, intérêts et frais; plus l'intimé sera tenu de garantir l'appelant à raison de l'acceptation personnelle du transport de bailleur de fonds fait à Alfred Desève contre tous troubles, actions, ou réclamations qui pourraient en résulter. Sur quittance finale de l'appelant dûment enregistrée, l'intimé devra rentrer dans la possession et propriété des dits immeubles et de leurs dépendances.

Appeal allowed with costs.

Solicitors for the appellant: *Lamothe & Trudel.*

Solicitor for the respondents: *Horace St. Louis.*

IN THE MATTER OF THE ARBITRATION

BETWEEN

EUGENE DOBERER.....APPELLANT;

AND

WILLIAM RIGGS MEGAW.....RESPONDENT.

1903

*Oct. 20, 21.

*Nov. 10.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Arbitration and award—British Columbia Arbitration Act—Setting aside award—Misconduct of arbitrator—Partiality—Evidence—Jurisdiction of majority—Decision in absence of third arbitrator—Judicial discretion.

A reference under the British Columbia Arbitration Act authorized two out of three arbitrators to make the award. After notice of the final meeting the third arbitrator failed to attend, on account of personal inconvenience and private affairs, but both parties appeared at the time appointed and no objections were raised on account of the absence of the third arbitrator. The award was then made by the other two arbitrators present.

Held, reversing the judgment appealed from (10 B. C. Rep. 48), that under the circumstances there was cast upon the two arbitrators present the jurisdiction to decide whether or not, in the exercise of judicial discretion, the proceedings should be further delayed or the award made by them alone in the absence of the third arbitrator, and it was not inconsistent with natural justice that they should decide upon making the award themselves.

Held, further, that although the third arbitrator had previously suggested some further audit of certain accounts that had already been examined by the arbitrators, there was nothing in this circumstance to impugn the good faith of the other two arbitrators in deciding that further delay was unnecessary.

Where it does not appear that an arbitrator is in a position with regard to the parties or the matter in dispute such as might cast

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

1903

DOBERER v. MEGAW.

suspicion upon his honour and impartiality, there must be proof of actual partiality or unfairness in order to justify the setting aside of the award.

APPEAL from the order of the Supreme Court of British Columbia (1) dismissing an appeal from an order of the Honourable Mr. Justice Irving, setting aside an award of arbitrators.

By an agreement in writing dated 24th October, 1902, questions in dispute between the appellant and the respondent were submitted to arbitration, the agreement providing that the arbitrators or any two of them should make and publish their award on or before 15th December, 1902. By an order of the Honourable Mr. Justice Irving, dated 5th January, 1903, the time within which the arbitrators might make their award was extended for one month from the date of said order. Two of the arbitrators made and published their award in writing, dated 10th January, 1903, awarding the appellant $4,800.95 in respect of the matters referred to them. The respondent applied to set aside this award, and on the 25th of March, 1903, the Honourable Mr. Justice Irving set it aside with costs to be paid by the appellant. The appellant appealed from this order to the full court of the Supreme Court of British Columbia, which, on the 22nd day of June, 1903, dismissed the appeal with costs. From this latter order the present appeal has been taken.

Sir C. Hibbert Tupper K.C. for appellant. No charge of misconduct can be considered established against an arbitrator in the absence of some evidence of acquiescence by him in improper communications by a party, and the authorities shew that the arbitrator's denial on such a question is conclusive. The authorities place an arbitrator in the same position as a judge against

(1) 10 B. C Rep. 48.

whom misconduct will not be inferred in the absence of positive evidence of the clearest character. See *Crossley* v. *Clay* (1); *Wood* v. *Gold* (2); *Falkingham* v. *Victorian Railways Commissioner* (3), at p. 463; Russell on Arbitration, (7 ed.) 116; Redman on Awards, (3rd ed.) 109. As was said in *Moseley* v. *Simpson* (4), there must be clear evidence of a corrupt act and corruption—mere suspicion is not sufficient. Whenever the conduct of arbitrators is sought to be impeached the court should look with a jealous and scrutinizing eye through the evidence adduced for that purpose. *Brown* v. *Brown* (5). *In re Maunder* (6); *Davy's Executors* v. *Faw* (7).

In *Dalling* v. *Matchett* (8), the very point is covered of an arbitrator being hindered by other engagements from being present. *White* v. *Sharp* (9); Russell (7th ed.) p. 666: Redman, (3 ed.) 111; *Levick* v. *Epsom and Leatherhead Railway Co.* (10); *In re Hotchkiss and Hall* (11), at page 427. In *Ex parte Pratt* (12), it is said that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction and afterwards, when he finds that the decision is against him, to deny its jurisdiction. See also *In re Elliott and South Devon Ry. Co.* (13); *Re Marsh* (14); *Bright* v. *River Platte Construction Co.* (15).

Davis K.C. for the respondent. The partisan attitude of Smith, one of the arbitrators making the award, and his acceptance of notes on the disputed matters made by the appellant, shew misconduct and the power to remove for misconduct by sec. 12 of the Arbitration

(1) 5 C. B. 581.
(2) 3 B. C. Rep. 281.
(3) [1900] A. C. 452.
(4) 28 L. T. 727.
(5) 23 Eng. Rep. 384.
(6) 49 L. T. 535.
(7) 7 Cranch 171.
(8) Willes, 215.
(9) 12 M. & W. 712.
(10) 1 L T. 60.
(11) 5 Ont. P. R. 423.
(12) 12 Q. B. D. 334.
(13) 2 DeG. & S. 17.
(14) 16 L. J. Q. B. 332.
(15) 70 L. J. Ch. 59.

1908

DOBERER v. MEGAW.

Act has been rightly exercised. The absent arbitrator, Buscombe, had insisted that the accounts of the Grand Forks business should be gone into before the award was made, but Ceperley peremptorily closed the award. There was considerable correspondence, but Ceperley and Smith proceeded to Vernon on the 9th of January, knowing that it was impossible for Buscombe to be present, and made an award, giving Doberer a large sum of money. The good faith of both Smith and Ceperley is impeached. Smith, in the course of the conferences, acquired very great influence over the mind of Ceperley, which subsequently culminated in Ceperley taking the course which he did, and which, together with Smith's improper conduct, are the acts complained of and chiefly relied upon in the application to set aside the award.

It may be said that there are two points, viz.: 1. Whether the award should be set aside; and, 2. Assuming that the evidence discloses sufficient material to set aside the award, has the respondent waived his right?

Upon the first point, the correspondence clearly shows that the other two arbitrators knew that it would be almost impossible for Buscombe to attend on the final making of the award. They knew that Buscombe insisted upon going into the accounts between the parties before the award was made, and he never had any opportunity of doing this. The action of Ceperley and Smith prevented his doing so. The two arbitrators in fact insisted upon making the award without listening to the advice of their colleague, and refused to admit the evidence and do that which, in his opinion, was necessary before an award should be made. *Templeman* v. *Reid* (1); *Morgan* v. *Bolt* (2). The conduct of Smith and Ceperley is highly reprehensible.

(1) 9 Dowl. 962.

(2) 7 L. T. 671.

With respect to waiver, a person will not be deemed to have waived a right unless at the time of the alleged waiver he was fully cognizant of such rights and of the facts of the case, nor unless the acts relied upon as constituting a waiver were done under such circumstances that he may reasonably be presumed to have intended to waive the right. *Darnley* v. *London Chatham & Dover Railway Co.* (1), at page 57. It must be shewn that Megaw had assented to something amounting to a waiver after he had become aware of the irregularity or impropriety of the arbitrators' conduct. *Hayward* v. *Phillips* (2). We refer also to *Conmee* v. *Canadian Pacific Railway Co* (3), at page 648; *Harvey* v. *Shelton* (4); *Race* v. *Anderson* (5); *Re Haigh's Estate* (6); *Dobson* v. *Groves* (7), at page 648; *Smith* v. *Sparrow* (8), at page 611.

The judgment of the court was delivered by:

KILLAM J.—We are all of opinion that there was no sufficient ground for setting aside the award in question upon this appeal.

There was no proof of actual misconduct on the part of any of the arbitrators. The utmost which the evidence can be taken to suggest is a partisan attitude of the arbitrator appointed by the appellant and an arrangement by him to take "notes" from the appellant, behind the backs of the other arbitrators, respecting the matters in question. Both he and the appellant deny that he received any such "notes." There is no proof that he did, or that he consulted with or received suggestions from the appellant separately, and the evidence does not appear to us to warrant the

(1) L. R. 2 H. L. 43.
(2) 6 A. & E. 119.
(3) 16 O. R 639.
(4) 7 Beav. 455.
(5) 14 Ont. App. R. 213.
(6) 31 L. J. Ch. 420.
(7) 6 Q. B. 637.
(8) 4 D. & L. 604.

1903

DOBERER v. MEGAW.

Killam J.

inference that he assented to the adoption of any such course. The only affidavit charging expressions of the arbitrator distinctly showing partiality was directly contradicted and does not appear to have been relied on in the court below.

Undoubtedly, an arbitrator should be careful to conduct himself not only with scrupulous fairness towards all parties, but also in such a manner as to cast no suspicion upon his honour and impartiality. But when he is not shown to have been so situated towards any of the parties, or the subject matter in dispute, or otherwise, as to render him unfitted to be an arbitrator in the matter, there should be some proof of actual partiality or unfair action.

The reference authorized the making of an award by two of the arbitrators. It is true that this would not have justified any two in proceeding without reference to the third; but on the other hand, it would be unreasonable that one of three arbitrators should be allowed to prevent the other two from making an award under a reference authorizing the two to make it. Here the third had full notice of the final meeting and an opportunity to attend. His reason for not being present was personal inconvenience and personal business. The other arbitrators were notified that he proposed to go to a distance on business, and upon his own letters it would appear uncertain that he would return before the expiration of the time then fixed for the making of the award. He had refused to concur in fixing any date prior to his departure for a meeting of the arbitrators.

At the appointed time both parties appeared and an opportunity was given them by the arbitrators present to raise any point or objection. No objection was raised, and no request was made for delay to enable

the third arbitrator to meet the others, although the respondent was fully advised of the situation.

Under such circumstances, there was cast upon the two arbitrators the jurisdiction to decide whether, in the exercise of a judicial discretion, the proceedings should be further delayed or the award made by themselves alone, and it does not appear that they acted in a manner inconsistent with natural justice in deciding to make their award.

The basis of the award had already been settled by the three arbitrators. The third arbitrator had indicated his view that there should be an audit of certain accounts of the respondent for the purpose of ascertaining whether further credits should be allowed to him. These accounts were before the arbitrators. There is no suggestion that they indicated a right to any credits which have been overlooked,—nothing whatever to impugn the good faith of the two arbitrators in deciding that further delay was unnecessary.

The appeal must be allowed, and the order setting aside the award discharged, with costs in all courts.

Appeal allowed with costs.

Solicitors for the appellant: *Tupper & Griffin.*

Solicitors for the respondent: *Wilson, Senkler & Bloomfield.*

1903
*Oct. 23, 26.
*Nov. 10.

THE DISTRICT OF NORTH VANCOUVER (DEFENDANT)..... } APPELLANT;

AND

THOMAS HENRY TRACY (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract—Resolution by municipal corporation—Acceptance of offer to purchase—Evidence—Written instruments—Statute of frauds.—Estoppel.

T. offered to purchase lands which the municipality had bid in at a tax sale, and to pay therefor the amount of the arrears of taxes and costs. The council resolved to accept "the amount of taxes, costs and interest" against the lands and authorized the reeve and clerk to issue a deed at that price.

Held, reversing the judgment appealed from, that, even if communicated to T. as an acceptance of his offer, this resolution would have raised no contract, on account of the variation made by the addition of interest.

An instrument, which was never delivered to T, was executed by the reeve and clerk of the municipality, in the statutory form of conveyance upon a sale for taxes, reciting the above resolution but without a reference to any contract in pursuance of the resolution, and about two months after the passing of the resolution, upon receipt of another offer for the same lands, the council resolved to intimate to the person making the second offer "that the lot had been sold to T."

Held, that these circumstances could not be relied upon as an admission of a prior contract of sale.

Held, also, that, even if it could be inferred that contractual relations had been established between T. and the municipality, it did not appear that there had been any written communications in respect thereto made on behalf of the municipality and, consequently, the alleged admissions of a contract did not satisfy the Statute of Frauds and could have no effect.

*PRESENT:—Sir Elzéar Taschereau C. J. and Sedgewick, Davies Nesbitt and Killam JJ.

1903

DISTRICT OF NORTH VANCOUVER v. TRACY.

APPEAL from the judgment of the Supreme Court of British Columbia, *en banc*, reversing the judgment of the Honourable the Chief Justice of British Columbia, at the trial, and awarding the plaintiff such damages as should be settled, on a reference, by the registrar of the court.

The lands in question were advertised for sale for delinquent taxes under R. S. B. C. ch. 144, as amended by 61 Vict. ch. 35, sec. 6 (B.C.) and were bid in by the municipality, under the provisions of the statute. The Act permits the municipality to sell property so bid in and not redeemed within the prescribed time, by a resolution sanctioned by a two-thirds vote of the council, for such price as the resolution may specify. An order was obtained confirming the sale under the provisions of sec. 14 of the last mentioned statute, and by the 15th section, the owner was entitled within a year from the date of the order, *i. e.*, from 3rd January, 1900, to redeem his land. There was no deed of the land executed to the municipality, nor was there any demand for such a deed made under secs. 15 and 16 of the Act. While affairs were in this position, the plaintiff wrote the following letter to the defendants: "I understand that lot No. 1483 was sold for taxes at the last sale and is now held by the municipality. I would like to know the lowest cash price for it or, if you will accept the taxes and costs to date, I will pay that amount for the property."

On receipt of the letter the council passed a resolution, on 3rd September, 1902, as follows: "Letter from Col. T. H. Tracy offering to purchase dist. lot number 1483, was received, and on motion of Councillor May, seconded by Councillor Erwin, it was resolved to accept for this property the amount of taxes, costs and interest to this date against it, amounting to $88, and the reeve and clerk were authorized to

1903

DISTRICT OF NORTH VANCOUVER v. TRACY.

issue a deed for that price." About 15th November, 1902, the reeve and clerk signed and sealed an instrument dated 14th November, 1902, in the form of a conveyance at a tax sale to the plaintiff, but the instrument was never delivered and was indorsed "not delivered." On the day of the execution of the instrument, the clerk received a letter from Tracy, dated 13th November, 1902, inclosing a certified cheque for $88, and asking for a deed of the land. On 14th November, 1902, the owner's agent wrote to the council stating that he wished to redeem the property and asking to be advised of the amount due. Thereupon the plaintiff's cheque was returned to him, on 17th November, 1902, and on the 20th of the same month the land was redeemed by the owner. On the 5th November, 1902, another offer had been received from another person proposing to purchase the land, and the council, on considering it, resolved "to intimate to him that the lot had been sold to Col. Tracy."

At the trial the plaintiff's action was dismissed, and on appeal to the full court the trial court judgment was reversed, Irving J. dissenting, and judgment ordered to be entered for the plaintiff, the amount of damages to be settled before the registrar. The present appeal is taken by the defendant from the latter judgment.

Riddell K.C. and *Rose* for the appellant. For want of a deed and of the demand required by the statute, the land, at the date of the resolutions, remained vested in the owner and the municipality had no power to make a sale of it. The resolution was not under seal (Municipal Clauses Act, R. S. B. C. ch. 144, sec. 26), and it does not purport to sell; it merely expresses a willingness to sell on terms differing from those on which the offer was made. No estoppel can arise in consequence of the resolution subsequently passed in

1903

DISTRICT OF NORTH VANCOUVER v. TRACY.

regard to the second offer; it merely shews that the council were in error as to the legal position of the matter. Nor is any estoppel worked by the instrument executed by the reeve and clerk, more particularly as, in that document, the reeve and clerk are grantors, not the corporation. It had no validity outside of the statute and, it could not operate under the statute as the provisions of the statute had not been complied with and it was never delivered. *McLaughlin* v. *Mayhew* (1); *Phillips* v. *Edwards* (2), and authorities there cited. The receipt of the cheque was not made known to the council till 3rd December, 1902.

The resolution is not a contract but merely an expression of opinion of the council; *Jennett* v. *Sinclair* (3); and it is not equivalent to a contract under the seal of the company. Resolutions of a council will not bind the corporation. Lindley on Companies (6 ed.) vol. 1, p. 426 c.; *Dunston* v. *Imperial Gas Light & Coke Co.* (4). A corporation will not be compelled to execute a contract which it has been resolved shall be entered into by it, as it is only bound by contract under seal. Lindley on Companies, p. 270 (*c*), (*d*) and (*e*); *Mayor of Ludlow* v. *Charlton* (5), at p. 823; *Wilmot* v. *Corporation of Coventry* (6); *Taylor* v. *Dulwich Hospital* (7); *Carter* v. *Dean of Ely* (8), at pp. 222 and 229; *Mayor of Oxford* v. *Crow* (9); *Houck* v. *Town of Whitby* (10); *Silsby* v. *Village of Dunnville* (11).

A contract of sale is not effective unless the name of the vendee be therein inserted as vendee, and none appears in this resolution. *White* v. *Tomalin* (12); *McIntosh* v. *Moynihan* (13), and cases therein cited.

(1) 2 Ont. W. R. 590.
(2) 33 Beav. 440.
(3) 10 N. S. Rep. 392.
(4) 3 B. & Ad. 125.
(5) 6 M. & W. 815.
(6) 1 Y. & C. Ex. 518.
(7) 1 P. Wm's 655.
(8) 7 Sim. 211.
(9) [1893] 3 Chy. 535.
(10) 14 Gr. 671.
(11) 8 Ont. App. R. 524.
(12) 19 O. R. 513.
(13) 18 Ont. App. R. 237.

1903

DISTRICT OF NORTH VANCOUVER v. TRACY.

As no demand in writing was made the period of redemption had not elapsed and the resolution was *ultra vires* of the council: consequently the defendants are not liable. Dillon on Corporations (4 ed.) sec. 447; Brice on Ultra Vires (3 ed.) p. 145; *The British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (1), at p. 719. No corporate body can be bound by estoppel to do something beyond its corporate powers. See also *Mayor of Kidderminster* v. *Hardwick* (2), and the cases there considered, and *Mayor of Oxford* v. *Crow* (3).

Davis K.C. for the respondent. The view taken by the Chief Justice at the trial, dismissing the action on the ground that an ordinary tax deed should have been given by the municipality, is entirely erroneous. The plaintiff was not entitled to a tax deed but to a deed of property owned by the municipality.

The municipality had authority to sell or to agree to sell the land in question to the plaintiff, because it was "not redeemed within the specified time," the year referred to in section 15, which had elapsed. Even if "specified time" includes not only the year but the time up to and until a demand in writing, then the latter provision was not intended to and does not apply in a case where the municipality has itself purchased at its own tax sale. This provision is merely to give the municipality notice that the purchaser at the tax sale intends to insist upon his purchase instead of abandoning it. The provision is not in any way for the benefit of the purchaser; it is simply for the information of the municipality and to prevent conveyances to purchasers who may possibly have decided to abandon purchases. There is no particular form of demand in writing required, anything is sufficient which clearly

(1) 18 Q. B D. 714. (2) L. R. 9 Ex. 13.
(3) [1893] 3 Ch. 535.

intimates that the purchaser intends to insist upon his purchase and to acquire title. No notice could be clearer in this direction than the notice that the municipality has actually sold the land to a third person and has instructed the clerk to perfect the title.

The resolution of 3rd September was passed by virtue, not only of the statute, but also of the by-law passed authorizing the tax sale, which was under seal, and, as the council may act by resolution, this resolution has the same effect as if it was also under seal.

The offer of the plaintiff was, it is true, the amount of the taxes and costs, and the resolution refers to taxes, costs and interest, but interest is really part of the taxes and there can be no doubt that the resolution was intended as an acceptance of the offer. All parties understood taxes and costs to be the same as taxes, interest and costs. This is put beyond all question by the entry in the minute book of 5th November, which shews that the parties were *ad idem* and that the sale was made to the plaintiff.

But if this is not so, then the contract consists, on the part of the council, in the resolution of the 3rd September, which is in writing signed by the reeve and having the same effect by virtue of the by-law as if it were itself under seal. The offer contained in this resolution was at once communicated to the plaintiff and accepted by him orally, and subsequently in writing by his letter of the 13th November containing a marked cheque for the amount of the purchase price. The deed drawn up by the clerk, though in a wrong form, has the corporate seal of the municipality attached. The effect of the resolution was to close the whole matter as if it were a by-law duly passed and voted on by the people for the purpose of conveying land and instructing the reeve and clerk to carry out the deal by executing the deed;

1903

DISTRICT OF NORTH VANCOUVER v. TRACY.

it put it beyond the power of the municipality to further deal with this land, and all that remained for it to do was to see that the reeve and clerk did as they were instructed and executed the deed.

This being so, there has clearly been on the part of the municipality a breach of contract, and one for which they must be responsible in damages. The vendor could have obtained a title but neglected or refused to do so, and by its own action was prevented from being able to carry out the contract; consequently ordinary damages should be given. *Simons* v. *Patchett* (1); *Engell* v. *Fitch* (2); *Bain* v. *Fothergill* (3); *Rowe* v. *School Board for London* (4). The municipality are in the position of an individual who, having obtained the option, has entered into an agreement to sell property to a third person, but who, although perfectly able to acquire a good title and transmit same to his vendee, deliberately choose to refrain from taking advantage of the option and obtaining a title to the property. Under these circumstances damages should be awarded.

The judgment of the court was delivered by:

KILLAM J.—We are all of opinion that there was not sufficient proof of a contract of sale of the land in question by the defendant municipality.

The plaintiff made an offer to purchase the land for the taxes and costs.

Upon that offer being laid before it, the council passed the following resolution:

Letter from Col. T. H. Tracy offering to purchase district lot No. 1483, was received, and on motion of Councillor May, seconded by Councillor Erwin, it was resolved to accept for this property the amount of taxes, costs and interest to this date against it, amounting to $88, and the reeve and clerk were authorized to issue a deed for that price.

(1) 7 E. & B. 568 at 572.
(2) L. R. 4 Q. B. 659.
(3) L. R. 7 H. L. 158.
(4) 36 Ch. D. 619.

Even if communicated as an acceptance of the offer made, this would have raised no contract on account of the addition of interest. It is not shown that, under this resolution, a counter offer in its terms was made to the plaintiff. So far as the evidence goes, it was a mere expression of the willingness of the council to accept the sum it named and an authority to the officers of the municipality to make the conveyance.

The provisions of the statutes and the by-law authorizing the municipal council to sell such property "by a resolution sanctioned by a vote of two-thirds of the council" can only be interpreted as specifying the method by which the enactment of the governing body giving authority for such a sale should be made. Until acted on the plaintiff acquired no rights under it. So far as he was concerned it could have been rescinded or modified at the pleasure of the council. It did not constitute an agreement, or even an offer the acceptance of which could create an agreement.

About two months after the passing of the resolution just mentioned, upon receipt of an offer from a Mr. Diploch for the land, the council "resolved to intimate to him that lot had been sold to Col. Tracy." This is relied on as an admission of a prior contract of sale. While it is impossible to say that it is not evidence which might be more or less cogent, according to circumstances, it does not appear to us that it should be relied on as sufficient proof that, as a matter of fact, the parties had really contracted with each other in the terms of the previous resolution. It seems difficult to believe that any communications constituting a contract would not have been formally proved if they had existed, and it would be unsafe to rely on the latter resolution as proving such communications as a court of law would have held to constitute a contract.

1903

DISTRICT OF NORTH VANCOUVER v. TRACY.

Killam J.

The instrument executed by the reeve and clerk of the municipality recited the resolution authorizing a sale, but not a contract in pursuance of the resolution. It was in the statutory form of conveyance by the officers upon a sale for taxes. It did not purport to be the act or grant of the municipality. Admittedly it was not delivered. It was, no doubt, intended to take effect, upon payment of the purchase money, as the conveyance authorized by the resolution. But as a memorandum in the hands of the municipal officers, it did not evidence the existence of a prior binding contract between the municipality and the plaintiff

There is a further point which appears to me to be, if possible, even stronger against the plaintiff's right to enforce his alleged contract. Even if we could feel justified in inferring that, as a matter of fact, the contractual relation had been entered into, it is not shown that this was done by any written communication on behalf of the municipality, and the alleged admissions of a contract do not satisfy the requirements of the Statute of Frauds. The deed of the officers, as already stated, contains no admission of a prior existing contract, written or verbal, and the resolution to inform Mr. Diplock that the land had been sold to the plaintiff made no reference to the prior resolution or to the terms of sale and is not sufficiently connected with the previous resolution to involve an admission of a sale on those terms.

It is unnecessary to refer to any of the other points argued before us.

The appeal should be allowed and the order dismissing the action restored, with costs here and in the court below.

Appeal allowed with costs.

Solicitors for the appellant: *McPhillips & Williams.*

Solicitors for the respondent: *Davis, Marshall & Macneill.*

THE MUTUAL RESERVE FUND LIFE ASSOCIATION (DEFENDANTS)..... } APPELLANTS;

AND

ELIZABETH DILLON (PLAINTIFF).....RESPONDENT.

1903
*Nov. 16.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—New trial—Alternative relief.

Where the plaintiff obtains a verdict at the trial and the defendant moves the Court of Appeal to have it set aside and judgment entered for him or in the alternative for a new trial, he cannot appeal to the Supreme Court if a new trial is granted.

APPEAL from a decision of the Court of Appeal for Ontario (1) setting aside a verdict for the plaintiff at the trial and ordering a new trial of the action.

The plaintiff, as widow of one John Dillon, brought an action on a policy held by the latter in the defendant company at the time of his death. At the trial, after the evidence was all in, counsel for the defendants moved to have the case withdrawn from the jury and the action dismissed, contending that the uncontradicted evidence prevented the plaintiff from recovering. This was refused and the case went to the jury who answered all the questions submitted in favour of the plaintiff and judgment was entered for her accordingly. Defendants then appealed to the Court of Appeal asking for judgment or a new trial. The Court of Appeal ordered a new trial and the defendants appealed to the Supreme Court for the greater relief previously demanded.

* PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ.

(1) 5 Ont. L. R. 434.

1903

MUTUAL RESERVE FUND LIFE ASSOCIATION v. DILLON.

Lucas (*Wright* with him) for the respondent, moved to quash the appeal on the ground that the judgment appealed from was not final and that the discretion of the Court of Appeal in granting one of the two remedies sought could not be reviewed.

Aylesworth K. C. contra, contended that the judgment was final as the case would be at an end if the appeal was successful. Also, that if the appeal was from the order for a new trial it was clearly given in the Act.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—The respondent moves to quash this appeal upon the ground that the judgment appealed from is not a final judgment within the meaning of the Supreme Court Act. Under section 24 of the said Act an appeal is given from final judgments only, and section 2, subsection "*e*" enacts that the expression "final judgment" means any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

The action is one brought by the respondent against the appellants to recover the sum of $2,000 on a policy of insurance.

Upon the findings of the jury, the presiding judge having previously refused appellants' application for the dismissal of the action, judgment was directed to be entered for the respondent for the sum of $1,905.24.

From that judgment the present appellants appealed to the Court of Appeal for Ontario and in their reasons of appeal reiterated their contention that there was no case for the jury, and that the action should be dismissed, and, in the alternative, that a new trial should be granted. The court ordered a new trial.

The respondent, though she loses thereby the benefit of the verdict that she had recovered, does not appeal from that judgment, as she undoubtedly would have had the right to do since the amendment to the Supreme Court Act of 1891, 54 & 55 V. c. 25, sec. 2. But singular to say, it is the appellants who, though they obtained from the Court of Appeal one of the alternatives they prayed for, would now contend that they are aggrieved by that judgment, because, they argue, the court should have granted the other of their alternative demands, and should have dismissed the respondent's action. They, on the one hand, hold on to the judgment granting them their demand for a new

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Appeal, that the appellants com-
v. *Brinkerhoff* (1); *Grant* v. *Phœ-*
ouis Iron Mountain and Southern
thern Express Co. (3); *Ex parte*
y v. *Toledo & Ohio Central Rail-*
. Spaulding (6); *St. Clair County*
y cannot and do not appeal from
a new trial.
e allowed the appeal and dismis-
ould put an end to the litigation.

(4) 108 U. S. R. 237.
(5) 146 U. S. R. 536.
(6) 46 N. Y. 556.
) 18 Wall. 628.

ADDITIONAL ERRATA, VOL. VII.

Page 628, line 12, for 1897, read 1807.
" 634, line 7 from bottom, for "and" read "or."

1903

MUTUAL RESERVE FUND LIFE ASSOCIATION v. DILLON.

The Chief Justice.

But, as we said in *Barrington* v. *The Scottish Union and National Ins. Co.* (1), that is not the criterion of the jurisdiction of this court; that is mistaking the exit door for the entrance door of the court. Our jurisdiction does not depend upon the judgment that we might possibly give, but upon the judgment that has been given by the court appealed from.

The appeal is quashed; no costs, as the respondent should have moved *in limine*.

Appeal quashed without costs.

Solicitors for the appellants: *MacMurchy, Denison & Henderson.*

Solicitors for the respondent: *Lucas, Wright & McArdle.*

(1) 18 Can. S. C. R. 615.

1903

WILLIAM PRICE (INTERVENANT).....APPELLANT;

AND

OSCAR WILLIAM ORDWAY (PLAINTIFF CONTESTING)..... } RESPONDENT.

*Oct. 13, 14.
*Nov. 30.

CHARLES VEILLEUX (DEFENDANT)...APPELLANT;

AND

OSCAR WILLIAM ORDWAY (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT QUEBEC.

Contract—Deceit and fraud—Rescission — Evidence—Concurrent findings of lower courts—Duty of second court of appeal.

A sale of timber limits to the plaintiff was effected through a broker for a price stated in the deed to be $112,500, but the vendor signed an acknowledgment that the true price, so far as he was concerned, was $75,000. At the time of the execution of the deed a statement was made shewing how the purchase money was to be paid and the vendor signed an agreement that out of the balance of the $112,500, viz. $46,502.02, the plaintiff was to get $37,500, *i.e.*, the amount of the difference between the true price and that mentioned in the deed. The vendor refused to pay over this $37,500 on the ground that the plaintiff and the broker had conspired together to deceive him as to the actual price to be obtained for the limits, and that the sale was not in fact to the plaintiff for $75,000 but to the plaintiff's principals, the grantees in the deed, for the full consideration of $112,500, and that the plaintiff and the broker were acting fraudulently and seeking by deceit and artifice to deprive him of the full price at which the sale had been effected. In an action to recover the $37,500 from the vendor :—

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*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

1903

PRICE v. ORDWAY.

VEILLEUX v. ORDWAY.

Held, affirming the judgments appealed from, that the acknowledgements signed by the vendor settled the rights of the parties unless there was very strong evidence to the contrary and, as there was no such evidence and as the circumstances as found by the courts below, tended to shew that plaintiff was entitled to the money in dispute as the natural result of the transactions between the parties, the case was one in which a second court of appeal would not be justified in disturbing the concurrent findings at the trial and of the court appealed from.

APPEALS by the intervenant and the defendant from the judgments of the Superior Court, sitting in review, at Quebec, affirming the judgments of the Superior Court, District of Quebec, maintaining the plaintiff's action with costs and dismissing the intervention of the appellant, Price, with costs.

The circumstances of the case, in respect to both appeals, are as follows: —The defendant, Veilleux, was the owner of timber limits on the Portneuf river, having an approximate area of three hundred miles. These limits had been purchased at a Government sale by Veilleux, who found difficulty in paying for them, and ultimately borrowed money from a Mr. Amyot for that purpose. Amyot on making the loan took a title to the limits giving Veilleux a right to redeem them within a limited time. This time being about to expire, Veilleux applied to the Hon. L. P. Pelletier to assist him in finding a purchaser for his limits. Mr. Pelletier saw Mr. Price who agreed to advance one-half of $2,000, the necessary sum to obtain an extension of time from Amyot, if Pelletier would advance the other half, and go into the transaction on joint account. This was agreed to, and on the 1st March, 1902, an agreement was entered into between Veilleux and Price, represented by Pelletier, to the effect that, in consideration of Price advancing $2,000 to obtain a six months' extension of time for redemption, Veilleux transferred to him all right of property in the limits, and

authorized a sale for not less than $200,000; and that in the event of sale, after payment of Amyot and all expenses, the balance should be divided between Veilleux and Price. By memorandum at the bottom of the agreement signed by Pelletier and Price, it was stated that Price was acting in the joint interest of himself and Pelletier, who was entitled to one-half of any profit which should be made out of the transaction. The $2,000 having been paid to Amyot, a subsequent agreement was entered into on 8th May, 1902, by which the People's Bank of Halifax, with the consent of Price, paid Amyot in full and took over the limits to secure the payment as well of $36,000 paid by the bank to Amyot, as of $11,660.23 previously due by Veilleux to the bank, also of $2,100, repaid to Price, and of the sums necessary to be paid to the Crown Lands Department to obtain the transfer of the limits to the bank, and it was agreed that until 1st November, then next, Veilleux might redeem the limits on paying the amount due to the bank, otherwise the limits to remain the property of the bank, and further that Veilleux should deal with the limits only with the written consent of Price.

Veilleux had for a considerable time employed Boulanger, a broker at Quebec, in the effort to dispose of his limits, and had given Boulanger reports, plans, etc., and, in fact, constituted him his agent for the sale giving him his entire confidence. On the 17th May, 1902, Boulanger made an offer to sell at $75,000, subject to a 5 per cent commission in his favour, which was accepted by Veilleux on 19th May. The acceptance was made after considerable discussion with Boulanger, in which Boulanger represented to both Veilleux and Pelletier that this was the largest sum obtainable, and that asking $100 more would prevent the transaction being carried through. On the 2nd July, 1902, Veilleux, Boulanger, Ordway, Webster, the

1903

PRICE v. ORDWAY.

VEILLEUX v. ORDWAY.

local manager of the People's Bank of Halifax, and Pelletier, the solicitor for the People's Bank of Halifax, met at the Quebec Bank in Quebec for the purpose of carrying out the transaction and a deed of sale by Veilleux to C. P. Easton & Co., (Ordway's principals,) of the limits in question, prepared by a notary named Sirois, under Ordway's instructions, was submitted and discussed, the price of sale being stated in the deed as $112,500, distributed as follows: to the People's Bank of Halifax $51,844.98, to the same bank in payment of advances $1,200; to Boulanger, for his commission $3750; to Price, $9203, and to Veilleux, the balance, $46,502.02. This deed was not finally executed that day, but was discussed and settled as to its terms and signed, as a draft by all the parties except the Quebec Bank and they then adjourned till next day, Ordway meanwhile obtaining from Veilleux the following acknowledgment: 'Quebec 2nd July, 1902. O. W. Ordway, Esq., Quebec. Dear Sir,—Out of an amount of $46,502.02, which I will receive from the Quebec Bank for my limits, in virtue of the deed before L. P. Sirois, and signed by me today, it is understood that you get $37,500 and I keep the balance.'

On the night of 2nd July, Pelletier was informed that the real price was not $75,000, as represented by Boulanger, but was in fact $112,500, and that the difference, $37,500, was to be divided between Ordway, Boulanger and another person. Boulanger had represented that the purchaser desired to state in the deed a price higher than the real price paid, for the purpose of giving an apparently larger value to the limits, and that the $37,500 difference was for the purpose of acquiring additional limits in the vicinity.

The same parties met again on 3rd July when the deed was signed and the cheques paid to all parties except Veilleux, the amount of money, $46,502 02,

coming to him, being placed to his credit in the books of the Quebec Bank. He then gave the bank a cheque for $16,025.81, his indebtedness to it, reducing the balance at his credit to $30.476.21. Ordway asked Veilleux for a cheque for the $37,500 mentioned in the memorandum of the previous day, but Veilleux, to whom the above information had been communicated, refused to pay Ordway any sum whatever. Ordway then took the action against Veilleux with an attachment of the moneys in the hands of the Quebec Bank.

The appellant, Price, intervened in the action, alleging his agreement with Veilleux and the transactions which had taken place, claiming $18,500 as half of the $37,500 in addition to what he had already received and contesting the plaintiff's claim.

On issues joined upon the merits, the parties went down to trial and, on his appreciation of the evidence, the trial judge maintained the plaintiff's action, declared the attachment binding and dismissed the intervention with costs. Both defendant and intervenant inscribed in review, unsuccessfully, and they now appeal from the judgments of the Court of Review, affirming the above mentioned judgments of the Superior Court.

Stuart K.C. and *L. P. Pelletier K.C.* for the appellant, Price.

L. P. Pelletier K.C. for the appellant, Veilleux.

Bédard K. C. and *Alex. Taschereau K. C.* for the respondent.

The judgment of the court was delivered by :

GIROUARD J.—This appeal involves only questions of fact decided by two courts. There is undoubtedly contradictory evidence, but two courts have found one way, although the reasons given by the judges do

1903

PRICE v. ORDWAY.

VEILLEUX v. ORDWAY.

Girouard J.

not all agree. There is some oral evidence in support of the judgment appealed from, but the written evidence is still stronger. The notarial deed of sale of the 3rd July, 1902, which was actually signed by the parties the day previous, fully explains the price paid by C. P. Easton & Co. for the Veilleux timber limits, namely $112,500, as follows:

To the People's Bank of Halifax, amount advanced	$51,844 98
To the same for transfer bonus	1,200 00
To Boulanger for his commission of 5 per cent	3,750 00
To Messrs. Price & Pelletier, for their share of the profits on the sale	9,203 00
To Veilleux, the balance	46,502 02
	$112,500 00

On the 2nd July, at the same time that the said notarial deed was signed by all the parties interested, the respondent Veilleux, one Boulanger, timber limit broker and jobber, and Mr. Webster, manager of the People's Bank of Halifax, signed a short note addressed to Mr. Price in which they acknowleged

that the purchase price of the Veilleux limits which is put down in the deed to C. P. Easton & Co. as $112,500 is only $75,000 *as far as Mr. Veilleux is concerned.*

Previously, on the 17th May, Boulanger wrote Veilleux offering him $75,000 for his timber limits, which offer he accepted by letter on the 19th May, agreeing further to pay him 5 per cent commission on the amount of the sale. Messrs Price and Pelletier were only interested in this sale.

Fraud has been charged by the appellants against Boulanger and Ordway, but I must confess I fail to see it on the part of any one. Ordway had personal dealings with Boulanger only. The latter was not the agent of Veilleux, although he was to receive a commission from him. On the 13th June, Mr. Pelletier, acting for Veilleux and Mr. Price, signified their con-

sent to accept $75,000 for the Veilleux limits from Boulanger "or his clients." The latter evidently were not Veilleux and his friends, but Ordway, and ultimately as it turns out C. P. Easton & Co., lumber merchants of Albany, who paid the money and got the title. It was only at that time that Ordway and Easton & Co. appeared on the scene. Boulanger told Veilleux and Pelletier that he could not get more than $75,000. That was perfectly true. Easton was unknown to them and of course Ordway wished to make his little pile and keep the name of the real purchasers a secret. I do not see anything fraudulent or wrong about this.

But even if all the transactions were not open and strictly honest, Mr. Pelletier became aware of their nature on the evening of the 2nd July before the said deed was signed by the notary and the purchase money distributed; he admits it in his evidence, and notwithstanding this knowledge he allowed that distribution to take place in the presence of all parties in accordance with the stipulations of said deed, without any protest or objection on his part. The appellants, who were represented by Mr. Pelletier, are therefore estopped from alleging fraud. There was full *acquiescement.*

I cannot understand that Mr. Pelletier did not know the full nature of the transactions, when the deed was signed by the parties on the 2nd July. On reading the following document which was prepared by him and signed by Veilleux immediately after, one would suppose that he knew or at least should have known the nature of the transactions.

QUEBEC, 2nd July, 1902.

O. W. ORDWAY, Esq., Quebec.

DEAR SIR,—Out of the amount of $46,502.02 which I will receive from the Quebec Bank for my limits in virtue of deed before L. P. Sirois, and signed by me to-day, it is understood that you get $37,500 and I keep the balance.

CHARLES VEILLEUX.

1903

PRICE v. ORDWAY.

VEILLEUX v. ORDWAY.

Girouard J.

The deed shews that this amount of $46,502 was the balance remaining as profits to be divided between Veilleux and Ordway, all other claims having been settled, especially the claim of Mr. Price which was to be divided between himself and Mr. Pelletier. It was always understood that Mr. Veilleux would get about an equal share of the profits and that is the reason why he, as depositor of the money in the bank, promised to pay to the respondent $37,500, he keeping $9,203 for his share of the profits.

The acknowledgment of Veilleux settles the rights of the parties and very strong evidence would be required to set it aside. Not only is there no such evidence, but all the circumstances of the case tend to shew that it was the natural result of the dealings and transactions between the parties. It is therefore one of those cases, in my opinion, where a second court of appeal would not be justified in disturbing the findings of facts of the trial judge who had an opportunity of seeing the witnesses, approved as they were in very clear language by the judges in review. The appeals both of Veilleux and Price should therefore be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellant Price: *Caron, Pentland, Stuart & Brodie.*

Solicitors for the appellant Veilleux: *Drouin, Pelletier & Baillargeon.*

Solicitors for the respondent: *Fitzpatrick, Parent, Taschereau, Roy & Caron.*

BERNARD J. COGHLIN (DEFENDANT) ..... } APPELLANT ;

AND

LA FONDERIE DE JOLIETTE, (PLAINTIFFS) ..... } RESPONDENTS ;

1903
*Oct. 16.
*Nov. 30.

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

Breach of contract—Damages—Evidence—Discretionary order by judge at trial—Interference by Court of Appeal.

The trial court condemned the defendant to pay $122.50 damages for breach of contract for the sale of goods but, in view of unnecessary expenses caused in consequence of exaggerated demands by the plaintiffs, which were rejected, they were ordered to bear half the costs. On an appeal by the defendant, the Court of King's Bench varied the trial court judgment by adding $100 exemplary damages to the condemnation and giving full costs against the defendant.

Held, reversing the judgment appealed from, that in the absence of any evidence of bad faith or wilful default on the part of the defendant, there was no justification for the addition of exemplary damages nor for interference with the judgment of the trial court.

APPEAL from the judgment of the Court of King's Bench, appeal side, modifying the judgment of the Superior Court, District of Montreal, by increasing the amount of the verdict against the defendant and ordering him to pay all the costs of the action, part of which costs had been imposed upon the plaintiffs by the trial court judgment.

The questions at issue on this appeal are stated in the judgment now reported.

Béique K.C. and *Lafleur K.C.* for the appellant.

Renaud K.C. for the respondeuts.

*PRESENT :—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

1903

COGHLIN
v.
LA FONDERIE DE JOLIETTE.

Girouard J.

The judgment of the court was delivered by:

GIROUARD J.—Il s'agit de savoir si l'intimée a droit à une somme additionnelle de $100 pour dommages-intérêts résultant de l'inexécution d'une vente de marchandises.

Voici les faits en peu de mots. Durant l'hiver de 1899, l'intimée donne deux commandes à l'appelant, l'une pour des dents de herse livrables dans un délai déterminé, et l'autre pour des pièces de fer et d'acier devant servir à la fabrication de faucheuses, râteaux et machines agricoles, livrables sans qu'aucun délai ne fût fixé. Il y a eu, dit l'intimée, retard dans la livraison et la qualité des dents de herse, et défaut de livraison en temps opportun des pièces de fer et d'acier. De là deux actions ; la première intentée par l'appelant contre l'intimée, à ce qu'il paraît, en recouvrement du prix de vente, savoir $948.21, et l'autre celle que nous sommes appelés à décider.

Je dis à ce qu'il paraît ; nous n'avons en effet que les dires des parties et l'affirmation des juges ; nous n'avons pas la déclaration, ni les plaidoyers, pas même les jugements qui furent rendus dans cette cause.

Une longue enquête s'en suivit, couvrant trois cents pages d'impression. L'action de Coghlin fut déboutée par les deux cours. Ce jugement était sans appel ultérieur, le montant demandé ne permettant pas d'aller plus loin.

De son côté, et sans attendre la fin de ce procès, l'intimée réclama $3,033.50 à titre de dommages-intérêts résultant du retard de la livraison et de la mauvaise qualité des dents de herse et du défaut de livraison des pièces de fer et d'acier en temps opportun. La preuve faite dans la première cause fut mise au dossier de consentement, et une preuve nouvelle, couvrant quatre-vingts pages imprimées, fut ajoutée. La

1903

COGHLIN v. LA FONDERIE DE JOLIETTE.

Girouard J.

cour supérieure (Fortin J.) a accordé $122.50 à raison de la mauvaise qualité et de la livraison tardive des dents de herse et renvoya l'action quant au surplus. Enfin, comme le savant juge était d'opinion qu'au moins la moitié des frais d'enquête avait été occasionnée par la tentative infructueuse de la demanderesse de prouver les items de dommages qui lui étaient refusés, elle fut condamnée à supporter la moitié des frais d'enquête. L'intimée seule en appella à la cour d'appel qui lui accorda $100 de plus du chef des dommages rejetés et partant tous les frais d'enquête.

Voici le texte du jugement :

Considérant que l'appréciation du contrat fait entre les parties relativement à ces pièces de fer et d'acier, a été faite à la cour supérieure dans une cause intentée par l'intimé contre l'appelante pour le prix des dites pièces de fer et d'acier et que la cour a décidé que l'intimé était en faute pour n'avoir pas livré les dites marchandises en temps opportun, et en conséquence a refusé le prix ;

Considérant que ce jugement de la cour supérieure a été confirmé par la cour d'appel ;

Considérant que la preuve faite dans la dite cause en recouvrement du prix a été de nouveau soumise dans la présente cause avec une preuve additionnelle ;

Considérant qu'il n'y a pas lieu dans l'appréciation que cette cour fait de la preuve de rendre une décision différente de celle qui a été donnée dans la première cause sur la question de responsabilité ;

Considérant que l'intimé était responsable de la non-livraison des dites pièces de fer et d'acier en temps opportun, il est en conséquence passible des dommages résultant de l'inexécution de son obligation ;

Considérant que l'appelante a établi des dommages que la cour évalue à cent piastres, etc.

La cour ne nous dit pas comment elle est arrivée à établir ce montant de dommages. Nous avons cependant l'opinion de M. le juge Hall, la seule au dossier, qui est plus explicite :

While therefore it is evident that plaintiff did sustain a damage by defendants' delay in supplying the iron and steel for the mowing machines and rakes, yet the evidence in regard to it is too vague and irrelevant to serve as the basis of a judgment some of it pointing to

1903

COGHLIN
v.
LA FONDERIE DE JOLIETTE.

Girouard J.

alleged features of damage which are too remote and hypothetical to establish a legal liability, and the rest being indefinite as to quantity, identity and actual expenditure.

Under these circumstances, the learned trial judge came to the conclusion to dismiss altogether this branch of the claim, evidently feeling that the adjudication in the previous case did not control the present one, and apparently not sharing the views expressed in the previous judgments as to the defendants being in default. As above stated, I think we must consider that there is a kind of *chose jugée* between the parties on this point and that being the case and the evidence not warranting a specific condemnation for damages in connection with the iron and steel plates, I would be of opinion to recognise the latter claim in principle,—by allowing a sum of say $100 as exemplary damage for these items; to maintain the appeal with costs and reform the judgment by increasing it to $222.50 with full costs in the Superior Court.

L'appelant appelle de ce jugement à cette cour, où il se plaint uniquement de l'addition des $100 et des frais d'enquête, n'ayant pas appelé du jugement de la cour de première instance. Je ne puis comprendre comment la cour supérieure ou la cour d'appel, pouvait invoquer un jugement ayant presque l'autorité de la chose jugée, dit-on, lorsqu'il n'est pas au dossier. Si les tribunaux inférieurs ont pu en constater le jugé, nous n'avons aucun moyen de le faire et nous devons rendre jugement sur les pièces et documents qui sont devant nous. Même si ce jugement était devant nos yeux, doit-on en conclure plus qu'il ne semble comporter, savoir que le prix de vente ne pouvait être demandé.

Le juge *a quo* est d'avis qu'aucun délai n'avait été fixé dans le contrat intervenu pour la livraison des pièces de fer et d'acier et que l'appelant avait fait toute la diligence possible pour les livrer. La cour d'appel admet qu'un délai fixe n'avait pas été stipulé; elle ajoute qu'alors la livraison devait se faire en temps opportun, ce qui je suppose veut dire en temps utile ou raisonnable. Cette raison était probablement suffisante pour refuser le prix de vente, point que nous

1903

COGHLIN v. LA FONDERIE DE JOLIETTE.

Girouard J.

n'avons pas à examiner. L'intimée avait besoin de ces articles à temps pour profiter de la saison d'affaires de 1899, s'ils sont arrivés trop tard pour en tirer profit, il est peut être raisonnable qu'elle ne soit pas tenue de les prendre et d'en payer le prix. Mais autre chose est l'action réclamant des dommages-intérêts. L'appelant peut-il être considéré en faute s'il a fait toutes les diligences possibles pour les obtenir, car l'intimée savait qu'il devait les faire fabriquer ailleurs? Le juge *a quo* n'a pas de doute sur ce point et la cour d'appel n'en dit rien; elle se contente de se retrancher dans son premier jugement qui ne décide rien au sujet de la responsabilité pour dommages-intérêts. S'il y a eu diligence—ce qui me paraît prouvé—il me semble qu'il ne peut y avoir faute donnant ouverture à des dommages-intérêts. Mais supposons même que l'appelant n'ait pas fait diligence et qu'il fût en faute, quels dommages doit-il payer? Il n'est pas de mauvaise foi; il n'est pas même soupçonné de mauvais vouloir envers l'intimée qui, dans sa déclaration, n'invoque que la non-exécution de son contrat en temps opportun par sa faute ou négligence; rien dans sa conduite ne frise le délit ou le quasi-délit où le tribunal a une grande latitude pour appécier et estimer les dommages. Tous les juges semblent d'accord sur ce point. Alors, il n'est pas passible à tout événement de dommages exemplaires qui paraissent cependant avoir été accordés par la cour d'appel. Les seuls dommages-intérêts que l'intimée peut réclamer doivent être existants, certains et spéciaux, et non douteux, éventuels ou vagues, ceux qu'on a prévus ou que l'on a pu prévoir et qui sont une suite immédiate et directe de l'inexécution de la convention, ainsi qu'il est porté aux articles 1065, 1073, 1074 et 1075 du code civil. Comme tous les commentateurs l'enseignent, le demandeur doit établir qu'il a souffert des domma-

1903

COGHLIN v. LA FONDERIE DE JOLIETTE.

Girouard J.

ges réels, en constatant le gain, dont il a été privé, et la perte qu'il a subie. La détermination du montant exact peut être difficile ou même impossible pour lui; la cour peut alors le faire d'après les règles de l'équité et accorder des dommages nominaux, ce qui n'est pas la même chose que des dommages exemplaires. Mais il faut alors que l'existence des dommages soit incontestable. C'est le principe qui fut consacré par cette cour, confirmant les deux cours provinciales dans *The Corporation of the County of Ottawa v. Montreal, Ottawa & Western Railway Co.* (1), particulièrement aux pages 205, 207 et 211. Cette jurisprudence fut d'ailleurs suivie par plusieurs autres arrêts de tous les tribunaux de la province de Québec, entr'autres, *Lepage v. Girard* (2), confirmé en revision et en appel (3).

L'intimée a-t-elle prouvé qu'elle a réellement souffert des dommages? La cour d'appel reconnaît que cette preuve existe, sans en avoir constaté le montant. La cour l'a fixé pour elle, ce qu'elle pouvait faire si des dommages spéciaux sont prouvés. Quelle était la nature de ces dommages? C'est ce que la cour ne dit pas. D'après quelle base, a-t-elle pu en fixer le montant? C'est ce qui n'apparaît pas non plus. M. le juge Hall nous en donne sans doute le secret, lorsqu'il déclare que des dommages spéciaux n'ont pas été prouvés, mais qu'il y a lieu d'accorder des dommages exemplaires. Dans sa pensée c'est probablement un dommage nominal qu'il avait en vue. Mais comment cette conclusion était-elle possible dans les circonstances, telles qu'il les apprécie? S'il eut déclaré qu'il existait des dommages spéciaux ou appréciables, et que de ce chef la cour accordait un montant nominal,

(1) 26 L. C. Jur. 148; M. L. R. 1 Q. B. 46; 14 Can. S. C. R. 193.

(2) 4 R. L. 554.

(3) See *Mulcair* v. *Jubinville* 23 L. C. Jur. 165.

1903

COGHLIN v. LA FONDERIE DE JOLIETTE.

Girouard J.

soit $100, je crois que peut-être il aurait été difficile de décider autrement. Mais le savant juge nous dit qu'il n'existe aucun dommage appréciable en loi. Même si nous n'avions devant nous que le texte du jugement de la cour qui, en apparence du moins, ne viole aucun principe, le résultat serait le même.

En effet, après avoir lu attentivement le dossier, nous sommes arrivés à la conclusion qu'il n'y a pas de preuve qui puisse nous justifier d'accorder des dommages nominaux. Nous sommes donc d'avis de réétablir le jugement de la cour supérieure *in toto*. C'est un dénouement bien ruineux pour l'intimée, car enfin l'appelant était en retard et même en faute au sujet d'une des commandes. C'est son malheur d'avoir si gravement exagéré les conséquences de cette faute ou de ce retard. Ce résultat aurait été évité si elle s'était contentée de demander des dommages raisonnables. Elle poursuivit pour $3,033.50, et aujourd'hui elle se déclare satisfaite avec $222.50, n'ayant pas appelé du jugement qui lui accorde seulement cette somme. Ayant imprudemment ouvert les portes de toutes les jurisdictions du pays, elle n'a qu'à s'imputer à elle-même si elle a des frais considérables à supporter.

L'appel est accordé et le jugement de la cour supérieure réétabli avec dépens devant cette cour et la cour du banc du roi.

Appeal allowed with costs.

Solicitors for the appellant ; *Béique, Turgeon, Robertson & Béique*

Solicitors for the respondents ; *Renaud & Guibault.*

1903
*Oct. 29, 30.
*Nov. 30.

JAMES TURNER AND COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

WILLIAM COWAN, THOMAS DOWNS AND CHARLES HOLTON (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Company law—Payment for shares—Transfer of business assets—Debt due partnership—Set-off—Counterclaim—Accord and satisfaction—Liability on subscription for shares—R. S. B. C. c. 44, ss. 50, 51.

On the formation of a joint stock company to take over a partnership business, each partner received a proportionate number of fully paid up shares, at their par value, in satisfaction of his interest in the partnership assets.

Held, reversing the judgment appealed from (9 B. C. Rep. 301) Davies J. *dubitante*, that the transaction did not amount to payment in cash for shares subscribed by the partners within the meaning of sections 50 and 51 of The Companies Act, R. S. B. C. ch. 44, and that the debt owing to the shareholders as the price of the partnership business could not be set off nor counterclaimed by them against their individual liability upon their shares. *Fothergill's Case* (8 Ch. App. 270) followed.

APPEAL from the judgment of the Supreme Court of British Columbia, *in banco* (1), affirming the trial court judgment by which the action was dismissed with costs.

The action was brought to recover from the defendants the amounts of subscriptions by them for shares in a joint stock company under the provisions of sections 50 and 51 of the British Columbia Companies Act (2), alleged to be due and unpaid under the cir-

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

(1) 9 B. C. Rep. 301.

(2) R. S. B. C. ch. 44.

cumstances stated in the judgment of His Lordship Mr. Justice Nesbitt, now reported.

Riddell K.C. for the appellants. The questions at issue are disposed of by *In re Innes & Co.* (1), and *Spargo's Case* (2). There was no actual sale in this case but a mere form intended to change partnership interests into shares in a company with limited liability. There was no liability of the company to either of the parties individually; the debt, if any, was a liability to all of them jointly. Hence no set-off could take place and they do not come within the principles laid down in the cases cited. Compare *White's Case* (3), *per* James L. J. at page 515, and Brett L. J. at pages 516, 517; *Andress's Case* (4); and *Leeke's Case* (5), at pages 106 and 107. These cases teach that the contract with the company must be for cash payable at once, and the contract with the subscriber for cash payable to the company at once; that a mere form is of no avail, and that the cash payable by the company can only be set off against money payable to the company in the same capacity not, as here, where a several liability for shares is sought to be paid by a liability of three parties jointly. Counterclaim is not allowed by the British Columbia statute and rules.

Again, under authority of *Fothergill's Case* (6), the respondents must shew, apart from the shares received for the partnership's assets, that they have paid the shares subscribed for in the memorandum of association. Shares cannot be set off against a money demand; a joint contract cannot be set off against a separate contract. *Middleton* v. *Pollock* (7); *Bowyear* v. *Pawson* (8).

(1) 72 L. J. Ch. 305.
(2) 8 Ch. App. 407.
(3) 12 Ch. D. 511.
(4) 8 Ch. D. 126.
(5) L. R. 11 Eq. 100.
(6) 8 Ch. App. 270.
(7) L. R. 20 Eq. 29, 515.
(8) 6 Q. B. D. 540.

1903

TURNER v. COWAN.

Davis K.C. for the respondents. The issue is whether or not there was a payment of shares for which the three defendants subscribed within the meaning of section 50 of the British Columbia Companies Act, which corresponds with section 25 of the English Act, 1862. At the time when the company was incorporated the three defendants became indebted to the company in the sum in question, and remained indebted to it in that sum up to the 27th day of July following, when the company in turn became indebted to the defendants in a similar amount, and the respective liabilities were adjusted between them without any formal transfer of cheques. In effect, each defendant gave a cheque for the amount of his indebtedness to the company for shares; the company received this amount, which was the amount owed in the aggregate by the company to the three defendants, and the cheques received by the company were indorsed, and handed back to the defendants in settlement of the amount due for the bill of sale which had been signed that day. It is not necessary at law that this procedure should be actually gone through with. See *Spargo's Case* (1); *White's Case* (2), at page 515; *Ferrao's Case* (3); *Larocque* v. *Beauchmin* (4); *North Sydney Investment & Tramway Co.* v. *Higgins* (5).

The sale of the assets was made for cash, not for shares; the defendants could have insisted upon payment in cash for their stock in trade and refused to take shares, or the company could, at any time prior to the 27th of July and the passing of the resolution, have insisted on payment in full of the shares in cash and refused to purchase the old partnership stock.

(1) 8 Ch. App. 407.
(2) 12 Ch. D. 511.
(3) 9 Ch. App. 355.
(4) [1897] A. C. 358.
(5) [1899] A. C. 263.

The two transactions were, in law, absolutely independent and separate.

THE CHIEF JUSTICE and GIROUARD J. concurred in the judgment allowing the appeal for the reasons stated by Nesbitt J.

DAVIES J.—I acquiesce in the judgment prepared in this case by my brother Nesbitt allowing the appeal. I do so, however, with much doubt, as I have had great difficulty in distinguishing this case from that of *Larocque* v. *Beauchemin* (1). This latter is a decision of the Privy Council and expressly approves of *Spargo's Case* (1) which had been somewhat discredited by having been twice disapproved of by the present Lord Chancellor. The reasoning of Lord Justice James in the latter case makes it difficult to appreciate the argument that there has been a mere evasion or trick to get rid of the 25th section of the Act in question. The present case may be distinguishable on the ground that the sale of the stock of goods in question was by the three partners to the incorporated company, and that the liability of the company was a liability to the partnership members jointly, while the liability of each of the three members of the partnership for the amounts of the stock severally subscribed by them was a separate liability. I do not, however, entertain so strong an opinion as to the binding authority of these cases as to justify my dissenting from the judgment agreed upon by my colleagues, more especially as but for these judgments I should have been in full accord with it. The section of the English Act corresponding to that of the British Columbia statute now under consideration has been repealed by 'The Companies' Act, 1900, sec. 33.

(1) [1897] A. C. 358. (2) 8 Ch. App. 407.

1903

TURNER v. COWAN.

Nesbitt J.

NESBITT J.—This is an action brought under sections 50 and 51 of the Companies Act, chapter 44 of the Revised Statutes of British Columbia, 1897, which sections read as follows:—

50. Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar at or before the issue of such shares.

51. Each shareholder, until the whole amount of his shares, stock or other interest has been paid up, shall be individually liable to the creditors of the Company to an amount equal to that not paid up thereon, but shall not be liable to an action therefor by any creditor before an execution against the Company has been returned unsatisfied in whole or in part; and the amount due on such execution, but not beyond the amount so unpaid of his said shares, stock or other interest, shall be the amount so recoverable, with costs, against such shareholder;

(*a.*) Any shareholder may plead by way of defence, in whole or in part, any set-off which he could set up against the company except a claim for unpaid dividends, or a salary or allowance as a president or a director of the Company;

(*b.*) The shareholders of the company shall not as such be held responsible for any act, default, or liability whatsoever of the Company, or for any engagement, claim, payment, loss, injury, transaction, matter or thing whatsoever, relating to or connected with the Company, beyond the unpaid amount of their respective shares in the capital stock thereof.

The plaintiffs are creditors of a company named Cowan Holten Downs Company, Limited, which carried on a liquor and cigar business at Revelstoke, British Columbia for about a year. Prior to the incorporation of the Company, the defendants carried on the business (subsequently carried on by the Company) as a partnership called Cowan Holten Downs Company. The plaintiffs recovered two judgments against the company, and the executions issued thereon were returned *nulla bona*.

The evidence is very short, and the pith of it is to my mind shown by the following in the examination of the solicitor of the partnership:

106. Q. What took place before the incorporation and transfer of the Company?

A. They wished the partnership thrown into a joint stock company, and Cowan or Braithwaite asked me how they could do it, and I told them the proper way would be to incorporate the company, and the company take over the partnership business and pay for it in stock.

107. Q. Explain paying for it in stock?

A. In shares. I told them they could sign a memorandum of association, that is each one of them, after Braithwaite had figured out how each one stood. Some had taken out capital from the business. Holten, I believe, had, and that is why the Company was to be formed, to prevent this.

The statute provides a very simple method to carry this out, and I think its provisions are to be strictly adhered to, unless the door is to be opened to the evils spoken of in *Leeke's Case* (1).

The defendants subsbribed for shares as follows:—

William Cowan	800
Charles Holten.....	100
T. Downs.....	664

and some months after, at a meeting of the Company, it was moved by J. S. Lawson, seconded by C. Holten, that the Company purchase the assets and good-will, and assume the "liabilities of the Cowan Holten Downs Company, for the sum of eight thousand one hundred and eighty-seven dollars and twenty-one cents ($8,187.21).—Carried."

And thereupon the following document was executed:

EXHIBIT "J."

Memorandum of agreement made the 27th day of July, A.D. 1899, between William Cowan, Thomas Downs and Charles Holten, carrying on business in partnership under the firm name of the Cowan Holten Downs Company, hereinafter called the parties of the first part, and

(1) L. R. 11 Eq. at p. 108.

1903

TURNER v. COWAN.

Nesbitt J.

The Cowan Holten Downs Company, Limited, a company incorporated under the laws of British Columbia, with its head office in the city of Revelstoke, in the said Province of British Columbia.

Witnesseth, that in consideration of the sum of $8,187.21 (eight thousand one hundred and eighty-seven dollars and twenty-one cents) of good and lawful money of Canada to them in hand paid, the receipt whereof is hereby by them acknowledged, they, the parties of the first part do, and each of them doth by these presents grant, bargain, sell and assign, transfer and set over under the party of the second part, its successors and assigns, all and singular, the goods, wares, chattels, effects and things, together with the stock-in-trade, and trade fixtures of or belonging to the said parties of the first part or any of them used in or pertaining to the business of the said parties of the first part as wholesale liquor merchants (said stock-in-trade consisting of a general stock of wines, liquors, cigars and aerated waters), now being in and about the building and premises now occupied and used by the said parties of the first part for the purposes of their said business in the said city of Revelstoke, said building and premises being situate on Front Street in the said city of Revelstoke: Also, all accounts, bank and other debts and securities which are now owing or payable to the parties of the first part or any of them in respect of or on account of or in connection with the said business. To have, hold, take, receive and enjoy the said goods, wares, chattels, effects, stock-in-trade, fixtures, accounts, debts and securities unto the party of the second part, its successors and assigns, to the only use and behoof of the party of the second part, its successors and assigns for ever.

And this memorandum further witnesseth that in consideration of the premises the party of the second part for itself, its successors and assigns, covenants, promises and agrees to and with the said parties of the first part, their and each of their executors, administrators and assigns, that the party of the second part, its successors or assigns shall and will well and truly pay or cause to be paid all debts now due, owing or payable or hereafter to become due, owing or payable by the parties of the first part or any of them, their or any of their executors, administrators or assigns, in respect or on account of or in connection with the said business, and shall and will indemnify and save harmless and keep indemnified and saved harmless, the said parties of the first part, and each of them, their and each of their executors, administrators and assigns, from and against all actions, suits, claims and demands for or in respect or on account of the said debts, and free from and against all costs, charges, expenses and damages which they, the parties of the first part may suffer, sustain or be put to for or on account or in respect of the said debts or any of them.

In witness whereof the parties of the first part have hereto set their hands and seals and the party of the second part has caused its corporate seal to be hereto affixed with all the formalities required by law, the day and year first above written.

W. COWAN (L. S.)
CHAS. HOLTEN (L. S.)
T. DOWNS (L. S.)

Signed, sealed and delivered in the presence of
JAMES MURPHY.

It is to be observed that there is no debt created by the Company to each partner for a specific amount, nor is the document executed by the Company, and it seems to me to fall within the very language of the Lord Chancellor Selborne in *Fothergill's case* (1).

Upon the only principle of construction which I know of as applicable to such a case, it appears to me to be quite clear that there are here two independent agreements. No connection between them is expressed on the face of any one of the documents. They take effect at different times, in different events, on different conditions, and between different parties. By the subscription for the memorandum of association under sections 7, 11 and 23 of the Companies Act, 1862 (and according, if authority were needed, to Evan's case), Mr. Fothergill not merely agreed to take, but actually did take, and immediately on the registration of the Company became the actual and legal holder of 1,000 ordinary shares, in respect of which he was thenceforth liable absolutely and unconditionally to contribute to the funds of the Company the full sum of £2,000. By agreement for the sale of the mine three persons jointly (of whom Mr. Fothergill was one), became entitled, not absolutely and immediately, but conditionally on certain events, which afterwards happened, to 5,000 shares, without liability to pay anything upon them, the land with which the vendors parted by the contract being agreed to be taken by the Company in lieu of the full amount of these shares. Shares cannot be set off against a money demand.

Any stranger proposing to give credit to the Company, who might have gone to the Registrar or Joint Stock Company, and might have there seen those agreements, must have understood (supposing to simplify the case, that the whole purchase money for the mine had been payable in paid-up shares) that the Company would have to satisfy his claims, the mine itself, free from all liability to creditors, and also the

(1) 8 Ch. App. 270.

1903

TURNER v. COWAN.

Nesbitt J.

£2,000 either actually paid or legally payable on Mr. Fothergill's shares. The appellant says he ought, on the contrary, to have understood that one of the assets of the Company was in effect to be set off against the other. Even if the whole had been payable in money, the debt to the three could not, without more, have been set off against the liability of the one. And it appears to me to be a fallacy to speak of Mr. Fothergill's liability on his shares.

The Court below relied on *Laroque* v. *Beauchemin* (1) but that case turned on the particular facts. Lord MacNaghton says :

> The learned counsel for the appellant then contended that the understanding between the parties was that the property should be sold for so much in cash and so much in shares. It was admitted that if this had been the real arrangement it would be in contravention of the statute. But the evidence is all the other way. According to the evidence, there was an independent agreement on the part of the promoters to take so many shares presently payble in cash, and an independent agreement by the Company to purchase the property for so much money down. There was not even an attempt in cross-examination to shake the testimony on this point.

Finding here as I do that there never was any real intention to pay for the shares subscribed for in cash but to pay for them in stock, it seems quite clear that the statute has not been complied with, and I think the clearest case should always be proved before we apply the principle of the cases relied on in the court below, and dispense with the salutary provisions of the statute. I would allow the appeal with costs in all courts, and direct judgment to be entered for the amount of this subscription against each defendant.

KILLAM J. concurred with Nesbitt J.

Appeal allowed with costs.

Solicitors for the appellants: *Harvey, McCarter & Pinkham.*

Solicitors for the respondents: *Lemaistre & Scott.*

(1) [1897] A. C. 358.

BARTHOLOMEW O'BRIEN (PLAINTIFF) ..... } APPELLANT;

AND

CHARLES HERBERT MACKINTOSH (DEFENDANT). ..... } RESPONDENT.

1903

*Oct. 28,29.

*Nov. 30.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract—Agreement in writing—Construction of terms—Sale of timber—Terms of payment.

The appellant held rights in unpatented lands and agreed to sell the timber thereon to respondent one of the conditions as to payment therefor being that, as soon as the Crown grant issued, the respondent should settle a judgment against the appellant which, they both understood could at that time be purchased for $500. On the issue of the grant, about six months afterwards, the judgment creditor refused to accept $500 as full settlement at the latter date and he took proceedings to enforce execution for the full amount. The execution was opposed on behalf of the appellant, the respondent becoming surety for the costs and being also made a party to the proceedings.

Held, affirming the judgment appealed from (10 B. C. Rep. 84) that the agreement to settle the outstanding judgment was not made unconditionally by the respondent, but was limited to settling it for $500, after the issue of the Crown grant for the land.

Held, also, Davies J. dissenting, that the costs incurred in unsuccessfully opposing the execution of the judgment, upon being paid by the respondent, were properly chargeable against the appellant.

APPEAL from the judgment of the Supreme Court of British Columbia *en banc* (1), reversing the trial court judgment and dismissing the plaintiff's action with costs.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

(1) 10 B. C. Rep. 84, sub nom. *Manley* v. *Mackintosh.*

1903

O'BRIEN v. MACKINTOSH.

On 13th January, 1900, an agreement was made between the plaintiff, of the first part, and the defendant, of the second part, for the sale to the defendant of the timber growing on a lot of land described for $1050. The agreement was made for the purpose of shewing in a formal manner, by a deed which might be registered, a former agreement by a letter signed by plaintiff for the sale of the timber to the defendant for $2000, the consideration mentioned as $1050 being the balance remaining on the price after deducting $250 for cost of survey, $200 for Crown dues, and $500 for the settlement of a judgment by one Manley against the plaintiff. *See* 8 B. C. Rep. p. 284.

The action was for the rectification of the agreement on the grounds that it did not represent the arrangement arrived at between the parties, because it made the consideration $1050 instead of stating that sum to be the balance of the purchase money, after the above mentioned deductions, and also because it wrongfully provided for the payment of the cost of survey and the Crown dues out of that balance, whereas they had already been deducted before that balance was established.

The plaintiff had not obtained his Crown grant at the time of the agreement and there was also the judgment for about $1000 in favour of Manly against him unsatisfied and registered against his interest in the land. An arrangement was made by the present defendant with Manly's solicitor under which it was understood that the judgment could be settled for $500, and the defendant agreed to settle it after the issue of the Crown grant.

The grant issued in July, 1900, in favour of the plaintiff and the defendant then tendered $500 in settlement of the judgment but the tender was refused, the full amount of the judgment demanded and pro-

ceedings were taken in execution for the sale of the land on which the timber was standing. These proceedings were resisted on behalf of the present plaintiff, the payment of the costs being guaranteed by the present defendant, on the ground, among others, that Manly was bound by the agreement to accept $500 for the judgment and the present defendant was made a party to the proceedings. In the result, after an appeal, the decision in respect to this agreement was that Manley was not bound to accept $500 for the judgment and the decision was also against the present plaintiff on the other grounds. *See* 8 B. C. Rep. 280. The costs, for which Mackintosh had become liable amounted to $1086.54 and Manley took proceedings against him as garnishee, on the ground that he was owing a balance to O'Brien under the agreement. On the issue being tried, the decision was in favour of Mackintosh. *See* 10 B. C. Rep. 84.

At the trial of the present action the rectification of the agreement was decreed by Hunter C.J., but his judgment was reversed by the judgment now appealed from.

Shepley K.C. for the appellant. There is no dispute, (except as to some costs for which respondent claims credit) regarding the payments made by respondent to appellant. On the day the agreement was signed $50 was paid to the appellant and $250 to the surveyor, making $300, and, subsequently, several sums were paid to appellant and $354.66 to the Crown (being $154.66 more than the estimated dues), making in all $845.31. Of these sums $250 and $200, *i.e.* $450, were amounts assumed by respondent making only $395.31 actually paid on account of the $1,050 and leaving a balance of $654.69 still due as found by the trial judge. The main dispute arises with regard to the assumption of the judgment which is not mentioned in the written

1903

O'BRIEN v. MACKINTOSH.

agreement and the non-payment of which has given rise to this litigation. It will be noticed that the assumption of this judgment by the respondent was by parol and was not intended to be included in the writing. There is no evidence to justify the conclusions of the judgment below. The proof is that respondent believing he had bought the judgment, represented to appellant that he had done so and would settle it so that appellant would have no further concern with it. Appellant, relying upon these representations, assented to the deduction of $500 from the purchase money for this purpose and executed the agreement. Respondent's neglect of the ordinary business precaution of having his agreement in writing and disregarding warnings to settle at once brought about the whole trouble.

If respondent became responsible for the judgment by reason either of his agreement or representations, his claim to credit the costs incurred in opposing the sale proceedings cannot be allowed, as these were incurred by reason of his failure to carry out his agreement or make good his representations. If, on the other hand, the real purchase money was $2,000, and respondent assumed payment of surveyor's and Crown fees to the extent of $450, but is not obliged to pay the judgment, then the question arises: Is the respondent entitled to charge against appellant the sums for costs incurred in contesting Manly's application to sell? The appeal from the order on the second motion was solely at the instance of respondent and he alone was responsible for the costs. There being no evidence as to the amount of the costs of the appeal, the above payments may have been no more than sufficient to satisfy them. Therefore, as respondent was not concerned with the costs of the first motion and was not requested by O'Brien to guarantee or pay any costs of

1903

O'BRIEN v. MACKINTOSH.

either of the sale proceedings, he cannot succeed in his claim to set-off these cases against purchase money.

The respondent was in no sense an equitable mortgagee but simply a purchaser. In any case the costs of the litigation arose by reason of his unfounded contention that he had bought the judgment.

Davis K.C. for the respondent. The claim for rectification is based solely on the ground of mutual mistake in stating the price at $1050 in the agreement. In order to rectify an instrument on the ground of a mistake, there must be proof, not only that there has been a mistake, but the plaintiff must shew precisely the form to which the deed ought to be brought in order that it may be set right, according to what was really intended, and he must establish, in the clearest and most satisfactory manner, that the alleged intention of the parties to which he desires to make it conform continued concurrently in the minds of all parties down to the time of its execution. The evidence must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. There can be no rectification if the mistake be not mutual or common to all parties or if one of the parties knew of the mistake at the time he executed the deed. Where one only has been under the mistake, while the other knew the character of the deed, the court cannot interfere by forcing a contract never entered into or depriving a party of a benefit *bonâ fide* acquired. A mistake on one side may be a ground for rescinding, but not for correcting or rectifying an agreement. Kerr, Fraud and Mistake (3 ed.) 461, 469. The court will not, under the name of rectification, add to the agreement a term which had not been determined upon nor agitated. There can be no rectification of an agreement executed in accordance with proposals nor, if it was the intention

1903

O'BRIEN v. MACKINTOSH.

of the parties, on the ground that the written instrument did not comprise all the terms of the actual agreement. *Townshend* v. *Stangroom* (1); *Harbidge* v. *Wogan* (2); Seton on Decrees (5 ed.) p. 1914. The evidence does not satisfy the standard of proof required for rectification. *Dominion Loan Society* v. *Darling* (3); *Ferguson* v. *Winsor* (4); *Darnley* v. *London, Chatham & Dover Railway Co.* (5); *McNeill* v. *Haynes* (6).

In this action we have nothing to do with the question whether or not a bargain was made for the satisfying of the judgment, and the question whether. as between the solicitor and Mackintosh, the latter was right or wrong in insisting on payment after the Crown grant issued. This can not affect Mackintosh's arrangement with O'Brien under which it is clear that Mackintosh was not to pay until the Crown grant issued. The costs were not incurred by reason of any breach of Mackintosh's word, but because O'Brien desired to litigate and procured Mackintosh to guarantee his costs. Then, after the costs were incurred, he admitted the correctness of Mackintosh's accounts in which the payments made on the costs were charged up against him. The agreement to satisfy the judgment for $500 after issue of the Crown grant was a part of the contract and, as such agreement was always impossible of performance, the whole agreement was at an end. *McKenna* v. *McNamee* (7); *Nickoll & Knight* v. *Ashton Edridge & Co.* (8); *Blakeley* v. *Muller* (9); *Griffith* v. *Brymer* (10); *Elliott* v. *Crutchley* (11); *Krell* v. *Henry* (12). The full court in *Manley* v. *O'Brien* (13),

(1) 6 Ves. 332.
(2) 5 Hare 258.
(3) 5 Ont. App. R. 576.
(4) 11 O. R. 88.
(5) L. R. 2 H. L. 43.
(6) 17 O. R. 479.
(7) 15 Can. S. C. R. 311.
(8) [1901] 2 K. B. 126.
(9) 19 Times L. R. 186.
(10) 19 Times L. R. 434.
(11) 19 Times L. R. 549.
(12) 19 Times L. R. 711.
(13) 8 B. C. Rep. 280.

having held that there was no contract for the satisfaction of the judgment for $500, and the whole of the arrangement being based on the assumption that such a contract existed, the principle of the above cases is applicable.

The payments made by Mackintosh for costs are properly chargeable against O'Brien and should be added to his security even though it could be shewn that they were not paid under the guarantee given at O'Brien's request; the respondent being an equitable mortgagee of the lands, would be entitled to charge O'Brien with the same as just allowances for the protection of his mortgage security. *Ramsden* v. *Langley* (1); *Lomax* v. *Hide* (2); *Barry* v. *Stawell* (3); *Wilkes* v. *Saunion* (4); *Wells* v. *Trust & Loan Co.* (5). The respondent being an equitable mortgagee of the lands, is entitled to hold the title deeds deposited with him until all his advances are paid. (See 8 B. C. Rep. 280); *Bank of New South Wales* v. *O'Connor* (6).

So much of the action as asks for rectification also fails for the additional reason that the plaintiff himself was a party to the proceedings reported in 8 B. C. Rep. 280, and succeeded there in having the court place a certain construction upon that agreement. Having allowed the court to assume that the agreement was in reality his agreement, he should not afterwards be allowed to be heard in the court to say that it was not his real agreement. The plaintiff's action also fails by reason of the fourth section of the Statute of Frauds, pleaded as a defence. *Olley* v. *Fisher* (7); Addison on Contracts (9 ed.) p. 120.

On the evidence it is abundantly clear that Mackintosh was never to pay more than $2,000; that he

(1) 2 Vernon 535.
(2) 2 Vernon 185.
(3) 1 Dr. & Wal. 618.
(4) 7 Ch. D. 188.
(5) 9 O. R. 170.
(6) 14 App. Cas. 273.
(7) 34 Ch. Div. 367.

1903

O'BRIEN v. MACKINTOSH.

was not to pay more than $500 for the Manly judgment, and that he was not to pay this $500 until the Crown grant issued.

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

DAVIES J.—While acquiescing, with much doubt, in the result that the appeal must be dismissed, I cannot help recording my decided opinion that the respondent is not entitled to charge, against the appellant, any part of the costs incurred in the protracted litigation carried on in British Columbia with the appellant's judgment creditor. These costs were incurred as the result of the respondent's own neglect and default and should be paid and borne by him.

NESBITT J.—I do not think anything can be usefully added to the judgment of Mr. Justice Irving in the court below. It seems clear that the defendant was not to satisfy the Manley judgment unconditionally, but only to pay $500 after the Crown grant issued. It is equally clear that the defendant was only to pay $2,000. After the Crown grant issued I think the proceedings taken to enforce the acceptance of $500 for the Manley judgment were taken for the benefit of O'Brien and the costs so incurred should, as between plaintiff and defendant, be chargeable to the plaintiff and the result of this is that the $2,000 so to be paid by Mackintosh has been exhausted, and the judgment of Mr. Justice Irving should be affirmed with costs.

KILLAM J. concurred in the judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Macdonald.*

Solicitor for the respondent: *W. S. Deacon.*

CHARLES J. HASTINGS (PLAINTIFF)..... } APPELLANT;

AND

LE ROI No. 2, LIMITED, (DEFENDANTS)..... } RESPONDENTS.

1903
*Oct. 26, 27.
*Nov. 30.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Negligence—Mining operations—Contract for special works—Engagement by contractor—Control and direction of mine owner—Defective machinery—Notice—Failure to remedy defect—Liability for injury sustained by miner.

The sinking of a winze in a mine belonging to the defendants was let to contractors who used the hoisting apparatus which the defendants maintained, and operated by their servants, in the excavation, raising and dumping of materials, in working the mine under the direction of their foreman. The winze was to be sunk according to directions from defendants' engineer and the contractors' employees were subject to the approval and direction of the defendants' superintendent, who also fixed the employees' wages and hours of labour. The plaintiff, a miner, was employed by the contractors under these conditions and was paid by them through the defendants. While at his work in the winze the plaintiff was injured by the fall of a hoisting bucket which happened in consequence of a defect in the hoisting gear, which had been reported to the defendants' master-mechanic and had not been remedied.

Held, affirming the judgment appealed from, (10 B. C. Rep. 9), Taschereau C. J. dissenting, that the plaintiff was in common employ with the defendants' servants engaged in the operation of the mine and that even if there was a neglect of the duty imposed by statute, in respect to inspection of the machinery, as the accident occurred in consequence of the negligence of one of his fellow-servants, the defendants were excused from liability on the ground of common employment.

PRESENT :—Sir Elzéar Taschereau C.J, and Sedgewick, Davies, Nesbitt and Killam JJ.

1903

HASTINGS v. LE ROI No. 2.

APPEAL from the judgment of the Supreme Court of British Columbia *en banc* (1), reversing the trial court judgment and dismissing the plaintiff's action with costs.

The plaintiff is a miner, and the defendants are the owners of the "Josie" mine at Rossland, B.C. The defendants had entered into a contract with a firm of contractors for sinking a winze on special terms and conditions which are stated in the judgments now reported. While the contractors were at work in the winze the defendants carried on their mining operations in other parts of the mine in the usual manner. The contractors engaged the plaintiff to work in the winze. While at his work in the bottom of the winze he was injured by the fall of the bucket used for hoisting rock from the winze, and for such injuries this action was brought. The plaintiff, on the above facts, claimed that the defendants were negligent in their duty towards him and that they had not complied with certain provisions of the British Columbia Metaliferous Mines Inspection Act. The defendants denied all negligence and pleaded, in the alternative, that the injury was occasioned by the negligence of a fellow-servant engaged in common employment with the plaintiff. Issue was joined on these defences. At the trial, before Irving J. with a jury, a general verdict was found for the plaintiff with $3,400 damages. The trial judge entered judgment for the plaintiff. The defendants appealed to the full court which reversed this judgment on the ground that the plaintiff was in fact in the service of the defendants and in common employment with those of their servants whose negligence caused the injury. From that judgment the plaintiff appeals to this court.

(1) 10 B. C. Rep. 9.

1903

HASTINGS v. LE ROI No. 2.

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

Shepley K.C. for the appellant. The question of common employment is purely one of fact to be decided by the jury. The jury by their general verdict having found this issue with all others against the defendants, and there being evidence on which the jury could have so found, the verdict is final and this court should not interfere. *St. John Gas Light Co.* v. *Hatfield* (1); *Masters* v. *Jones* (2); *Cahalane* v. *North Metropolitan Railway Co.* (3). There is no ground for the defence of common employment as this is not an action on the written contract or between the parties to it and it was open to the plaintiff to shew that this writing was not the real contract and to shew by other evidence what was the relationship between the parties. The judges in the full court looked only at the terms of the written contract to determine whether the plaintiff was in common employment with those whose negligence caused the injury. The appellants submit that the whole of the evidence must be considered. And, on the evidence, the case of *Johnson* v. *Lindsay* (4) applies. The court should look at all the circumstances and the real agreement. *Waldock* v. *Winfield* (5) at page 602.

In cases cited in the judgments below the question of "control" over the injured and injuring party is considered the material question. It is submitted that "direction" in this contract is not the same as "control." If the defendants could "control" the work of the plaintiff then they could put him to work in any part of their mine or could make him work fast or slowly as they pleased, and that without any refer-

(1) 23 Can. S. C. R. 164.
(2) 10 Times L. R. 403.
(3) 12 Times L. R. 611.
(4) [1891] A. C. 371.
(5) [1901] 2 K. B. 596.

1903

HASTINGS v. LE ROI No. 2.

ence to the contractors. Anything short of that would not be control at all, and it can hardly be suggested that the defendants possessed such rights. If the men employed by the contractors were really the servants of the defendants, then the contractors had no servants at all, and as the contract was purely to perform manual labour by themselves or their servants, it really meant nothing; there was in effect no contract at all. The case of the defendants must go this length; that the contractors would not have been liable but that the defendants would have been liable to any person injured by the negligence of one of the contractors' men. *Cameron* v. *Nystrom* (1); *Abraham* v. *Reynolds* (2). So far as the power to dismiss, assuming it to exist in this case, is concerned, it is of no effect. *Reedie* v. *London & North Western Railway Co.* (3). The payment of wages, that must surely mean payment under a legal liability to pay. The plaintiff could only look to the contractors for his wages. Payments charged to the contractors would not be payments by the defendants. *Laugher* v. *Pointer* (4), at page 558; *Quarman* v. *Burnett* (5); *Union Steamship Co.* v. *Clardge* (6); *Jones* v. *Corporation of Liverpool* (7); *Warburton* v. *Great Western Railway Co.* (8).

Assuming that the plaintiff was in fact the servant of the defendants they are still liable in this action under the pleadings, evidence and finding of the jury. *Smith* v. *Baker* (9), at page 362, per Herschell L. J.; *Grant* v. *Acadia Coal Co.* (10); *Murphy* v. *Philips* (11); *Clarke* v. *Holmes* (12), per Cockburn C. J.; *Williams* v.

(1) [1893] A. C. 308.
(2) 5 H. & N. 143.
(3) 4 Ex. 244.
(4) 5 B. & C. 547.
(5) 6 M. & W. 499.
(6) [1894] A. C. 185.
(7) 14 Q. B. D. 890.
(8) L. R 2. Ex. 30.
(9) [1891] A. C. 325.
(10) 32 Can. S. C. R. 427.
(11) 35 L. T. N. S. 477.
(12) 7 H. & N. 937.

Birmingham Battery and Metal Co. (1); *Sault St. Marie Pulp and Paper Co.* v. *Myers* (2); *Paterson* v. *Wallace & Co.* (3); *McKelvey* v. *Le Roi Mining Co.* (4).

The defendants are also liable by virtue of the Metalliferous Mines Inspection Act (5). The direction to report and record the report applies to the daily as well as to the weekly examination. *Scott* v. *Bould* (6). The provisions of this law were not complied with. If such an inspection had been made the defect in the hook would have been detected. The hoist would at once have been stopped, and all danger avoided. For the breach of this statutory duty imposed on the defendants, and the injury resulting to the plaintiff therefrom, *primâ facie*, the plaintiff has a good cause of action. *Groves* v. *Lord Wimbourne* (7), at p. 407; *Baddeley* v. *Earl Granville* (8); *Kelly* v. *Glebe Sugar Refining Co.* (9); *Blamires* v. *Lancashire & Yorkshire Railway Co.* (10). The defence of common employment does not apply to an action arising out of a breach of a statutory duty.

Davis K.C. for the respondents. The sole question in issue is whether or not the defence of common employment is open to the defendants. If the plaintiff was a servant of the defendants, so far as the circumstances connected with and surrounding the accident are concerned, then the defendants are not liable. Whether or not one man is the servant of another is a question of fact to be decided either by the jury upon disputed facts, or by the judge upon facts which are admitted. Here the facts in that connection are all admitted. The wages of plaintiff and

(1) [1899] 2 Q. B. 338.
(2) 33 Can. S. C. R. 23.
(3) 1 Macq. 748.
(4) 32 Can. S. C. R. 664.
(5) R. S. B. C. c. 134, s. 25, Rule 11.
(6) [1895] 1 Q. B. 9.
(7) [1898] 2 Q. B. 402.
(8) 19 Q. B. D. 423.
(9) 20 Rettie 833.
(10) L. R. 8 Ex. 283.

1903

HASTINGS v. LE ROI No. 2.

other workmen under the contractors were, by arrangement, paid by the defendants and charged to the contractors. The principal test, however, as to whether or not one man is the servant of another, is whether or not the former is controlled by the latter. One of the results which in law follows the relationship of master and servant is that the master is responsible for the acts of the servant, and it would clearly be unreasonable that a man should be responsible for acts which he himself cannot control, and on the other hand it is clearly most reasonable that a man should be responsible for those acts of others which he does control. Here, the terms of the contract, taken with the evidence, shew clearly that the actions of the plaintiff were subject to the control of the defendants, and, therefore, he was their servant, and a fellow-servant with whichever one of the defendants' servants was responsible for the accident. If the plaintiff, himself, had been guilty of negligence in connection with his proper work, which resulted in injury to another workman in the mine, or to a stranger, the defendants could not have escaped liability on the ground that he was not their servant, and, therefore, that they were not responsible for his negligence.

The following authorities are refered to: *Wigget* v. *Fox* (1); *Abraham* v. *Reynolds* (2), at pp. 149, 150; *Johnson* v. *Lindsay* (3), at pp. 379, 381, 382: *Donovan* v. *Laing W. & D. Syndicate* (4); *Jones* v. *Scullard* (5); *Masters* v. *Jones* (6); *Cahalane* v. *North Metropolitan Railway Co.* (7); *Griffiths* v. *Gidlow* (8); *Dynen* v. *Leach* (9); *Murphy* v. *Phillips* (10); *Clarke* v. *Holmes*

(1) 25 L. J. Ex. 188.
(2) 5 H. & N. 143.
(3) [1891] A. C. 371.
(4) [1893] 1 Q. B. 629.
(5) [1898] 2 Q. B. 565.
(6) 10 Times L. R. 403.
(7) 12 Times L. R. 611.
(8) 3 H. & N. 648.
(9) 26 L. J. Ex. 221.
(10) 35 L. T. N. S. 477.

(1), at page 943; *Bartonshill Coal Co.* v. *Reed* (2); *Wilson* v. *Merry* (3).

THE CHIEF JUSTICE (dissenting).—I would allow this appeal.

I am of opinion that the trial judge was right in ruling that the appellant was not a servant of the company, respondent.

He was clearly engaged by Hand & Moriarity, the contractors. They alone were his masters. Against them alone was his recourse for his wages: he was paid by them through the company, acting for them and in their name for that purpose. There was nothing in their contract with the company of a nature to bind the appellant that prevents them from making any agreement with him about increasing or decreasing his wages: they alone could dismiss him: the very fact that by the contract with Hand & Moriarity the company could request his dismissal shows that he was not the company's servant, since they could not themselves dismiss him.

The learned judges of the full court seem to have been under the impression that the appellant was under the control of the company and its officers. But that is not so as I view the evidence. He received no orders directly from the officers of the company, for the good reason that the contractors, not the company, were his masters. It is not because the engineers and superintendent of the company had as between themselves by their contract with Hand & Moriarity the direction of the works to be done that the appellant was himself under the control of the company. He is not proved to ever have known of the terms of that contract, nor that there was such a contract in writing at all. He

(1) 7 H. & N. 937.
(2) 3 Macq. 266.
(3) L. R. 1 H. L. Sc. 326; 19 L. T. N. S. 30.

1903

HASTINGS v. LE ROI No. 2.

The Chief Justice.

never knew that any one could ever pretend that he was not under the exclusive control of his masters, the contractors; he never received orders but from them; he never submitted himself to the control of any one else. They, not the company, directly controlled him. "He was working for the contractors and not for the company" says Kenty, the company's own foreman.

Assuming, however, that there was a common master and a common employment as regards the appellant and the company's foreman or other employee whose fault might be said to have been the cause of the accident, that would not put an end to the appellant's claim.

The accident in question was caused by a defect in one of the permanent appliances for the working of this mine. A clevis had originally been provided by the company for the purpose of raising the bucket at the point in question; that was a safe appliance, but later on, eight or ten days before this accident, the contractor, Hand, replaced this clevis with a hook, having a safety spring, supplied at his request by the company, thereby substituting an unsafe appliance for a safe one. Now it is incontrovertible law that the master is bound to provide for his employee proper and reasonably safe appliances and to keep them in a reasonably safe condition, so that the work be carried on without subjecting the employee to unnecessary risks. And if the master instead of discharging this duty himself, as a corporation must do, imposes it upon one of his employees, the negligence of this employee is, in that respect, the negligence of the master. The master's breach of such duty towards his servant cannot be absolved by the negligence of any one else. The doctrine of non-liability of the master on the ground of common employment has therefore no application in this case.

It is, moreover, in evidence that before the accident the defect in question had been brought to the knowledge of the officers of the company. The evidence is contradictory as to this, but the jury have given credit to the appellant's witnesses. It is in evidence that immediately after the accident, Kenty, the company's foreman, said to Hand, the contractor, "I told you that the hook was dangerous; you had no business to have it on there." Then, Miller, the hoisting engineer, had told, two weeks before and since, to the master mechanic and to the foreman, that the hook was defective. The trial judge was clearly justified under the circumstances in telling the jury that if they believed the evidence they had to find for the appellant.

It is also clear that no prior knowledge of this defect in the hook in question can be imputed to the appellant.

At the close of the trial, the learned judge presiding charged the jury that:

> If you find that the company took reasonable precautions for the protection of the men working in there, then you find for the company, and if you find that they did not, then you find for the plaintiff and assess the damages.

The jury returned their verdict as follows:

> We, the undersigned jurors, impannelled on the case of *Hastings* v. *Le Roi No.* 2, in which it is attempted to show that the said defendant company did not take the proper precautions to safe-guard the lives of the workmen engaged in sinking the winze on the seven hundred foot level of said company's property, hereby find that the plaintiff is entitled to damages to the extent of $3,400.

That is clearly a finding that the company had not taken the proper precautions to safe-guard the lives of the men working in that mine at the time of this accident. And upon what grounds that verdict could be disregarded I entirely fail to see. The case of

1903

HASTINGS v. LE ROI No. 2.

THE Chief Justice.

McKelvey v. *Le Roi Mining Co.* (1) is precisely in point. There the company's contention was that they were not liable on the ground of common employment, the accident, as they argued, being due to the carelessness of the engineer, a co-worker of the plaintiff. But the court held that as the master who employs a servant in a work of a dangerous character is bound to take all reasonable precautions for the servant's safety, the finding against the company could not be interfered with, though the carelessness of the engineer had undoubtedly contributed to the accident.

I cannot distinguish this case from the present. Indeed, the evidence against the company in this case is stronger than in that one.

Apart from these considerations I would think that the appellant is entitled to succeed upon clauses 14 and 15 of his statement of claim which read as follows:

14. It was the duty of the defendants to the plaintiff and those working in said winze to have inspected once at least in every twenty-four hours, the state of the head gear, working places, levels, inclines, ropes and other works of the said mine which were in actual use, including the said winze and its ropes, head-gear and appliances; and once, at least, in every week to have inspected the state of the shaft and inclines by which persons ascend or descend, and the guides, timbers and ladder-ways therein, and to make a true report of the result of such examination and have such report recorded in a book to be kept at the mine for that purpose and to have such report signed by the person who made the same, and to remedy any defects found on such examination which were liable to be dangerous to those working in the said winze; but the defendants neglected to observe and perform their said duty as above set forth.

15. If the defendants had made or caused to be made the examinations and inspections in the preceding paragraph hereof and had caused the result of such examination to be recorded as aforesaid, the defective condition of said hook and appliances would have been discovered and remedied, and the injury to the plaintiff would have been prevented.

(1) 32 Can. S. C. R. 664.

Now section 25 of the Metalliferous Mines Inspection Act, R. S. B. C. ch. 134, enacts as follows:

11. A competent person or persons who shall be appointed for the purpose shall, once at least, every twenty-four hours examine the state of the external parts of the machinery, and the state of the head-gear, working places, levels, inclines, ropes and other works of the mine which are in actual use, and once at least in every week shall examine the state of the shafts or inclines by which persons ascend or descend, and the guides, timbers and ladder-ways therein, shall make a true report of the result of such examination, and such report shall be recorded in a book to be kept at the mine for the purpose, and shall be signed by the person who made the same.

It appears that these provisions of the statute were not complied with. And, if they had been, the defect in question would bave been detected and the accident averted. Now, under the law laid down by this court in *Sault St. Marie Pulp and Paper Co.* v. *Myers* (1), the doctrine of common employment cannot, under these circumstances, be invoked successfully by the respondents. They cannot shift their responsibi ity for the non-performance of any of their statutory duties on the shoulders of any of their employees.

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

The judgment of the majority of the court was delevered by

NESBITT J.—I am of opinion that the judgment of the full Court of British Columbia should be affirmed. My opinion, after the very able argument of Mr. Shepley, was that the appeal should be allowed, but after examination of the evidence and all the authorities quoted, in addition to some others, I think that the Chief Justice in the court below has correctly stated the decisive test of whether or not the relation of fellow servant exists, namely, "who has the control and

(1) 33 Can. S. C. R. 23.

1903

HASTINGS v. LE ROI No. 2.

Nesbitt J.

direction of the negligent and injured persons." The evidence in this case shews that in order to work the mine as a non-union mine, the form was gone through of letting a contract for work in this case to two men called Hand and Moriarity, the contract in question being for sinking a winze, Hand and Moriarity, with the men they purported to employ doing the excavating, the defendants owning the hoisting apparatus and operating same through their acknowledged servants, the whole of the men engaged in the operation of excavating and raising and dumping of material being under the directions of one Kenty. A contract in writing existed, the important parts of which are follows :—

(1) The parties of the second part agree to sink a winze, as aforesaid, to be at least ten feet long by six feet wide in the clear, direction and dip to be as given by engineers of the party of the first part.

(3) The parties of the second part agree to work continuously in eight-hour shifts, and change shifts at the same hour as the men employed by the company : *it is also agreed that all men employed in carrying out this contract shall be subject to the approval and direction of the superintendent of the party of the first part*, and any men employed *without the consent and approval of, or unsatisfactory to the superintendent, shall be dismissed on request.*

(4) The parties of the second part agree to bind themselves under this contract to pay the regulation wages of the mine to all the men under their employ and to work only the regulation and lawful number of hours for underground miners, and where any deviation therefrom is considered absolutely necessary, the consent of the superintendent of the mine shall be first obtained before any *increase or decrease in the scale of pay or hours of employment shall be made.*

It was argued that the word "direction" in the third paragraph was not to be given the meaning that the men were under the orders of the superintendent, but I think the reference in clause one shows that the word "direction" as used in that clause indicates that full effect is to be given to the word "direction" in the third clause, and the evidence seems to me to make it very plain that the excavating, raising and

dumping of material was all looked upon as the one work. The plaintiff says :—

Q. You say you were employed by Hand. Did you see Kenty in the mine often ?—A. Every day I see him.

Q. He directed the way the work was to go on, didn't he ?—A. Yes sir.

Q. Hand and yourself followed the directions he gave ?—A. He gave direction to Hand, and Hand directed us. He never told me. I don't remember speaking to him, only as I was going out of the mine.

Q. Hand was in charge of the mine ?—A. Yes sir.

Q. And in your presence Kenty would come down and direct how the work was to go on ?

A.—Yes, every day.

This, taken with the admitted facts that the man got his pay in an envelope from the company (although the form was gone through of the amount paid him being charged to Hand and Moriarity) with the written contract showing precisely the relations between the superintendent of the mine and all the men, namely, that no man could be employed except by the superintendent's consent; that the rate of wages was fixed by the company; that a man could be discharged at any moment by the superintendent by going through the form of instructing Hand or Moriarity to discharge the man ; that he had complete control and direction of the men, could tell them in what part of the work for which they were employed they should work; gave orders to Hand just as any superintendent would give directions to a foreman in a factory which orders were by Hand communicated to the men. It is well known in all works of this character some one is foreman of the gang to whom directions are given, and such foreman transmits the orders to the men. I think that it is perfectly clear that the answer to the inquiry as to the control and direction of the negligent and injured persons must be that the company had such control. All the

1903

HASTINGS v. LE ROI No. 2.

Nesbitt J.

authorities establish clearly the proposition that A. may employ B. and pay him, and still B. being under the control of C. has a common employment with others engaged in the same work who are under the control of C. and who are directly hired by C. The discussions which have arisen in the cases have always been upon the facts as to the control of the workmen. I think that here the men engaged by Hand and Moriarity in this particular work knew that there was one common controlling mind in those engaged in the work of excavating and raising the material excavated to the surface, and I think clearly, on this evidence, that if a stranger had been injured by some negligent act done by the plaintiff while engaged in his work, that the company would have been liable, and I think that the appellant continuing in the employment runs the risks of the organization so controlled by Kenty.

It was also argued that under the statute there was a liability because of the failure to make a daily report of the condition of the machinery. I do not think anything turns upon this for the simple reason that the accident was not in any sense due to the failure to make such examination. The want of a proper hook, according to the evidence, was known to and reported to Burns who should have stayed the hoisting until the defect was remedied, so that the object for which the statute was passed, namely, discovery of the defect, was obtained, and the act of negligence from which the accident arose was Burn's failure to remedy the defect when it was discovered and reported to him.

Appeal must be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant; *A. H. MacNeil.*

Solicitor for the respondents; *J. S. Clute, jr.*

1903

THE MANITOBA ASSURANCE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ROBERT J. WHITLA AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

*Nov. 2, 3.
*Nov. 30.

ROBERT J. WHITLA AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS;

AND

THE ROYAL INSURANCE COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Fire insurance—Condition of policy — Double insurance—Application—Representations and warranties — Substituted insurance—Condition precedent—Lapse of policy—Statutory conditions—Estoppel.

B., desiring to abandon his insurance against fire with the Manitoba Assurance Co. and, in lieu thereof, to effect insurance on the same property with the Royal Insurance Co., wrote the local agent of the latter company stating his intention and asking to have a policy in the "Royal" in substitution for his existing insurance in the "Manitoba." On receiving an application and payment of the premium, the agent issued an interim receipt to B. insuring the property pending issue of a policy and forwarded the application and the premium, with his report, to his company's head office in Montreal where the enclosures were received and retained. The interim receipt contained a condition for non-liability in case of prior insurance unless with the company's written assent, but it did not in any way refer to the existing insurance with the Manitoba Assurance Co. Before receipt of a policy from the "Royal" and while the interim receipt was still in force, the property insured was destroyed by fire and B. had not in the meantime formally abandoned his policy with the Manitoba Assurance Co. The

*PRESENT:— Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

latter policy was conditioned to lapse in case of subsequent additional insurance without the consent of the company. B. filed claims with both companies which were resisted and he subsequently assigned his rights to the plaintiffs by whom actions were taken against both companies.

Held reversing both judgments appealed from, (14 Man. L. R. 90) that, as the Royal Insurance Company had been informed, through their agent, of the prior insurance by B. when effecting the substituted insurance, they must be assumed to have undertaken the risk notwithstanding that such prior insurance had not been formally abandoned and that the Manitoba Assurance Co. were relieved from liability by reason of such substituted insurance being taken without their consent.

Held, further, that, under the circumstances, the fact that B. had made claims upon both companies did not deprive him or his assignees of the right to recover against the company liable upon the risk.

The Chief Justice dissented from the opinion of the majority of the court which held the Royal Insurance Company liable and considered that, under the circumstances, B. could not recover against either company.

APPEALS from the judgments of the Court of King's Bench for Manitoba, *en banc*, (1) affirming the judgments of the trial court, by which the action against the Manitoba Assurance Company was maintained with costs, and the action against the Royal Insurance Company was dismissed with costs.

The circumstances under which the actions were instituted and the questions at issue on the present appeals are stated in the judgments now reported.

J. Stewart Tupper K.C. and *Phippen* for the Manitoba Assurance Company, appellants. We submit that a subsequent insurance with the Royal Insurance Company was proved. This was subsequent insurance within the meaning of the 8th statutory condition, even if invalid. But a subsequent valid insurance with the Royal Insurance Company, to take effect

(1) 14 Man. L. R. 90.

on the 7th of January, 1901, when its interim receipt was issued, has been proved.

Even if the insurance with the Manitoba Assurance Company was not abandoned by the issue of the interim receipt by the Royal Insurance Company and the omission to notify the appellants thereof, the insurance with the Royal Insurance Company was nevertheless a valid insurance, as its duly authorized agent had full knowledge of the prior insurance before they issued their interim receipt and accepted the premium which they never returned. *Wing* v. *Harvey* (1); *Bawden* v. *London, Edinburgh & Glasgow Assurance Co.* (2); *Watteau* v. *Fenwick* (3); *Gore District Mutual Fire Insurance Co.* v. *Samo* (4); *Liverpool & London & Globe Insurance Co.* v. *Wyld* (5); *Hastings Mutual Fire Insurance Co.* v. *Shannon* (6); *Naughter* v. *Ottawa Agricultural Insurance Co.* (7); *Hatton* v. *Beacon Insurance Co.* (8). The validity of the appellants' contract does not depend on whether or not the subsequent insurance was to be adjudged valid or invalid. The court cannot decide on the validity of the subsequent insurance in this action to which the Royal Insurance Company is not a party. *Ramsay Cloth Co.* v. *Mutual Insurance Co.* (9), per Robinson C.J., at page 523. It is immaterial whether the subsequent insurance might be strictly a legally binding contract. It was an insurance in fact made. *Mason* v. *Andes Ins. Co.* (10); *Jacobs* v. *Equitable Insurance Co.* (11); *Bruce* v. *Gore District Mutual Assurance Co.* (12); *Gauthier* v. *Waterloo Mutual Insurance Co.* (13).

(1) 5 DeG. M. & G. 265.
(2) [1892] 2 Q. B. 534.
(3) [1893] 1 Q. B. 346.
(4) 2 Can. S. C. R. 411.
(5) 1 Can. S. C. R. 604.
(6) 2 Can. S. C. R. 394.
(7) 43 U. C. Q. B. 121.
(8) 16 U. C. Q. B. 316.
(9) 11 U. C. Q. B. 516.
(10) 23 U. C. C. P. 37.
(11) 19 U. C. Q. B. 250.
(12) 20 U. C. C. P. 207.
(13) 44 U. C. Q. B. 490; 6 Ont. App. R. 231.

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

Haggart K.C. for Whitla *et al.*, respondents. If there was no complete contract with The Royal Ins. Co., no valid subsequent insurance existed; and the case is within the principle of *Commercial Union Assurance Co.* v. *Temple* (1). The plaintiffs frankly admit that should this court reverse the judgment in the suit against the Royal Insurance Company and direct a verdict to be entered for the plaintiffs in that suit, then they could not successfully hold their verdict in this case to the extent of the $2,000 covering the stock in trade. There would then be a breach of the 8th statutory condition indorsed on the "Manitoba" policy as to the insurance on the stock in trade. *Commercial Union Assurance Co.* v. *Temple* (1); *Western Assurance Co.* v. *Temple* (2): The subsequent insurance referred to in the 8th statutory condition must be a valid insurance existing at the time of the fire. The same principle has been affirmed in Massachusetts in respect to policies containing similar conditions. The subsequent insurance being inoperative, the first policy remains in force and that subsequent insurance, void by its own terms, is no insurance within the meaning of the usual conditions against other insurance, although the subsequent insurance be in fact paid. *Hardy* v. *Union Mutual Insurance Co.* (3); *Clark* v. *New England Mutual Fire Insurance Co.* (4); *Stacy* v. *Franklin Fire Insurance Co.* (5); *Philbrook* v. *New England Mut. Fire Insurance Co.* (6); *Germania Fire Insurance Co.* v. *Klewer* (7).

If there is a valid contract with The Royal Ins. Co. then there is double insurance as to the stock in trade, but there is, however, no double insurance as to the

(1) 29 Can. S. C. R. 206.
(2) 31 Can. S. C. R. 373.
(3) 4 Allen (Mass.) 217.
(4) 6 Cush. (Mass.) 342.
(5) 2 Watts & Sargeant (Penn.) 506 at p. 544.
(6) 37 Maine 137.
(7) 129 Ill. 599.

household furniture, wearing apparel, jewellery and piano. The Royal Insurance Company's interim receipt does not cover these articles The insurance, there, is "on general stock."

Haggart K.C. for Whitla *et al.*, appellants. The contract with the Royal Insurance Company was a provisional agreement with the company's duly authorized agent for such purposes. It was made after full disclosure of all the circumstances and there was no condition exacted as to Bourque formally abandoning the prior insurance as a condition precedent to the substituted insurance attaching. Porter on Insurance (3 ed.) 447; *Union Mutual Insurance Co.* v. *Wilkinson* (1); *Cockburn* v. *British America Assurance Co.* (2); May on Insurance (4 ed.) sec. 132; *Wing* v. *Harvey* (3); *Liverpool & London & Globe Fire Ins. Co.* v. *Wyld* (4); *McQueen* v. *Phœnix Mutual Fire Ins. Co.* (5); *Hastings Mutual Fire Ins. Co.* v. *Shannon* (6); Holt "Insurance Law of Canada" p 494. See remarks of Moss C.J. as to warranties at page 495 in *Worswick* v. *Canada Fire and Marine Ins. Co.* (7); also *Grant* v. *Ætna Ins. Co.* (8); and *Gibson* v. *Small* (9).

The company waived any breach of the condition by failing to object when they had knowledge of the prior insurance and retaining the premium paid to them. May on Insurance (4 ed.) secs. 143, 498; Beach, secs. 764, 797, 802; Porter (3 ed.) 190, 212; *Dominion Grange Mut. Fire Ins. Co.* v. *Bradt* (10); *Law* v. *Hand-in-Hand Mut. Ins. Co.* (11); *Hopkins* v. *Manufacturers & Merchants Mut. Insurance Co.* (12).

(1) 13 Wall. 222.
(2) 19 O. R. 245.
(3) 5 DeG. M. & G. 265.
(4) 1 Can. S. C. R. 604.
(5) 4 Can. S. C. R. 660.
(6) 2 Can. S. C. R. 394.
(7) 3 Ont. App. R. 487.
(8) 15 Moo. P. C. 516.
(9) 4 H. L. Cas. 353.
(10) 25 Can. S. C. R. 154.
(11) 29 U. C. C. P. 1.
(12) 43 U. C. Q. B. 254.

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

Munson K.C. and *J. Travers Lewis* for the Royal Insurance Company, respondents. There was not to be any contract of insurance until the prior insurance with the "Manitoba" Company had been abandoned. If the interim receipt be considered as having become effective, it became so merely as an executory contract, which could not be enforced until the prior insurance had been abandoned.

The interim receipt was not binding on the company, however, owing to the non-payment in cash of the whole of the premium. The agent's authority was dependent upon payment of the premium in cash, which is not proved. *Canadian Fire Insurance Co.* v. *Robinson* (1); *London & Lancashire Life Ass. Co.* v. *Fleming* (2); *Acey* v. *Fernie* (3). The appellants should, therefore, have pleaded and proved such payment, and having failed to do so, cannot succed. In any event, the appellants cannot succeed on the interim receipt as under condition number eight, indorsed on it, the company is not liable for loss in case of prior insurance. If the respondents cannot rely upon this eighth condition, as indorsed on the interim receipt, they claim the benefit of it as one of the conditions indorsed on the policy, which was issued in pursuance of the interim receipt, because the right of action upon such a receipt still depends, as it did before the fusion of law and equity, upon the right to a specific performance of the agreement which it involves to issue a policy or other contract in binding form. In determining whether specific performance should be granted, the court will look at all the surrounding circumstances, and in the present case the trial judge has found that Bourque must be taken to have understood that Dumouchel expected the prior insurance to

(1) 31 Can. S. C. R. 488. (2) [1897] A. C. 499.
(3) 7 M. & W. 151.

be abandoned This finding is approved of by Mr. Justice Bain, and would be sufficient in itself to disentitle the appellants to specific performance.

We refer also to *Dominion Grange Mut. Fire Ins. Co.* v. *Bradt* (1); *Hawke* v. *Niagara District Mut. Fire Ins. Co.* (2); *Western Assurance Co.* v. *Doull* (3); *Jackson* v. *Massachusetts Mut. Fire Ins. Co.* (4); *Skillings* v. *Royal Insurance Co.* (5); *Barnard* v. *Faber* (6); *Edington* v. *Fitzmaurice* (7); *North British & Mercantile Ins. Co.* v. *McLellan* (8); *Compton* v. *Mercantile Ins. Co.* (9); *Browning* v. *Provincial Ins. Co.* (10); Fry on Specific Performance (2 ed.) 407.

THE MANITOBA ASSURANCE CO. *v.* WHITLA *et al.*

THE CHIEF JUSTICE.—The facts of this case appear at full length in the report of it in the Manitoba Court at page 90, vol. 14, of the Manitoba Reports.

Some confusion may arise, and has perhaps arisen, from the course pursued in the full court where this case and one by the same plaintiffs against the Royal Insurance Company appear to have been heard together. They were not tried together by the learned Chief Justice of Manitoba, and were not heard together at our bar. This action was taken nearly four months after the other. It was tried after the other as a distinct and separate case. I think that this was the right course to pursue. The two cases have to be considered independently of each other. The result of one should not in any way influence the result of the other.

We are not concerned in this case with the ultimate determination of the respondents' action against the

(1) 25 Can. S. C. R. 154 at p. 163.
(2) 23 Gr. 139.
(3) 12 Can. S. C. R. 446.
(4) 23 Pick. 418.
(5) 4 Ont. L. R. 123.
(6) [1893] 1 Q. B. 340.
(7) 29 Ch. D. 459.
(8) 21 Can. S. C. R. 288.
(9) 27 Gr. 334.
(10) L. R. 5 P. C. 263.

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

The Chief Justice.

Royal Insurance Company which cannot even be ascertained from this record.

If the policy with the Royal Company had been obtained by Bourque upon false representations, for instance, making it voidable *ab initio*, and if that policy were not subject to the 8th condition against further insurance, it could not be contended that in such a case, Bourque could recover upon this policy with the appellants notwithstanding his double insurance, simply because he could not recover against the Royal.

There is only a question of fact before us upon this appeal, as I view it.

Were there two policies valid on their face and actually subsisting at the same time on the same property in question? Did Bourque as a matter of fact take a subsequent insurance with the Royal, without the knowledge and consent of the appellant company upon the property insured by them? To these questions there is room for but one answer.

Not only had Bourque applied for and obtained from the Royal a further insurance upon the property upon which he held an insurance in the appellant company, but after the fire he immediately notified the Royal and filed his claim with them, and subsequently through his assignees took an action against them for the amount of his interim receipt. Examined as a witness he says:

Q. Then the insurance in the Royal was a further insurance on the same stock which you claim is covered by the Manitoba Company's policy?—A. Yes.

Q. And you are claiming to-day that the Royal Company is liable to you under that interim receipt for insurance?—A. Yes, well I am claiming as a witness.

Q. Liable to your assignees, the Messrs. Whitla & Company. You are claiming that the Royal Company issued the $3,000 policy called for by this interim receipt?—A. Yes.

Q. After the fire you put in a proof of loss to the Royal Company, this document which I have in my hand?—A. Yes.

Now whether that insurance was valid or not cannot be determined in this case so as to bind the Royal were it necessary to do so. And the question is not whether Bourque intended to doubly insure or not. Did he in fact doubly insure? We have nothing to do with his intentions.

The statutory condition that governs this case, as varied in this policy, reads as follows:

(8.) The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is indorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assents thereto or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected.

The appellants were therefore entitled to get from Bourque two weeks' previous written notice of his intention to further insure in the Royal, and they never got any. Neither before nor after taking the interim insurance with the Royal did Bourque give them any. Upon what principle the respondents can support their contention that Bourque was at liberty to so ignore at will a material condition of his contract with the appellants and his obligation thereunder, I entirely fail to see.

This condition does not say, it is true, that the policy is void if any subsequent insurance is effected without notice to a prior insurer; but it says clearly that in such a case the prior company is not liable for loss, that is to say, not bound in law to pay if they choose, as the appellants do here, to avail themselves of the fact that operates avoidance of their obligation to pay. I would dismiss their action with costs.

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

The Chief Justice.

The respondents' other contention that they are, in any event, entitled to succeed for the amount of $250, the insurance on household furniture, wearing apparel and jewellery, on which there is no double insurance as they are not covered by the Royal's interim receipt, cannot prevail. The contract of insurance with the appellants was entire and indivisible, and though there is no double insurance as to the articles so separately insured for $250 by the appellants, yet the whole policy is void. *The Gore District Mutual* v. *Samo* (1).

I would allow the appeal and dismiss the action. Costs in all the courts against respondent.

WHITLA *et al. v.* THE ROYAL INSURANCE CO.

THE CHIEF JUSTICE.—The facts of this case appear at length in the Manitoba Reports, page 90, of vol. 14.

This action was instituted nearly four months before the other one by the same plaintiffs against the Manitoba company in question in this record. It was tried and determined before that other one, and should be considered and disposed of as if tried and determined before the other one was instituted.

I would dismiss this appeal. Bourque's policy with the Manitoba company was on their books a *de facto* subsisting policy when he insured with the respondents, and at the time of the fire. Had any return to be then made to the Government as required by the statute, the Manitoba company would have had to report Bourque as insured by them. Bourque had covenanted with the respondents that this policy with the Manitoba was to be put an end to by himself by some action on his part, and he never did it *de facto*. We have nothing to do with his intentions. They

(1) 2 Can. S. C. R. 411.

may have been very good, but he did not put them into execution. And what does he do after the fire? Far from himself treating the Manitoba policy as abandoned, he immediately furnished the required proofs of loss and filed his claim with them, and upon their refusal to pay has since instituted an action against them, and as proved in this case, actually recovered a judgment through his assignees for the amount of his insurance with them. Moreover, he swore, when giving his proof of loss to the respondents, that he had another insurance for $2,500 on the same property in the Manitoba Assurance Company. And he would now, forsooth, ask us to declare that he had sworn falsely and that this policy with the "Manitoba" had come to an end before the fire (at what time he, of course, cannot tell) and he never did anything in view of putting an end to it, though he holds his judgment against them upon that policy.

How could the court below come to any other conclusion but that his contentions are untenable? And we have here to determine this case upon the very same facts as they existed and were presented to the court below.

The 8th condition varied in the Manitoba policy as proved in this case, reads as follows:

> The company is not liable for loss * * * if any subsequent insurance is effected in any other company unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance or does not dissent in writing after that time and before the subsequent or further insurance is effected.

Now Bourque's "Manitoba" policy by this condition, it is clear, was not *ipso facto* void by his taking subsequently a further insurance with the respondents, but only voidable if the Manitoba company chose to invoke that subsequent insurance with the respondents in avoidance of their liability.

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

The Chief Justice.

Suppose that the Manitoba company's policy had not the double insurance clause and was issued in the Province of Quebec, for instance, where there are no statutory conditions, but that they, the Manitoba company, would have been able to defeat Bourque's claim against them upon any other ground, say, for false representations made by Bourque when applying for the insurance with them, could the appellants recover against the respondents notwithstanding the double insurance clause in the respondent's policy? I do not think so. In that case, they would have lost their recourse against both companies, as, I think, they do in this case.

Then the words '*Je vais abandonner*' used by Bourque in his first letter to the respondents clearly import a representation that he, personally, was to do some act, something towards preventing a double insurance. And he never did anything, not even giving to the Manitoba the notice of his intention that his contract with them, as proved in this case, obliged him to give. Now having induced the respondents to contract with him upon such express condition that he would act and do something toward putting an end to his other policy, without which they would not have insured him and having entirely failed to conform to it, how his action against them can be maintained, I cannot see.

I remark further in this case, though it cannot affect the result, that, as I have already mentioned, it appears by this record that the appellants have recovered judgment against the Manitoba company for the amount of Bourque's policy with them.

They surely cannot themselves attack that judgment and contend that they were not entitled to it. Could any more cogent proof, as against them, be made of the double insurance pleaded by the respondents?

Can any better evidence be made by the respondents of the truth of their allegations? Of course, if their action against the Manitoba company had been dismissed on the ground that the respondents' policy, not that of the "Manitoba," was in force, that would be as to the respondents, *res inter alios*, and could not affect them in any way. But the fact that they have recovered judgment against the Manitoba company is, as against them, conclusive evidence of the fact that Bourque had a prior insurance at the time of the fire, though the event of the failure of his action against the Manitoba company could not have affected the result of this case. The appellants' reasoning on this point seems to me turning in a vicious circle, the inevitable result of not considering these two cases apart and independently of each other.

Could the court of Manitoba, in face of the evidence that a judgment against the Manitoba company had so been obtained by the appellants, a judgment which the appellants could not and do not impeach in this case, give them a judgment against the respondents. I fail to see any error whatever in the judgment appealed from at the time it was rendered, and nothing that may have happened since between Bourque and the Manitoba company (specially if not of record in this case) can affect our determination of the appeal. In my opinion the judgment appealed from is unassailable and I would dismiss the appeal with costs.

THE MANITOBA ASSURANCE CO. *v.* WHITLA *et al.*
WHITLA *et al. v.* THE ROYAL INSURANCE CO.

SEDGEWICK J.—On the 12th July, 1900, one P. E. Bourque, residing at Altamont, Manitoba, insured his stock of goods in the Manitoba Assurance Co. for $2,500. The policy insuring the goods contained the usual statutory conditions together with a varied condition,

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

Sedgewick J.

should the assured desire, providing for its interim cancellation. That policy being then subsisting, on the 1st January, 1901, Bourque wrote to one J. T. Dumouchel, an agent of the Royal Insurance Co., a letter of which the following is a copy:

ALTAMONT, le 1er Janvier 1901.

M. J. DUMOUCHEL,

MONSIEUR,—Etant en train de me faire assuré contre le feu sur mon stock, ici à Altamont lorsque Mr Landry m'a prié de vous écrire comme étant assuré lui-même dans votre compagnie, j'ai pris une petite assurance l'été dernier lorsque j'ai acheté de M. Landry, dans la Manitoba Assurance Co. et comme il y a des gens qui pensent que c'est une compagnie faible. je vais abandonné. J'avais $2,000 sur stock, meubles, piano, etc. J'ai un stock audelà de $5,000, et je désirais de mettre a peu près $3,000 d'assurance.

Attendant votre retour, Je demeure votre, etc.,

P. E. BOURQUE.

Dumouchel had

full power to receive proposals for insurance against loss or damage by fire, to sign interim and renewal receipts—to receive moneys, and to do all lawful acts and business pertaining to such agency which might from time to time be given him in charge as said agent.

Dumouchel replied to this letter that he would be glad to have the insurance; that he knew nothing about the standing of the other company; but that his was a very strong one.

On the 5th January, 1901, Bourque wrote Dumouchel.

In answer to yours received yesterday, I beg to say I desire to insure the stock only and store fixtures included, dry goods, groceries, boots and shoes, furniture, for $3,000. I do not keep a stopping place.

Then follows a description of the building.

I think that this is the explanation necessary. If you desire anything further I will be pleased to furnish it to you.

Dumouchel thereupon wrote to Bourque that if he sent $75 for the premium he would "put through the insurance" for him. Bourque replied on the 6th of January that he could not pay the amount at once, but would do so later, in reply to which Dumouchel

on the morning of the 7th of January sent him an interim receipt for insuring the stock in trade for $3,000 from that date, and a promissory note payable to Dumouchel's order for $51, requesting him to sign the note and return it with a cheque for $25. This was done and the note was subsequently paid and the amount of the premium, less commission, sent by Dumouchel to the Royal Insurance Company's head office in Montreal which retained it. The interim receipt was as follows:

The Royal Insurance Company, No. 32513, St. Boniface Agency, 7th January, 1901. Mr. P. E. Bourque having this day applied for insurance against loss or damage by fire to the extent of $3,000 on the property described in application of this date for twelve months, *subject to the conditions as indorsed* hereon of the company's policy, and having also paid the sum of $75 as the premium for the same, the property is hereby held insured for forty-five days from this date or until a policy is sooner delivered or notice given that the application is declined. If the application is declined the premium received will be refunded on this receipt being given up, less the proportion for the time the risk has been covered.

N.B.—If a policy be not received before the expiration of the period above mentioned and no intimation has been given that the application is declined, immediate notice thereof should be given to the manager of the company in Montreal.

On general stock, Altamont, premium $75.

(Sgd.) JOS. DUMOUCHEL,
St. Boniface Agency.

Indorsed on the back were the statutory conditions without alterations or additions the eighth being as follows:

The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is indorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after notice of the intention or desire to effect the subsequent insurance has been mailed to them and addressed to their principal office in Manitoba by registered letter, or does not dissent in writing after that time and before the subsequent or further insurance is effected.

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

Sedgewick J.

Before the time mentioned in the interim receipt expired the property insured was burnt. He made claim by proofs of loss from both companies, but intended to recover only from that one which should ultimately appear to be liable, if either was liable. Both companies disputed liability and both were sued by R. J. Whitla & Co., to whom the assured has assigned his claim.

Upon trial of the two actions, Killam C. J. dismissed the action against the Royal Insurance Co. and gave judgment against The Manitoba Assurance Co. for the amount of the loss, which judgment was affirmed on appeal to the Court in Banc.

All parties against whom judgment was given appealed to this court, and the question to be determined is: Under the circumstances of this case, is either company liable and, if so, which?

I have, after some doubt, arrived at the conclusion that there is error in both the judgments of the court below, and that while the Manitoba Assurance Co. is not liable, the Royal Insurance Co. is.

So far as the Manitoba Assurance Co. is concerned it seems to me that there can be but little question as to its non-liability. The effecting of the new insurance in the Royal Co. without its assent gave it the right at its option to void it, and, as has been established by a long series of cases in Canadian courts, whether the new insurance was in the first event valid or invalid, if there was a new contract of insurance in fact, that *de facto* second insurance made void the first. Besides, for the reason presently to be pointed out, the company is discharged. The assured abandoned his claim under his contract in consideration of the Royal re-assuring him.

Before discussing the further facts in this case let me call attention to two principles of law which I

think may be found to determine the controversy here. "There is nothing," says a learned text writer,

in the law to prevent parties, if they so think fit, from agreeing that, as between them, a certain fact, or state of facts, shall, for the purposes of a particular transaction, which it is competent for them to enter into, and into which they propose to enter, be taken to be true, whether it be in fact true or not, or although they know, or either of them knows, it to be untrue.

That is called estoppel by contract.

The meaning of estoppel, says Martin B. is this : that the parties agree for the purpose of a particular transaction to state certain facts as true ; and that so far as regards that transaction there shall be no question about them.

In *Ashpitel* v. *Bryan* (1), Pollock C. B. says :

For the purpose of the transaction in question the parties agreed that certain facts should be admitted to be facts, as the basis on which they would contract, and they cannot recede from that * * * We ll agree with the court below that there may arise an estoppel by agreement, and that such an estoppel arises here.

And in *McCance* v. *London & North Western Railway Co.* (2), Williams J. in delivering the judgment of the Exchequer Chamber says :

Here it appears in evidence that the contract declared on was to be regulated and governed by a state of facts understood by the parties * * * It is laid down in my brother Blackburn's Treatise on the Contract of Sale, p. 163, that 'when parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts, and not on the truth.' Applying that rule to the present case, we think that both parties are bound by the conventional state of facts agreed upon between them.

The other principle, that of election, which is perhaps a sub-class of the one just referred to, is to be found stated in the case *Scharf* v. *Jardine* (3) where Lord Blackburn makes reference to it as follows :

(1) 3 B. & S. 474 ; 5 B. & S. 723 ; 32 L. J., Q. B. 91 ; 33 L. J., Q. B. 328.

(2) 7 H. & N. 477 ; 3 H. & C. 343 ; 31 L. J. Ex. 65 ; 34 L. J. Ex. 39.

(3) 7 App. Cas. 360.

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

Sedgewick J.

Now on that question there are a great many cases; they are collected in the notes to *Dumpor's Case* (1) and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered.

Lord Blackburn also refers to the case of *Jones* v. *Carter* (2) as most neatly stating the point.

The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him: but so soon as he has not only determined to follow one of these remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

The case, it seems to me, very largely depends upon the phrase "*Je vais abandonner*" in Bourque's letter of the 1st of January, 1901, to the Royal Insurance Co's agent at St. Boniface. That that letter was incorporated in and formed part of the contract evidenced by the interim receipt there can be no question.

Now, from a perusal of the correspondence and evidence and interim receipt, I draw several conclusions. The agent Dumouchel knew perfectly well of the then existing policy in the Manitoba Assurance Co. Both he and Bourque fully understood that there was no intention on Bourque's part to effect "other" or "additional" insurance in the Royal Insurance Co. There was no intention that there should be two existing insurances at the same time upon the property. Neither was it the intention that there should be any time when there should be no insurance upon it. The proposal in the letter of 1st January, in effect was

(1) 1 Sm. L.C. 11th ed. 35. (2) 15 M. & W. 718.

this: "I intend to abandon my insurance in the Manitoba Assurance Co. if I can obtain substituted insurance in the Royal Insurance Co. In other words —you insure me and I undertake to abandon my insurance in the Manitoba Assurance Co. and not to make any claim against it if loss occurs to me after you have insured me." The acceptance of the money of the assured and the signing of the interim receipt carried out the intention of both parties, and its effect was, as between the assured and the "Royal" Co., to destroy the right of the assured under the first policy, that is to say to annihilate it and to substitute in its stead the new assurance. The assured used the word "*abandonner*." As a matter of strict law it was impossible for him to abandon his contract with the "Manitoba" Co. without their assent. Under its special terms he might during its currency have cancelled it and claimed the unearned premium, but that would not be an act showing that he had abandoned the policy but living up to its terms and insisting upon the performance of its conditions in his favour, and Dumouchel must be presumed to have known this and that the acceptance by Bourque of the interim receipt and the payment of the premium in itself constituted the abandonment which both parties had in contemplation.

This is a suit that, before the modern practice, would have had to be brought in a Court of Equity and the relief sought for would have been a decree directing the company to issue a policy and as ancillary to that relief to pay the amount of the loss of the plaintiff. In that case the policy directed to issue would, in my judgment, contain a declaration that the insurance thereby effected was an insurance in substitution and in consequence of the abandonment by the assured of his rights under the "Manitoba" policy. Sup-

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

Sedgewick J.

pose a policy so ordered to be issued contained provision in words such as the following: "Whereas the applicant is now insured in the 'Manitoba' Co. and has declared that upon the effecting of an insurance in this company he abandons his right under the first policy; and whereas this company has agreed to such abandonment and to the issue of this policy under the circumstances aforesaid the company hereby assures etc., etc."; could it be contended that it nevertheless had a right to claim the "Manitoba" policy as an existing insurance upon the property? The words "other insurance" in the statutory conditions in that case would clearly not apply to the "Manitoba" policy but to any other existing insurance not disclosed to Dumouchel. It therefore seems to me the more reasonable view to hold that under all the circumstances of this case, while the "Manitoba" Co. were relieved from liability by reason of the substituted insurance, the "Royal" Co. was not relieved from its liability.

I am not disposed to place much reliance upon the fact that the assured proved a claim against both companies and sued both companies. He was on the horns of a dilemma. The proofs were made and the actions were commenced on the advice of his legal adviser. The very fact that there is now a difference of opinion as to which, if either, company is liable, or as to whether there is any liability at all, shews that perhaps the advice of the solicitor displayed good judgment. At the very most it is only evidence, not conclusive evidence, in proof of the allegation that he never did abandon his claim against the Manitoba Co. There is however no estoppel, and as I consider that the contract creating the second insurance was a valid contract effected for the purpose for which it was intended, and that there was not even a suspicion of fraud or of an intention to doubly insure, the subse-

quent conduct of the assured with regard to the proofs of loss cannot vary or in any way injuriously affect his rights.

On the whole I am of opinion that both appeals should be allowed and that judgment should be entered dismissing the action against the "Manitoba" Co. and that judgment should be entered against the "Royal" Co. Costs to the successful party in each case.

GIROUARD J. concurred.

DAVIES J.—Both during the argument of this case and since I have entertained serious doubts of the right of the plaintiffs to recover and I confess that even now these doubts are not entirely removed.

The plaintiffs sue as assignees of one Bourque who at a time when he was insured in the Manitoba Ass. Co. became dissatisfied with the stability of the company and applied to the agent of the Royal Ins. Co. for insurance upon practically the same property. In his application which was written in French he stated with respect to his existing insurance in the Manitaba Ass. Co. that

as there are people who think that it is a weak company I am going to abandon.

A few days afterwards in response to a letter from the agent of the "Royal" he furnished the necessary particulars to effect insurance, and afterwards paid the insurance premium to the agent who remitted it to the head office of the company by which it has since been retained. The agent issued to Bourque an interim receipt with the statutory conditions indorsed thereon. The receipt says:

Mr. P. E. Bourque having this day applied for insurance against loss or damage by fire to extent of $3,000 on the property described in application of this date for 12 months, subject to the conditions as indorsed hereon of the company's policy and having also paid the sum of $75 as the premium, &c.

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

Davies J.

In my opinion therefore, both Bourque's application and the indorsed conditions must be read into and form part of the contract. No question of fraud or of any attempt to insure doubly is raised. It is admitted that the intention was to substitute the insurance in the "Royal" for that in the "Manitoba." In fact Bourque's application specifically set out the existence of the insurance in the "Manitoba," and his intention to abandon it for that he was taking out in the "Royal"; and it was with full knowledge, therefore, of all the material facts that the latter insurance issued. The intention of the parties was clear that there should not be a moment of time when Bourque was not actually insured. He was not obliged to complete the abandonment of his insurance in the "Manitoba" company as a condition precedent to that effected in the Royal attaching. The latter company was willing to insure knowing of the existence of the other insurance, and to accept Bourque's statement that the insurance he was effecting was not intended as additional, but as substituted insurance. They knew that under the statutory conditions binding alike on the "Manitoba" Company as on themselves, a subsequent insurance by Bourque relieved the "Manitoba" company of any further liability, and with this knowledge and Bourque's statement of his intention to abandon the prior insurance, they effected substituted insurance for him. The 8th statutory condition which they invoke to relieve themselves of liability says:

> The company is not liable for loss if there is any prior insurance in any other company unless the company's assent thereto appears herein or is indorsed hereon, &c.

I doubt whether the insurance in the "Manitoba" which the "Royal" Company was expressly informed about in Bourque's application and as to which he stated his intention to abandon, can be held as "prior

insurance" within the meaning of those words in this condition. Those words evidently have reference to some prior insurance the existence of which the company effecting the second insurance might assent to. In other words, they refer either to an attempt to effect a second or double insurance without the company's knowledge, or to do so with their knowledge and assent, but in any case to some attempted or intended double assurance. Here was an honest attempt, not to obtain an assent to a declared prior insurance or to suppress the fact of a prior insurance existing, but to obtain substituted insurance in lieu of a declared prior insurance which was to be abandoned. If the true construction of the clause requires the assent even in the latter case which seems to me an illogical construction, I am still of the opinion that it does sufficiently appear in the interim receipt of which the application is made a part, and that it appears coupled with their acceptance of Bourque's promise to abandon, and that the failure of Bourque subsequently to carry out his intention of formally abandoning the "Manitoba" insurance cannot under the peculiar circumstances of this case defeat his claim against the "Royal" company.

The question, apart from the construction of the condition, seems to me to be whether this promise to abandon was a warranty or an antecedent condition to the policy attaching which would go to the root of the transaction or whether it is merely a collateral stipulation, the non-performance of which did not avoid the defendant company's obligation, but only gave it a cause of action in case of breach with damage. I am of opinion that it was the latter.

It has been contended that Bourque by asserting in his proofs of loss the existence of the insurance in the "Manitoba" company has prevented his recovery in this

1903

MANITOBA ASSURANCE CO. v. WHITLA.

WHITLA v. ROYAL INSURANCE CO.

Davies J.

action. But the circumstances must be looked to. It was very doubtful which policy would be held to be effective or indeed whether either of them would be. The subsequent judicial differences of opinion shew how well founded the doubts were. There was no intention to deceive any one by these proofs in the form in which they were made out, nor did they deceive anyone. It is unfortunate that they were worded as they were and that the facts were not set forth correctly. But no doubt the difficulties were great and in the absence of any fraud or attempted fraud I am disposed to agree with the contention that this irregularity or incorrect statement in the proofs should not be held to destroy an otherwise valid insurance.

NESBITT J. concurred.

Appeals allowed with costs.

Solicitors for the appellants, The Manitoba Assurance Co.: *Tupper, Phippen & Tupper.*

Solicitors for the respondents, Whitla *et al.*: *Macdonald, Haggart & Whitla.*

Solicitors for the appellants, Whitla *et al.*: *Macdonald, Haggart & Whitla.*

Solicitors for the respondents, The Royal Insurance Co.: *Munson & Allan.*

1903

JAMES BURROWS DAVIDSON AND OTHERS (PLAINTIFFS)..... } APPELLANTS; *Nov. 3, 4. Nov. 30.

AND

JAMES STUART AND OTHERS (DEFENDANTS..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Negligence — Electric plant — Defective appliances — Master and servant — Electric shock — Engagement of skilled manager — Contributory negligence.

An electrician engaged with defendants as manager of their electric lighting plant and undertook to put it in proper working order, the defendants placing him in a position to obtain all necessary materials for that purpose. About three months after he had been placed in charge of the works he was killed by coming in contact with an incandescent lamp socket in the power house which had been there during the whole of the time he was in charge, but, at the time of the accident, was apparently insufficiently insulated.

Held, that there was no breach of duty on the part of the defendants towards deceased who had undertaken to remedy the very defects that had caused his death and the failure to discover them must be attributed to him.

The judgment appealed from (14 Man. L. R. 74) ordering a new trial was affirmed but for reasons different from those stated in the court below.

APPEAL from the judgment of the Court of King's Bench for Manitoba, *en banc* (1), reversing the judgment entered by Mr. Justice Richards upon the finding of the jury at the trial, and setting aside the verdict in favour of the plaintiff and ordering a new trial.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

(1) 14 Man. L. R. 74.

1903

DAVIDSON v. STUART.

The action was by the father, mother and three sisters of the late W. B. Davidson, deceased, for damages in consequence of his death which, it was alleged, had been caused through defendants' negligence. The circumstances of the case are as follows:—

A few months prior to the time of the occurrence which resulted in the death of W. B. Davidson, the defendants had purchased the electric lighting plant at the Town of Selkirk, in Manitoba, which at the time was not in good working condition. They were unacquainted with electrical matters and engaged the deceased, a skilled electrician, to manage the plant and put it in proper working order and, to enable him to do so, they arranged to have everything that he might require for that purpose furnished upon his orders by an electrical supply company at Winnipeg. Deceased inspected the plant both before and after his engagement, put the electrical works in operation and, from time to time, ordered such electrical supplies as he considered necessary for repairs, alterations and new installations and acted as manager from the month of June, 1900, until his death, on 11th September following. On the latter date, there being some trouble with an air pump at the works, he went into the pump pit to examine it before it was attended to by the engineman in charge of the power house, and while going down, grasped the brass socket of an incandescent electric lamp in his hand and received a shock which killed him.

The electric lamp was hanging from a wooden grating over the pump pit and, although it was not of the kind most approved for use in pits and damp places, he had allowed it to remain there when making the alterations he thought necessary on assuming the management of the works. There was an ordinary lantern provided for the use of any person having to

examine the machinery in the pump pit, but deceased did not make use of it and the inference appeared to be that he had taken the electric lamp in his hand to make an examination of the machinery instead of using the lantern. A short time after the accident the power house lights went out gradually and it was afterwards discovered that the electrical transformer had burned out.

The action was taken under the Manitoba statute respecting compensation to families of persons killed by accidents (1), as amended by 61 Vict. c. 11 (Man.) and charged the defendants with negligence in failing to remedy defects in the electrical plant and machinery some of which might have caused the accident.

The jury found a general verdict in favour of the plaintiffs for $1,500 damages, upon which judgment was entered by the trial judge. On appeal, the full court directed that the verdict should be set aside and ordered a new trial (2), on the ground that there was no evidence that the plaintiffs had suffered any damages that would entitle them to recover judgment under the statute. The plaintiffs now appeal.

Davidson K.C. for the appellants. The deceased while engaged in the performance of his ordinary duty of running an electric plant was instantly killed through the negligence of the defendants by reason of defects in the condition of the ways, works, machinery, plant, buildings and premises used in the business; the particular defects alleged being: (1.) Transformer in power house defective; (2.) Absence of a primary ground detector; (3.) Insufficient lightning arresters; (4.) Defective pump in pump house; (5.) Wet floor in pump house; (6.) Main switch-boom not provided with necessary safeguards and instruments

(1) R. S. M. [1891] c. 26. (2) 14 Man. L. R. 74.

1903

DAVIDSON v. STUART.

to run the same; all of which arose and were not remedied owing to the negligence of the defendants.

There was evidence from which inferences of a reasonable expectation of pecuniary benefit could be drawn and, upon this, there was justification for the general verdict. *Duckworth* v. *Johnson* (1). Anticipated benefit may be the subject matter of damages; *Franklin* v. *South Eastern Railway Co.* (2); *Ricketts* v. *Village of Markdale* (3); *Grand Trunk Railway Co.* v. *Weegar* (4); *Connecticut Mutual Life Ins. Co.* v. *Moore* (5); *Hetherington* v. *North Eastern Railway Co.* (6); *Jones* v. *Hough* (7); *Metropolitan Railway Co.* v. *Wright* (8); *Canada Atlantic Railway Co.* v. *Moxley* (9). The rule adopted by the court below as to evidence of "reasonable expectation" is too narrow and vigorous; it is in contradiction of the leading decisions; see cases already cited, and *St. Lawrence and Ottawa Railway Co.* v. *Lett* (10); *Blake* v. *Midland Railway Co.* (11); *Pym* v. *Great Northern Railway Co.* (12); *Grand Trunk Railway Co.* v. *Jennings* (13); *Condon* v. *Great Southern Railway Co.* (14), per Pigott C.B. and an American case particularly in point, *Kane* v. *Mitchell* (15).

As to the remaining reasons assigned by defendants affecting contributory negligence, character of deceased, whether he was a workman or contractor, care or negligence of defendants, etc., they have been submitted to and passed upon the jury upon evidence which should support their finding, and this court will not reverse on questions of fact unless con-

(1) 4 H. & N. 653.
(2) 3 H. & N. 211.
(3) 31 O. R. 610.
(4) 23 Can. S. C. R. 422.
(5) 6 App. Cas. 644.
(6) 9 Q. B. D. 160.
(7) 5 Ex D. 115.
(8) 11 App. Cas. 152.
(9) 15 Can. S. C. R. 145.
(10) 11 Can. S. C. R. 422.
(11) 18 Q. B. 93.
(12) 4 B. & S. 406.
(13) 13 App. Cas. 800.
(14) 16 Ir. C. L. R. 415.
(15) 90 Hun. N. Y. 65.

vinced beyond all reasonable doubt that the judgment appealed from is clearly erroneous. *Arpin* v. *The Queen* (1); *Sewell* v. *British Columbia Towing Co.* (2); *Royal Electric Co.* v. *Hévé* (3). The defendants' evidence is wholly insufficient to establish absence of negligence on their part or remove liability from them. Keasby on Electric Wires, pages 259, 269. It is for those who control the wires to shew that the accident occurred from some cause beyond their control and not by reason of any want of care in the construction or maintenance of their dangerous appliances. *Ennis* v. *Gray* (4); *Citizens Light & Power Co.* v. *Lepitre* (5).

Coutlée K.C. and *Phippen* for the respondents. Although the Manitoba statute differs to a certain extent from Lord Campbell's Act, yet the principle upon which actions of this nature are given is the same and, to entitle the plaintiffs to succeed, they must shew a reasonable expectation of pecuniary benefit from the continuance of life of the deceased. There is no such proof in this case. *Blake* v. *Midland Railway Co.* (6); *Chapman* v. *Rothwell* (7); *Franklin* v. *South Eastern Railway* (8), at pp. 211, 213; *Dalton* v. *South Eastern Railway Co.* (9); *St. Lawrence and Ottawa Railway Co.* v. *Lett* (10); *Grand Trunk Railway Co.* v. *Jennings* (11); *Mason* v. *Bertram* (12); *Rombough* v. *Balch and Peppard* (13); *Blackley* v. *Toronto Railway Co.* (14); *Ricketts* v. *Village of Markdale* (15). For the reasons given for the judgments appealed from, and in the cases cited, the appellants have not established that reasonable expectation of pecuniary benefit from the continuance

(1) 14 Can. S. C. R. 736.
(2) 9 Can. S. C. R. 527.
(3) 32 Can. S. C. R. 462.
(4) 87 Hun. N. Y. 355.
(5) 29 Can. S. C. R. 1
(6) 18 Q. B. 93.
(7) 4 Jur. N. S. 1181.
(8) 3 H. & N. 211.
(9) 4 B. N. S. 296.
(10) 11 Can. S. C. R. 422.
(11) 13 App. Cas. 800.
(12) 18 O. R. 1.
(13) 27 Ont. App. R. 32; Cout. Dig. 940.
(14) 27 Ont. App. R. 44 (n.)
(15) 31 O. R. 180, 610.

1903

DAVIDSON v. STUART.

of the life of the deceased necessary to entitle them to succeed. They have been unable to shew more than that the deceased was a dutiful son. There is no evidence of any actual assistance to the plaintiffs by him at any time.

If the action is based on common law rights, apart from The Employers Liability Act, then it must appear that the master knew of the defect, and that the deceased was ignorant of it, and the pleadings must so allege. *Griffiths* v. *London and St. Katharine Docks Co.* (1); *Black* v. *Ontario Wheel Co.* (2). Here these conditions have not been met. If the claim be under The Employers Liability Act (56 Vict. c. 39, Man.) it must be shewn that the employer knew of the defect, or was negligent in not discovering it. Nothing of the kind is pretended here.

It was the duty of the deceased, who had been employed for that specific purpose, to discover any defects in the works to put them right. He was the expert in charge of the plant. There was no one higher in authority on whom any duty devolved. The owners had not only instructed the deceased to remedy defects should he find any, but they had also supplied him with ample means of doing so, and there is no evidence of knowledge by any of the defendants of any defects or of want of care on their part in discovering any defect. The deceased knew the state of the works and voluntarily accepted the risk and defendants are not liable. *Thomas* v. *Quartermaine* (3); *Yarmouth* v. *France* (4); *Smith* v. *Baker* (5).

The evidence does not shew that death resulted from any defect in the appliances, and if any such defect caused the death it must have arisen *eo instanti*.

(1) 12 Q. B. D. 493.
(2) 19 Ont. 578 at p. 582.
(3) 18 Q. B. D. 685.
(4) 19 Q. B. D. 647.
(5) [1891] A. C. 325.

Critical investigation by electrical experts failed to disclose any defect discoverable before the accident. There is no evidence inconsistent with deceased having been killed entirely independent of and without any defect in the works. None of the witnesses would attribute the death to any particular defect.

The deceased lost his life through his own negligence which was the proximate cause of his death. The pump pit was necessarily wet. Damp places are specially dangerous when dealing with light currents. It was unnecessary to touch the lamp. It was always kept burning. It was necessarily in a dangerous place. Others thought it dangerous to handle. A lantern had been provided for use in the pump pit. With high pressure currents a break may take place at any moment. The better connection you make with the ground the greater the strain on the system and the more liable to break. A careful electrician should always assume a possibility of breakage in insulation and yet deceased with knowledge of these facts unnecessarily handled the lamp in a dangerous place, thus throwing extra weight on the insulation, and death resulted. *Davey* v. *London and South Western Railway Co.* (1); *Martin* v. *Connah's Quay Atkali Co.* (2); Ruegg 171; *Brunell* v. *Canadian Pacific Railway Co.* (3).

All the experts examined agree that there was no defect visible or apparent which could have caused the accident and there can be no liability for latent defects. Ruegg, 37, 38; *Stokes* v. *Eastern Counties Railway Co.* (4); *Readhead* v. *Midland Railway Co.* (5); *Richardson* v. *Great Eastern Railway Co.* (6).

(1) 12 Q. B. D. 70.
(2) 33 W. R. 216.
(3) 15 O. R. 375.
(4) 2 F. & F. 691.
(5) L. R. 2 Q. B. 412; 4 Q. B. 379.
(6) 1 C. P. D. 342.

1903

DAVIDSON v. STUART.

The defendants were within their rights, operating an enterprise for public utility and had engaged a competent manager and discharged every duty incumbent upon them not only towards him but towards the public. Deceased was warned that the works were out of order, he visited and inspected the premises, engaged as manager and undertook to put them in proper order. After three months experience he acted most imprudently and his misfortune resulted from his own fault.

We refer generally to *Canadian Pacific Railway Co.* v. *Roy* (1); *Messenger* v. *Bridgetown* (2); *Fawcett* v. *Canadian Pacific Railway Co.* (3); *Dominion Cartridge Co.* v. *Cairns* (4); *Headford* v. *McClary Mfg. Co.* (5); *Roberts* v. *Hawkins* (6); *Demers* v. *Montreal Steam Laundry Co.* (7); *Tooke* v. *Bergeron* (8).

The American cases cited by appellant are not in point as Lord Campbell's Act has not been enacted in the State of New York.

The judgment of the court was delivered by:

NESBITT J.—The plaintiffs are the father, mother and three sisters of one W. B. Davidson, deceased, and the defendants are the proprietors of the electric light plant at the Town of Selkirk. The deceased took charge of the plant under arrangements to run same and with instructions to see what was required and put the plant in proper running order.

The evidence is clear that any requests for supplies were complied with, but unfortunately on the 11th September, 1900, the engineer in charge informed the deceased that something was wrong with the air pump at the works and the deceased went into the pump

(1) [1902] A. C. 220.
(2) 31 Can. S. C. R. 379.
(3) 32 Can. S. C. R. 721.
(4) 28 Can. S. C. R. 361.
(5) 24 Can. S. C. R. 291.
(6) 29 Can. S. C. R. 218.
(7) 27 Can. S. C. R. 537.
(8) 27 Can. S. C. R. 567.

pit and apparently took hold of the nozzle of a small electric lamp suspended in the pit and, while grasping the nozzle, received an electric shock which killed him.

Several theories as to the cause of the overcharge of electricity were advanced and the jury found a general verdict for the plaintiffs fixing the damages at $1,500. The trial judge entered judgment for this amount and the full court held that the judgment could not stand on the ground that no sufficient evidence of damage under the Act in Manitoba, similar to Lord Campbell's Act, had been offered. In my opinion it is not necessary to deal with this question.

I think the case may be disposed of on the short ground that no evidence was adduced of any breach of duty owing by the defendants to the deceased. The charge and control of the plant was with the deceased, and any of the defects complained of were the very matters which the deceased undertook to remedy if discovered, and the failure to discover such defects must be attributed to him. There was no evidence of negligence in the defendants, having in mind the duties of the deceased.

I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants: *Robinson & Hull.*

Solicitors for the respondents: *Tupper, Phippen & Tupper.*

1903
*Nov. 19.

THE CANADIAN MUTUAL LOAN AND INVESTMENT COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

JOHN LEE (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Amount in dispute—Title to land—Future rights.

L. had given a mortgage to the Standard Loan and Savings Co. as security for a loan and had received a certain number of the company's shares. All the business of that company was afterwards assigned to the Canadian Mutual and L. paid the latter the amount borrowed with interest and $460.80 in addition, and asked to have the mortgage discharged. The company refused claiming that L. as a shareholder in the Standard Co. was liable for its debts and demanding $79.20 therefor by way of counterclaim. At the trial of an action by L. for a declaration that the mortgage was paid and for repayment of the said $460.80, such action was dismissed (1 Ont. L. R. 191) but on appeal the Court of Appeal ordered judgment to be entered for L. for $47.04 (5 Ont. L. R. 471). The defendants appealed to the Supreme Court.

Held, that the appeal would not lie; that no title to lands or any interest therein was in question; that no future rights were involved within the meaning of subsec. (*d*) of 60 & 61 Vict. ch. 34; and that all that was in dispute was a sum of money less than $1,000 and therefore not sufficient to give jurisdiction to the court.

Held, also that the time for bringing the appeal cannot be extended after expiration of the sixty days from the pronouncing or entry of the judgment appealed from.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial by which the action was dismissed (2), and directing judgment to be entered for the plaintiff for $47.04.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

(1) 5 Ont. L. R. 471. (2) 3 Ont. L. R. 191.

The facts of the case necessary to understand the judgment of the Supreme Court are sufficiently stated in the above head-note.

W. J. Clark for the respondent moved to quash the appeal on the ground that only a sum of money less than $1,000 was in dispute, and citing *Bank of Toronto* v. *Le Curé, &c. de la Nativité* (1); *Jermyn* v. *Tew* (2).

Shepley K.C. (*Macdonell* with him) contra. The appeal involves the title to land or an interest in land. *Purdom* v. *Pavey* (3); *Stinson* v. *Dousman* (4).

Moreover the future rights of the appellants are affected and subsection (*d*) of the Act 60 & 61 Vict. ch. 34, gives a right of appeal.

If there is no appeal as of right I would ask for special leave under subsec. (*e*). The case is a very important one for loan companies.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—We are all agreed that this appeal must be quashed. As the case comes before us, there is nothing in it but a controversy as to a pecuniary amount of less than $1,000, and therefore not sufficient to give us jurisdiction.

The contention that the case might be appealable under subsection (*a*) of the Act 60 & 61 Vict. c. 34, cannot prevail. There is no title to real estate or any interest therein in question, *controverted* or *in controversy*, upon this appeal. Compare *Tintsman* v. *National Bank* (5); *Stillwell B. & S. V. Co.* v. *Williamston Oil & F. Co.* (6); *Carne* v. *Russ* (7); *Farmers Bank of Alexandria* v. *Hooff* (8); *Nicholls* v. *Voorhis* (9); *Scully* v. *Sanders* (10). The effect or consequences of a judgment are not a test of our jurisdiction.

(1) 12 Can. S. C. R. 25.
(2) 28 Can. S. C. R. 497.
(3) 26 Can. S. C. R. 412.
(4) 20 How. 461.
(5) 100 U. S. R. 6.
(6) 80 Fed. Rep. 68.
(7) 152 U. S. R. 250.
(8) 7 Peters 168.
(9) 74 N. Y. 28.
(10) 77 N. Y. 598.

1903

CANADIAN MUTUAL LOAN & INVESTMENT CO. v LEE.

The Chief Justice.

Wineberg v. *Hampson* (1); *The Emerald Phosphate Co.* v. *The Anglo-Continental Guano Works* (2); *Jermyn* v. *Tew* (3); *Frechette* v. *Simmonneau* (4); *Toussignant* v. *County of Nicolet* (5).

Neither can the right of appeal be supported upon sec. 1, subsec. (*d*) of the Act. There is in the case no matter in question relating to the taking of an annual or other rent, customary or other duty or fee, or a *like demand of a general or public nature affecting future rights.* These last words are governed by the preceding ones. A demand must be of a general and public nature besides affecting future rights. *In re Marois* (6); *Gilbert* v. *Gilman* (7); *Wineberg* v. *Hampson* (1); *Raphael* v. *MacLaren* (8).

The appellant now asks that, failing his maintaining his appeal as of right, we should grant him special leave under subsec. (*c*). But that application is too late, assuming that it could be heard without notice to the respondent. More than sixty days have elapsed since the judgment he would now appeal from; sec. 40 Supreme Court Act; and under a constant jurisprudence, our power to grant special leave is gone, and the time cannot be extended for such a purpose either under sec. 42 which applies exclusively to appeals as of right, or under rule 70 which has always been construed as not applying to delays fixed by statute. Our jurisprudence on the subject under this Ontario Act is the same that we have followed as to leave to appeal *per saltum* under section 26, subsec. 3. *Barrett* v. *Syndicat Lyonnais du Klondyke* (9), and cases therein

(1) 19 Can. S. C. 369.
(2) 21 Can. S. C. R. 422.
(3) 28 Can. S. C. R. 497.
(4) 31 Can. S. C. R. 12.
(5) 32 Can. S. C. R. 353.
(6) 15 Moo. P. C. 189.
(7) 16 Can. S. C. R. 189.
(8) 27 Can. S. C. R. 319.
(9) 33 Can. S. C. R. 667.

1903

CANADIAN MUTUAL LOAN & INVESTMENT CO. v. LEE.

The Chief Justice.

cited, to which may be added *In re Smart* (2); and *Stewart* v. *Skulthorpe*, referred to in the second edition of Cassels's Supreme Court Practice, at page 37. See *Credit Company* v. *Arkansas Central Railway Co.* (3); *Brooks* v. *Norris* (4).

Appeal quashed with costs.

Solicitors for the appellants: *Macdonell, McMaster & Geary.*

Solicitor for the respondent: *W. J. Clark.*

(2) 16 Can. S. C. R. 396. (3) 128 U. S. R. 258.
(4) 11 How. 204.

1903

* Oct. 21-23.
*Nov. 30.

JOAN OLIVE DUNSMUIR (DEFENDANT) ..... } APPELLANT;

AND

LOWENBERG, HARRIS AND COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Finding of jury—New trial—Principal and agent—Qualification of juror—Waiver of objection—Written contract—Collateral agreement by parol.

An agent employed to sell a mine for a commission failed to effect a sale but brought action based on a verbal collateral agreement by the owner to pay "expenses" or "expenses and compensation" in case of failure. The jury found in answer to a question by the judge that "we believe there was a promise of fair treatment in case of no sale."

Held, reversing the judgment in appeal (9 B. C Rep. 303), Taschereau C. J. and Killam J. dissenting, that this finding did not establish the collatlral agreement but was, if anything, opposed to it and the real issue not having been passed upon there must be a new trial.

If a juror on the trial of a cause is allowed without challenge to act as such on a subsequent trial, that is not *per se* a ground for setting aside the verdict on the latter.

APPEAL from a decision of the Supreme Court of British Columbia (1) refusing to set aside a verdict for the plaintiff and order a new trial.

The plaintiffs, whose action has been thrice tried, claimed from defendant their expenses and compensation for endeavouring to sell a coal mine for the latter who by a written agreement promised them five

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

(1) 9 B. C. Rep. 303 *sub nom. Harris* v. *Dunsmuir*.

1903

DUNSMUIR v. LOWENBERG, HARRIS & CO.

per cent commission. He failed to effect a sale but based his action on the ground that his failure was caused by defendant's interference. He obtained a verdict which was set aside and a new trial ordered on which the claim was amended by adding a claim on an alleged collateral and verbal contract to pay expenses in case of no sale. This second trial resulted in a nonsuit which was set aside by the full court and a third trial ordered (1) which the Supreme Court of Canada affirmed (2). The third trial resulted in a verdict for plaintiff which the full court sustained and the defendant appealed.

The principal questions at issue on this appeal are stated in the judgment of His Lordship Mr. Justice Davies now reported.

Sir Charles Hibbert Tupper K.C. for the appellant. We contend that the fact that one of the jurors sat on a former trial is a good ground for challenge, and that this can be taken advantage of after verdict, because that ground of challenge was not known to the defendant at the time of the last trial. Archbold Q. B. Practice (ed. 1885) p. 619; 1 Coke, Littleton, p. 157*b*, "challenge *propter affectum*;" Blackstone (Lewis ed.) vol. 3, p. 363; Hawkins' Pleas of the Crown, vol. 2, p. 577; Thompson on Trials, vol. 1, sec. 68; *Argent* v. *Darrell* (3); Bacon's Abridgement, vol. 9, p. 598. There can be no waiver where the party had no knowledge of the ground of challenge; Thompson on Trials, sec. 114 (ed. 1399). *Herbert* v. *Shaw* (4); *Earl of Falmouth* v. *Roberts* (5); *Peermain* v. *Mackay* (6).

The finding of the jury upon the main point is really a finding in appellant's favour; or if that is too broad a statement, it is clear that the jury have dis-

(1) 6 B. C. Rep. 505.
(2) 30 Can. S. C. R. 334.
(3) 2 Salk, 648.
(4) 11 Mod. 118.
(5) 9 M. & W. 469.
(6) 5 Jur. 491.

1903

DUNSMUIR v. LOWENBERG, HARRIS & CO.

regarded what was the only evidence they could possibly have found upon. They expressly state that their verdict is founded upon evidence which did not and could not bear upon the issue found. They answered: "In view of concessions made subsequently, we believe there was a promise of fair treatment in case of no sale." On this all-important point they find their verdict, not because they believed the only real evidence upon the point, but in consequence of "subsequent concessions." The general verdict does not affect the question; the jury might have declined to answer questions, but they did not, and their answers are a part of the verdict. They find the general verdict because they have come to certain conclusions regardless of the evidence.

The special findings are incomplete, inconclusive and contradictory both to each other and to the verdict, and upon the findings, the defendant is entitled to have a verdict or judgment entered for her in spite of the added general verdict in plaintiffs' favour. The jury only give the plaintiffs compensation for expenses incurred by them and for nothing else, although they sued also for compensation for work and labour. The verdict must, therefore, be taken to negative the claim actually made by the plaintiff Harris in his evidence for work and services, although according to his evidence his whole claim depended on the one promise. *Cobban Manufacturing Co.* v. *Canadian Pacific Railway Co.* (1); *McQuay* v. *Eastwood* (2), at page 406. They do not find as a fact that there was a distinct agreement by the defendant to pay compensation made "some time in the middle of the year 1890." The jury did not credit the evidence of the plaintiff Harris, and a promise of "fair treatment" does not impose any legal

(1) 26 O. R. 732; 23 Ont. App. R. 115; 22 Can. S. C. R. 132.

(2) 12 O. R. 402.

responsibility upon the defendant. See the remarks of McColl C.J. in this case (1), at page 513 of the report on the trial, also *Taylor* v. *Brewer* (2); *In re Vince* (3); *Croasdaile* v. *Hall* (4); *Briggs* v. *Newswander* (5). Moreover, there is no evidence whatever of any promise of fair treatment. The evidence of the plaintiff, Harris, was directed to proving a different contract entirely, and the jury have not seen fit to believe him; nor is there any allegation in the pleadings of any such contract. The jury clearly ignore the evidence of Harris that he was promised compensation for his time spent in endeavouring to sell the mine. The special findings are not consistent with a general finding in plaintiffs' favour, and entitle the defendant at least to a new trial. Where, from their answers it can be seen that the jury proceeded wrongly in coming to their verdict, or have found without proper or sufficient evidence, the verdict cannot stand. *Yorkshire Banking Co.* v. *Beatson & Mycock* (6), per Denman J., at p. 206, and in 5 C. P. D. 109, at pp. 126, 127; *Hutchison* v. *Bowker* (7); *Gordon* v. *Denison* (8).

The evidence is such that the jury, viewing the whole of it reasonably could not properly find a verdict for the plaintiffs, and a verdict for the defendant or judgment for her should have been entered by the trial judge; or at all events a new trial should be directed. *Metropolitan Ry. Co.* v. *Wright* (9); *Webster* v. *Friedeberg* (10); *Ferrand* v. *Bingley Local Board* (11); *Allcock* v. *Hall* (12); *Hiddle* v. *National*

(1) 6 B. C. R. 504.
(2) 1 M. & Sel. 290.
(3) [1892] 1 Q.B. 587; 2 Q.B. 478.
(4) 3 B. C. R. 384 at p. 392.
(5) 8 B. C. R. 402; 32 Can. S. C. R. 405.
(6) 4 C. P. D. 204.
(7) 5 M. & W. 535.
(8) 24 O. R. 576; 22 Ont. App. R. 315.
(9) 11 App. Cas. 152.
(10) 17 Q. B. D. 736.
(11) 8 Times L. R. 70.
(12) [1891] 1 Q. B. 444.

1903

DUNSMUIR v. LOWENBERG, HARRIS & CO.

Fire &c. Ins. Co. (1); *Campbell* v. *Cole* (2); *Grieve* v. *Molsons Bank* (3). The right to a new trial is not confined to cases where the jury have been "perverse" or have "misconducted themseves." Per Morris L.J. in *Jones* v. *Spencer* (4) at p. 538. This right is not affected by the fact that two juries had found for plaintiff. *Daun* v. *Simmins* (5).

The following cases are in point respecting a mistrial by reason of a juror having sat on a former trial. *Barrett* v. *Long* (6), at pp. 405, 414-415; *Bailey* v. *Macaulay* (7) at page 829.

The rule respecting the Privy Council interfering with verdicts said to be against the weight of evidence is referred to in *Lambkin* v. *South Eastern Rway. Co.* (8); *Archambault* v. *Archambault* (9); and shews that the two courts referred to are appellate courts, and not the finding of the trial court and one appellate court. Compare *Black* v. *Walker* (10); *Headford* v. *McClary Mfg. Co.* (11); *North British Mercantile Insurance Co.* v. *Tourville* (12); *Lefeunteum* v. *Beaudoin* (13); *City of Montreal* v. *Cadieux* (14); *Russell* v. *Lefrancois* (15). It is the duty of the final court of appeal to review the decisions of the lower courts where they turn on proper inferences to be drawn from the evidence; *Arpin* v. *The Queen* (16); *Hunter* v. *Corbett* (17); *Sutherland* v. *Black* (18); and *Smith* v. *McKay* (19), at page 613.

Bodwell K.C. for the respondents. As to the juror who sat on the previous trial, the knowledge of his

(1) [1896] A. C. 372.
(2) 7 O. R. 127.
(3) 8 O. R. 162.
(4) 77 L. T. 536.
(5) 40 L. T. 556.
(6) 3 H. L. Cas. 395.
(7) 13 Q. B. 815.
(8) 5 App. Cas. 352.
(9) [1902] A. C. 575.
(10) Cass. Dig. 768.
(11) 24 Can. S. C. R. 291.
(12) 25 Can. S. C. R. 177.
(13) 28 Can. S. C. R. 89.
(14) 29 Can. S. C. R. 616.
(15) 8 Can. S. C. R. 335.
(16) 14 Can. S. C. R. 736.
(17) 7 U. C. Q. B. 75.
(18) 10 U. C. Q. B. 515; 11 U. C. Q. B. 243.
(19) 10 U. C. Q. B. 412.

disqualification must be imputed to the defendant and we must assume that she waived the objection. *Brown* v. *Sheppard* (1).

The question at issue was one for the jury altogether and rested entirely upon the credibility of the witnesses. The jury has chosen to believe Harris, and they are the sole judges. *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery* (2) at pages 1201 and 1202; *Commissioner of Railways* v. *Brown* (3); *Australian Newspaper Company* v. *Bennett* (4); *Dunsmuir* v. *Lowenberg, Harris & Co.* (5). The jury intended to give a general verdict; they answered the questions out of deference to the expressed opinion of the Judge that they should do so, but it is clear from all circumstances that they did not intend that these questions should constitute their verdict. To establish the contention by the other side that the questions are contradictory, and that the findings shew that the jury had gone upon the wrong principle, the appellant must shew that the answers are so framed as to to be destructive of the verdict as a matter of law. All the authorities cited by the appellant when examined establish this. But the answers are entirely consistent with the general verdict. The answer to the first question is simply a statement of the process of reasoning by which the jury arrived at their conclusion, and is, in fact, an adoption by the verdict of the exact case made by the plaintiff on his evidence. The alleged written contract was merely a written instruction which contained a statement of the proposed price and terms, but was intended to be subject to variations by Harris using his best endeavors to effect a sale, should he be unable to find a purchaser on those terms.

(1) 13 U. C. Q. B. 178 at p. 180.
(2) 3 App. Cas. 1155.
(3) 13 App. Cas. 133.
(4) [1894] A. C. 284.
(5) 30 Can. S.C.R. 334.

1903

DUNSMUIR v. LOWENBERG, HARRIS & CO.

Even if the court should think that a different inference might have been properly drawn by the jury from the facts in evidence, it should refuse a new trial on the ground that so many trials have taken place and so many juries have pronounced in the plaintiff's favor. *Wight* v. *Moody* (1) at pp. 502 and 506; *Pender* v. *War Eagle Con. M. & D. Co.* (2). New trials have been persistently refused against the opinions of the courts below. The latest of a long series of decisons in this direction being :— *Rowan* v. *Toronto Ry. Co.* (3); *Fraser* v. *Drew* (4). The only cases where contrary rulings have been made are easily distinguishable. They are *Hardman* v. *Putnam* (5), where there was gross misdirection, the judge charging on the question of fraud which had not been raised in the pleadings; and *Griffiths* v. *Boscowitz* (6) also a case of misdirection and refusal to make a direction. In *Cowans* v. *Marshall* (7), there was also a misdirection and the jury failed to make any finding and no proof was made as to the particular act of negligence charged against the defendant. In *Peters* v. *Hamilton* (8) the court below was reversed on an order for a new trial and blamed for it.

This court has consistently held that reversals on mere questions of fact should not be made in the appellate courts unless there were findings so clearly erroneous as to shock a reasonable mind. *Bellechase Election Case* (9); *Ryan* v. *Ryan* (10); *Arpin* v. *The Queen* (11), approved in *North British & Mercantile Ins. Co.* v. *Tourville* (12) at page 192; *Titus* v. *Colville* (13);

(1) 6 U. C. C. P. 506.
(2) 7 B. C. R. 162.
(3) 29 Can. S.C.R. 717.
(4) 30 Can. S.C.R. 241.
(5) 18 Can. S.C.R. 714.
(6) 18 Can. S.C.R. 718.
(7) 28 Can. S.C.R. 161.
(8) Cas. Dig. 763.
(9) 5 Can. S. C. R. 91.
(10) 5 Can. S. C. R. 387, 406.
(11) 14 Can. S. C. R. 736.
(12) 25 Can. S. C. R. 177.
(13) 18 Can. S. C. R. 709.

Town of Levis v. *The Queen* (1); *Black* v. *Walker* (2): *The Queen* v. *Murphy* (3); *Paradis* v. *Corporation of Limoilou* (4); *Hamelin* v. *Bannerman* (5); *London Street Railway Co.* v. *Brown* (6); *D'Avignon* v. *Jones* (7); *McKelvey* v. *LeRoi Mining Co.* (8). Concurrent findings must not be disturbed: *Warner* v. *Murray* (9); *Schwersenski* v. *Vineberg* (10), approved in *The North British Mercantile Insurance Co.* v. *Tourville* (11), at page 192; *Bickford* v. *Hawkins* (12); *Quebec, Montmorency & Charlevois Railway Co.* v. *Mathieu* (13); *Bowker* v. *Laumeister* (14); *Bickford* v. *Howard* (15), and cases there cited by Taschereau J. Where there is conflicting testimony the findings of the trial judge are decisive: *Grasett* v. *Carter* (16). In *Parker* v. *Montreal City Passenger Ry. Co.* (17), this court reversed the judgment appealed from and restored the findings of fact and the judgment of the trial court because such findings ought not to have been interfered with. This decision was affirmed by the Privy Council which refused leave to appeal precisely because the issues were upon the findings as to fact (18). In *The Santanderino* v. *VanVert* (19), followed in *The Reliance* v. *Conwell* (20), it was held that even in doubtful cases findings of fact ought not to be interfered with. In the *Village of Granby* v. *Ménard* (21), the evidence was contradictory, and Girouard J., with whom all the judges

(1) 21 Can. S. C. R. 31.
(2) Cass. Dig. 768.
(3) Cass. Dig. 314.
(4) 30 Can. S. C. R. 405.
(5) 31 Can. S. C. R. 534.
(6) 31 Can. S. C. R. 642.
(7) 32 Can. S. C. R. 650.
(8) 32 Can. S. C. R. 664.
(9) 16 Can. S. C. R. 720.
(10) 19 Can. S. C. R. 243.
(11) 25 Can. S. C. R. 177.
(12) 19 Can. S. C. R. 362.
(13) 19 Can. S. C. R. 426.
(14) 20 Can. S. C. B. 175.
(15) Cass. Dig. 286.
(16) 10 Can. S. C. R. 105.
(17) Cass. Dig. 731.
(18) 6 Can. Gaz. 174.
(19) 23 Can. S. C. R. 145.
(20) 31 Can. S. C. R. 653.
(21) 31 Can. S. C. R. 14.

1903

DUNSMUIR v. LOWENBERG, HARRIS & CO.

concurred, set out the jurisprudence very fully. The findings of fact by the trial judge were restored in the face of adverse holdings by two appellate courts. This case was followed in *The Reliance* v. *Conwell* (1). In *Grand Trunk Railway Co.* v. *Weegar* (2), all the judges (see texts) held that findings of jury supported on a first appeal ought not to be disturbed, King J. going so far as to say that the findings bound this court (at p. 427), and Gwynne J. stating the same thing practically in his remarks. In *Toronto Railway Co.* v. *Balfour* (3), this court refused to interfere in a matter of procedure as to whether a verdict was special or general and refused to disturb a verdict as against weight of evidence after affirmance by the first court of appeal.

We distinguish the following cases:—*North British and Mercantile Ins. Co.* v. *Tourville* (4), was a case of mixed law and fact depending on an inference of fraud to be drawn from evidence, but the rule as to finality on mere findings of fact is there specially approved, at page 191 by Taschereau J. *Lefeunteum* v. *Beaudoin* (5), depended upon the admissibility of evidence and its appreciation. In *The City of Montreal* v. *Cadieux* (6) an exorbitant rate of remuneration had been allowed based on a corrupt system previously in vogue and thus it appears a great injustice had been caused to the ratepayers. It was not a jury case. (See p. 623 of report.) Taschereau J. very strongly dissented, citing high authority at p 619. See also *Bentley* v. *Peppard* (7).

THE CHIEF JUSTICE dissented from the judgment allowing the appeal and ordering a new trial.

(1) 31 Can. S. C. R. 653.
(2) 23 Can. S. C. R. 422.
(3) 32 Can. S. C. R. 239.
(4) 25 Can. S. C. R. 177.
(5) 28 Can. S. C. R. 89.
(6) 29 Can. S. C. R. 616.
(7) 33 Can. S. C. R. 444.

1903

DUNSMUIR v. LOWENBERG, HARRIS & CO.

Davies J.

SEDGEWICK J.—I agree with the judgment prepared by my brother Davies, but I wish to add that in my view the evidence overwhelmingly preponderates in favour of the appellant, and that upon that ground also the judgment of the court below should be reversed.

DAVIES J.—This was an appeal from the judgment of the Supreme Court of British Columbia refusing an application made by the appellant for a new trial. The action was tried before Mr. Justice Walkem and a special jury who returned a verdict for the respondents for $9,667.62. The case has been long before the courts and is now for the second time on appeal before us. This appeal has been twice argued, the second argument becoming necessary owing to the deaths of two of the judges who sat during the first hearing. The action was begun in 1894 and was originally brought to recover damages for the alleged prevention by the appellant of the sale of her colleries in British Columbia which she had entrusted to Harris, a member of the plaintiffs' firm to dispose of on certain terms. Large damages were awarded plaintiffs by the jury, but on appeal the full court set aside the verdict and ordered a new trial. At the second trial before the late Chief Justice McColl, and after the plaintiffs' claim as originally formulated had been amended by adding a claim on the alleged supplemental contract to pay all expenses in case no sale was effected, a non-suit was entered, but this was reversed by the full Court of British Columbia and a new trial ordered. On appeal to this court by the present appellants it was held that there was legal and admissible evidence of a parol agreement supplemental to both the commissions to sell the colleries—to that of the 18th of January, 1892, as well as that of the 18th September, 1890—making

1903

DUNSMUIR v. LOWENBERG, HARRIS & CO.

Davies J.

provision for a case which the written agreement did not contemplate. The appeal, therefore, was dismissed and the order for a new trial confirmed, but upon this one ground alone. The then Chief Justice who delivered the judgment of this court expressed his own strong opinion that there was no evidence whatever of the original case made by the respondents, that of undue interference with them by the appellant in their efforts to make a sale, and stated that as the order for the new trial in the court below proceeded upon this ground exclusively, had there been nothing else in the case the appeal ought to have succeeded.

At the third trial a great mass of testimony was again given in support of the original case, but the verdict of the jury was limited to findings in plaintiffs' favour on the alleged collateral agreement. I am of the opinion that this is the only branch of his case on which under the evidence the plaintiffs could possibly succeed and I mention the fact because, if the cause is again tried before a jury, I think the evidence should be confined to that one branch of the case, and a large amount of irrelevant evidence bearing on the claim for damages for alleged undue interference with the respondents in their efforts to make a sale of the colleries eliminated.

The appellants seek to set aside the last verdict on several grounds. In the view I take of the case however it is unnecessary for me to do more than deal with one of them, though I am quite in accord with the judgment of the full Court of British Columbia in holding that the fact of one of the jurors at this hearing having also sat on one of the former trials, is not *per se* a ground for disturbing the verdict. Under the practice in British Columbia the appellant had a double opportunity of challenging this juror and not having exercised her right at the proper time or given

satisfactory reasons for her neglect cannot now, when the verdict has gone against her, be heard upon the point.

The main questions in the appeal however, are, first: Was there any evidence to go to the jury of the collateral agreement to pay the respondent Harris his "expenses" or "compensation and expenses" in case there was no sale of the collieries? And if so, have the jury found that there was such an agreement? I agree that there was evidence on the point which it was the duty of the judge to submit to the jury and am unable to concur in the contention of the appellant's counsel that the weight of the evidence was so strongly against the plaintiff that the defendant was entitled to have judgment entered for her *non obstante veredicto*. It is not a question of the preponderance of the testimony, nor is it a question of how this court would find if the matter was open to them. The conduct and demeanour of the witnesses and the credibility and weight to be attached to their statements together with the correspondence and other written testimony, were matters peculiarly within the exclusive province of the jury, and if they had found one way or the other upon the issue this court would not, under the circumstances, have entered a judgment against their finding. But in my opinion there has not been any finding upon the only substantial issue open to the jury to find upon. The real dispute has not been tried, or, if tried, has not been passed upon by the jury. The learned judge told the jury that they could bring in a general verdict, but that he would leave certain specific questions to them in order the more clearly to determine the actual facts. The jury were not bound under the laws of British Columbia to answer these questions, but they acted upon the

1903

DUNSMUIR v. LOWENBERG, HARRIS & CO.

Davies J.

advice of the judge and did so. The first question was:

Did the defendant, Mrs. Dunsmuir, authorize the plaintiff, say in the middle of 1890, to "do his best" to sell her mine, and if so, was any compensation mentioned at the time?

Their answer was:

In view of concessions made subsequently, we believe there was a promise of fair treatment in case of no sale.

The question might possibly have been more definite and clear and have asked the jury to answer whether there was any verbal promise made by Mrs. Dunsmuir to Harris, on either of the occasions when the written commissions to sell the collieries were given or after the giving of either of such commissions to pay or allow Harris any and what compensation in case he failed to effect a sale. That was the vital point of the case on the answer to which the verdict depended. The onus of proving any such supplemental contract lay upon the plaintiff. He cannot recover unless the jury first find that such a supplemental promise or contract was in fact made. Now reading the answer the jury gave to the question put to them it will be seen that they carefully refrain from finding the existence of the alleged supplemental agreement or promise. All they find is a promise of fair treatment and that finding they base upon certain expressed reasons. Reasons for their finding they were not bound to give, and indeed it would have been better if they had not given any, because those they have given have been the subject of much pertinent criticism. But apart from their reasons which may appear more or less cogent or relevant, they failed to give either an affirmative or a negative answer to the question, or indeed any answer from which the court could properly infer the existence of the agreement or promise relied upon.

The promise found of "fair treatment in case of no sale" has no evidence whatever to support it, and strictly speaking if it amounts to anything is a finding against the specific collateral agreement plaintiff alleged had been come to and which he had either to prove or in case of failure suffer defeat. Whether there was or was not a promise of fair treatment in case of no sale was not an issue between the parties at all. If it was, a serious question which was raised by appellant's counsel had to be answered, namely, whether such a promise is capable of being enforced or given effect to. What is fair treatment, and who is to determine it? Such a question however need not be discussed now. The plaintiff did not claim, and no evidence whatever pointed to, any such promise. The plaintiff, Harris, said in one place he was promised his "*expenses and a fair remuneration*", and in another place "*his expenses*" in case no sale was effected by him. The plaintiff's evidence was the only evidence offered in support of the agreement. The defendant denied it Much collateral evidence was given to shew that such a promise was not and could not have been made. But the issue was plain and square and the jury were bound to find one way or the other. They did not do so but on the contrary found the promise was one of "fair treatment" only. As I have already said neither party contended this was the promise and no evidence supported it. In fact, in my opinion, the evidence as a whole strongly preponderated in defendant's favour on the point at issue. The jury's general verdict was a sympathetic one, but not one which could be upheld on such a special finding as they made. If the general verdict had stood alone it might be supported possibly on the ground that the jury had preferred to believe Harris rather than accept the evidence against him.

1903

DUNSMUIR v. LOWENBERG, HARRIS & CO.

Davies J.

But no such contention can prevail in the face of the specific finding they have come to.

The real issue not having therefore been passed upon or found one way or the other, the verdict cannot stand and there must be a new trial.

In view of the strong expressions of opinion that we have felt bound to give of the uselessness of the mass of evidence given with reference to the claim as originally framed, and of the fact that the issue is a simple and square one, was the promise made by the defendant to Harris as he alleges in case there was no sale, it is to be hoped that the evidence on the new trial can be materially lessened.

The learned counsel for the appellant contended very strenuously that some evidence had been wrongfully admitted and some excluded, and also that sufficient proof had not been given by plaintiff of his actual expenditure. It is obvious however that these questions do not in view of our decision require treatment at our hands now. They may safely be left to the tribunal, which will now dispose, I hope finally, of this much litigated dispute.

The appeal will be allowed with costs in this Court and in the full Court of British Columbia.

NESBITT J.—I concur with the judgment prepared by my brother Davies, with the additional observations by my brother Sedgewick.

KILLAM J.—In my opinion the appeal should be dismissed.

While a perusal of the printed report of the case naturally leads one to seriously doubt the correctness of the verdict, I do not think that the court should interfere with it.

1903

DUNSMUIR v. LOWENBERG, HARRIS & CO.

Killam J.

This court has already decided that, upon practically the same evidence for the plaintiff, there was a case for the jury. It was still so after the evidence for the defence was given.

The jury's finding that there was a promise of fair treatment in case of no sale is, of course, not a finding of a fact raising a liability by implication of law, but such a promise would warrant, I think, the inference of an agreement to remunerate, justifying a verdict for the plaintiff.

In this case, it was not a question of entering a judgment upon special findings, but there was a verdict involving the necessary inference.

I am not prepared to say that the verdict is so clearly unreasonable as to warrant its being set aside.

Appeal allowed with costs.

Solicitors for the appellant: *Tupper, Peters & Griffin.*

Solicitors for the respondents: *Bodwell & Duff.*

1903

*Oct. 27, 28.

*Dec. 9.

ELIZABETH JANE HOSKING AND OTHERS, (PLAINTIFFS) ..... } APPELLANTS;

AND

LE ROI No. 2, LIMITED, (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mining plans and surveys—Negligence of higher officials—Duty of absent owners—Operation of metalliferous mines—Common law liability—Employers liability Act—R. S. B. C. ch. 69, s. 3.

The provisions of the third section of the "Inspection of Metalliferous Mines Act, 1897," of British Columbia, do not impose upon an absent mine-owner the absolute duty of ascertaining that the plans for the working of the mine are accurate and sufficient and, unless the mine-owner is actually aware of inaccuracy or imperfections in such plans, he cannot be held responsible for the result of an accident occurring in consequence of the neglect of the proper officials to plat the plans up to date according to surveys.

The defendant company acquired a mine which had been previously worked by another company and provided a proper system of surveys and operation and employed competent superintendents and surveyors for the efficient carrying out of their system. An accident occurred in consequence of neglect to plat the working plans according to surveys made up to date, the inaccurate plans misleading the superintendent so that he ordered works to be carried out without sufficient information as to the situation of openings made or taking the necessary precautions to secure the safety of the men in the working places. The engineers who had made the surveys and omitted platting the information on the plans had left the employ of the company prior to the engagement of the deceased who was killed in the accident.

Held, Taschereau C.J. contra, that the employers not being charged with knowledge of the neglect of their officers to carry out the efficient system provided for the operation of their mine, could

*PRESENT:—Sir Elzéar Taschereau, C. J. and Sedgewick, Davies, Nesbitt and Killam JJ.

not be held responsible for the consequences of failure to provide complete and accurate plans of the mine.

Held, also, that negligence of the superintendent would be negligence of a co-employee of the person injured for which the employers would not be liable at common law, although there might be liability under the British Columbia "Employers' Liability Act" (R. S. B. C. ch. 69, sec. 3), for negligence on the part of the superintendent.

Judgment appealed from reversed and a new trial ordered, Taschereau C.J. being of opinion that a judgment should be entered in favour of the plaintiffs.

Per Taschereau C.J. An employee who has left the service of the common master cannot be regarded as a fellow workman of servants engaged subsequently.

APPEAL from the judgment of the Supreme Court of British Columbia, *in banco*, affirming the judgment of the trial court which, upon the findings of the jury, directed judgment to be entered for the defendant and dismissed the plaintiffs' action with costs.

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

J. Travers Lewis for the appellants. We cite the statutes of British Columbia, in point, and the decisions in *Wilson* v. *Merry* (1); *Johnson* v. *Lindsay* (2); *Bartonshill Coal Co.* v. *Reid* (3); *Swainson* v. *North Eastern Railway Co.* (4); *Charles* v. *Taylor* (5); *Wood* v. *Canadian Pacific Railway Co.* (6); *Smith* v. *Baker & Sons* (7); *Choate* v. *Ontario Rolling Mill Co.* (8). The plaintiffs submit that the manager and mine superintendent were negligent as to the surveys and in failing to get accurate information before placing men to work in a dangerous situation. A case at common law has been made or, alternatively, under the Employers' Liability Act and there is evidence to justify a judg-

(1) L. R. 1 H. L. Sc. 326.
(2) [1891] A. C. 371.
(3) 3 Macq. 266.
(4) 3 Ex. D. 341.
(5) 3 C. P. D. 492.
(6) 30 Can. S. C. R. 110.
(7) [1891] A. C. 325.
(8) 27 Ont. App. R. 155.

1903

HOSKING v. LE ROI No. 2.

ment for plaintiffs on the verdict. Again, if a judgment cannot be entered for plaintiffs, a new trial should be ordered for misdirection by the trial judge and mistrial.

Davis K.C. for the respondents. There is no liability for the default of the mine officials in respect to the plans. The accident was due to the negligence of the defendants' engineer and to that alone. The British Columbia Employers' Liability Act only applies to cases where personal injury is caused to a workman:—(1) By reason of defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for, or used in the business of the employer by reason of any defect in the construction of any stages, scaffolds, or other erections erected by or for the employer, or in the materials used in the construction thereof; or (2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or (3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or (4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by the employer or by any person delegated with the authority of the employer in that behalf; or (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive, engine, machine or train upon a railway, tramway or street railway.

Of these, the second case is the only one that could possibly be suggested but it does not apply, inasmuch as the superintendence referred to, as is shewn

by the English and Canadian authorities, and also by the interpretation clause of the Act itself (sec. 2, subsec. 1), is a superintendence over workmen, and the engineers were not persons exercising superintendence of that kind, nor indeed of any kind for that matter, and, moreover, neither of them is charged in the statement of claim with negligence in the exercise of any superintendence.

At common law, it is impossible for the plaintiff to recover inasmuch as the accident happened by reason of the negligence of a fellow-servant. The only duties cast upon an employer who does not personally superintend the work are to supply at the outset fit and proper premises, fit and proper appliances and machinery, a proper system and competent agents and officers. These things having been done the liability of the employer ceased. *Wilson* v. *Merry* (1). *Rajotte* v. *Canadian Pacific Railway Co.* (2); *Wood* v. *Canadian Pacific Railway Co.* (3); *Rudd* v. *Bell* (4); *Matthews* v. *Hamilton Powder Co.* (5); *Howells* v. *Landore Steel Co.* (6); *Hedley* v. *Pinkney & Sons S. S. Co.* (7).

The argument that the doctrine of common employment does not apply, because the so-called fellow-servants whose negligence caused the accident (that is, the engineers) were not in the defendants' employ at the time when the accident happened, or indeed while the person injured was working for the defendants, is of no force. That point is dealt with, though merely *obiter*, by Lord Cairns in *Wilson* v. *Merry* (1) at page 332.

THE CHIEF JUSTICE:—In this case the jury have found that the Company, acting without reasonable

(1) L. R. 1 H. L. Sc. 326.
(2) 5 Man. L. R 365.
(3) 6 B. C. Rep. 561; 30 Can. S. C. R. 110.
(4) 13 O. R. 47.
(5) 14 Ont. App. R. 261.
(6) L. R. 10 Q. B. 62.
(7) [1894] A. C. 222

1903

HOSKING v. LE ROI No. 2.

The Chief Justice.

care and skill, have been the cause of the accident complained of by their failure to provide proper and accurate working plans of the shaft wherein the accident occured.

That there is ample evidence to support that verdict, which is conceded to be a finding of negligence at common law, is not denied by the court whose judgment in favour of the respondent, notwithstanding that verdict, is appealed from.

The ground upon which the court reached their conclusion against the action is that these plans were made either by one Stewart or one Turnbull who were competent employees and must be considered as fellow-workmen of the appellant, as the court holds, though they had ceased to be in the service of the company before the appellant entered their service, and had not been employed since.

In my opinion that view of the law on the subject, taken by the judgment appealed from, is erroneous.

A fellow-servant in the common employment of a common master must be a co-worker, a collaborateur, and a collaborateur is one with whom a work is carried on, though it need not be in the same branch or department. An employee who has left the service of a company cannot be said to be a co-worker or a collaborateur of all its future employees. Yet, that is what the judgment appealed from necessarily imports. He has ceased to be a worker at all; therefore, he cannot be a co-worker.

In entering its service, an employee impliedly covenants to take upon himself the risks of the negligence of those working with him, with whose habits, conduct and competence he may, in the course of his employment, become acquainted or hear of, and against whose carelessness, listlessness, bad habits or incompetency he has an opportunity to protect him-

self as he may deem best. But he does not assume the consequences of all past negligent acts of his predecessors.

Then under the finding of the jury and the evidence, the respondents have committed a breach of the common law obligation that they impliedly contracted towards the appellant when he entered their service, of providing the adequate materials and a reasonably safe place in which he was to work and a reasonably safe system for the carrying on of the works in which they agreed to employ him. I would not think the operating of a mine of this kind, without a plan, or with a defective and deceiving plan, which is worse, a reasonably safe system of carrying on the operations.

And it is no defence to his claim for injuries received in the course of his employment, in consequence of their failure to fulfil such a positive duty, that the accident was the result of the negligence of some one else upon whom they relied for the performance of such duties that the law imposes upon them personally, whether they act, or have to act, in the matter through other persons or not.

I would allow the appeal with costs and grant the appellants' motion for judgment on the verdict of the jury with costs.

SEDGEWICK and DAVIES JJ. concurred in the judgment allowing the appeal and ordering a new trial for the reasons stated by Nesbitt J.

NESBITT J.—This action is brought under the Employers Liability Act, chapter 59 of the Revised Statutes of British Columbia (1897), and in the alternative at common law.

It is an action for damages resulting from the death of Charles Hosking which occurred on the 23rd day of

1903

HOSKING v. LE ROI No. 2.

Nesbitt J.

August, in the metalliferous mine called the 'Josie,' at Rossland, B.C., owned and operated by the respondent company, it having acquired this property in July, 1901.

The deceased, with three others, was working in the bottom of the Josie shaft sinking it deeper, and was 565 feet directly below the point in the Josie shaft where the 300 foot level runs into the Josie shaft; in the roof of this 300 foot level and directly under the Annie shaft (then not sunk down to the 300 foot level) were men working raising from the 300 foot level to the bottom of the Annie shaft.

The Annie shaft had been sunk by the respondents' predecessors in title and, as I read in the evidence, a certain amount of work had been done by the respondents; but, however this is, it is quite plain that at the date of the accident the foot of the Annie shaft was about 14½ feet from the top of the level. I extract from the evidence of William Thompson, the general superintendent and general manager of the mine:

Q. Now what was the distance between (producing exhibit 1) the foot of the Annie shaft and the top of the level marked on plan No. 1 as the 300 foot level?

A. Approximately about 14½ feet.

Q. How many feet—what would be the rock necessary to go through in making the upraise to connect with the Annie shaft?

A. About 12 feet.

Thompson, the general superintendent, gave Kenty, the mine superintendent, instructions to have the pumps repaired and put in this Annie shaft in order to pump water out which was in it while the work was proceeding in the up-raise from *the* 300 *foot level;* and apparently Kenty gave these instructions to the machinist who was getting the pumps ready preparatory to pumping in a proper manner. Thompson and Kenty thought that the bottom of the Annie shaft to which they were raising was about 75 feet above

the roof of the 300 foot level and consequently supposed they would have plenty of time to pump the water out while the work in the upraise was being proceeded with. That the upraise was made to the extent of about 12 feet when the next blast allowed the water from the Annie shaft to escape into the 300 foot level along which it rushed and descended upon the deceased with great force, who was working at the bottom of the Josie shaft, killing him. The questions given to the jury and their answers read as follows:

1. Q. Have the defendants or their servants done anything which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done?

A. Yes.

2. Q. If yes, what was it?

A. Failure of the defendant company to provide proper and accurate working plans of the Annie shaft, showing the distance between the roof of the 300 foot level and the bottom of the Annie shaft.

3. Q. Have the defendants or their servants by such act of commission or omission caused injury to the plaintiff?

A. Yes.

4. Q. If you find in answering the first question that the company or its servants was or were guilty of any act or omission, who was or were the persons, if any, who did such act or made such omission?

A. The defendant company.

5. Q. Damages, if any?

A. Total $5,000, divided as follows: Elizabeth Jane Hosking (widow), $3,000; William John Hosking (son), $1,150; Stanley Hosking (son), $850.

Upon this the trial judge, Mr. Justice Martin, gave judgment in favour of the defendants on the ground that the answers were answers solely referable to common law negligence, and that the negligence, if any, was the negligence of Turnbull in not properly platting the plan, and that this was negligence of a fellow employee.

This judgment was affirmed by the full Court of British Columbia.

1903

HOSKING v. LE ROI No. 2.

Nesbitt J.

The system as to plans as it was adopted is described by Thompson as follows:

Q. What method is usually adopted in large mines with respect to keeping track of work done in the mine; that is, to keep track of levels, tunnels, winzes and all that sort of thing?

A. Usually, the employment of a competent engineer who is held responsible for the correctness of the work.

Q. What are the duties of this competent engineer?

A. To make surveys; make his notes and plat the results.

Q. What was done in that regard in the Le Roi No. 2 from the time of the commencement of the work?

A. That was the method followed.

The previous owners had begun the sinking of the Annie shaft, and they had in their employ when they first began operations, a Mr. R. H. Stewart, then stated to be one of the best mine operators in the west, and he was succeeded by Mr. Turnbull (who is described as a competent man, a graduate of McGill University), and both of these gentlemen were subordinate and reported to Mr. Thompson. Their duties were to survey the mine and record the survey notes in books kept in the office for the purpose, and to plat and keep the plan up to date. At the time of the accident Mr. Thompson states that the notes were in existence in the office, and that these notes showed that the distance between the bottom of the Annie shaft and the top of the 300 foot level was 14½ feet. The survey engineers had neglected to plat these notes upon the plan and Mr. Thompson neglected to see that the vertical plan was up to date, and that his orders in that respect were complied with. He knew of the notes and that they were in existence, but he simply made a casual examination of an old report from which he gathered that there was a distance of 75 or more feet between the bottom of the Annie shaft and the 300 foot level, and so gave the negligent order to commence the upraise which I have described.

1903

HOSKING v. LE ROI No. 2.

Nesbitt J.

On appeal to this court it was argued for the first time that there had been a breach of the Metalliferous and Mines Act of British Columbia (1897) ch. 27, s. 23, in this that no accurate plan had been kept in the office of the company. In my opinion an examination of the language in this section shows that this contention is not tenable. The provisions of that section, instead of imposing upon the mine-owner the absolute duty to have accurate and sufficient plans, seem rather to support the view that such is not the absolute duty of the mine-owner himself since he is not liable to the penalty if he can show ignorance of the imperfection or inaccuracy.

The company provided a proper system of surveying and plan making and employed men, apparently efficient, to carry out the system.

Any inaccuracy or want of completeness in the plans would be due to the default of those so employed, of which an employer at a distance could not be expected to be aware. And it seems immaterial that there was a change of surveyor before the deceased came into the company's employ.

But even if there was negligence in the surveyor, the jury might well have found, also, negligence on the part of Thompson in not seeing that the system was properly carried out, as well as in giving the directions for the upraising, in the absence of accurate information respecting the Annie shaft, without having the water pumped out. This, at common law would be negligence of a co-employee for which the employer would not be responsible, but subsection (2) of section 3 of the "Employers' Liability Act" R. S. B. C. c. 69, imposes upon an employer responsibility for the negligence of any person who has any superintendence entrusted to him while in the exercise of such superintendence. And it is quite pos-

1903

HOSKING v. LE ROI No. 2.

Nesbitt J.

sible to treat the answer of the jury to the 4th question as including the negligence of any person for whose acts or omissions the company is responsible.

While the record of the case appears to justify the view of the court below, that the plaintiffs' case was directed mainly to establishing liability at common law, the learned judge who presided at the trial left it open to the jury to find for the plaintiffs under the Employers' Liability Act; and although the questions put to the jury did not distinctly point to any specific phase of the Act, the jury could have given answers clearly finding facts establishing liability under it. It does not appear that the plaintiffs have ever abandoned the alternative claim.

As there was not sufficient evidence to warrant judgment against the company upon the principles of the common law, and the damages assessed went beyond the limit allowed under the Employers' Liability Act, there could not well have been a judgment for the plaintiffs for any sum. But it appears to us that, as there was evidence warranting a verdict against the company under the statute, and as the findings of the jury do not negative the liability, the judgment should not stand.

The appeal should be allowed, with costs, and a new trial ordered, no costs of the appeal to the full court in British Columbia; costs of the former trial to abide the event.

KILLAM J. concurred in the opinion stated by Mr. Justice Nesbitt.

Appeal allowed with costs.

Solicitors for the appellants: *Taylor and O'Shea.*

Solicitor for the respondents: *J. Stillwell Clute.*

MANITOBA AND NORTH-WEST LAND CORPORATION (DEFENDANTS) ..... APPELLANTS;

AND

GEORGE DAVIDSON (PLAINTIFF)..... RESPONDENT.

1903

*Nov. 17.

*Nov. 30.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Principal and agent—Breach of duty—Secret profit.

D. represented to the manager of a land corporation that he could obtain a purchaser for a block of its land and was given the right to do so up to a fixed date. He negotiated with a purchaser who was anxious to buy but wanted time to arrange for funds. D. gave him time for which the purchaser agreed to pay $500. The sale was carried out and D. sued for his commission not having then received the $500.

Held, reversing the judgment appealed from (14 Man. L. R. 233) that the consent of D. to accept the $500 was a breach of his duty as agent for the corporation which disentitled him from recovering the commission.

APPEAL from a decision of the Court of King's Bench, Manitoba (1), affirming the verdict at the trial in favour of the plaintiff.

The material facts are stated in the above head-note and more fully in the judgment given on this appeal.

Aylesworth K.C. for the appellants. The plaintiff in obtaining a secret profit from the purchaser forfeited his commission. *Andrew* v. *Ramsay & Co.* (2); *Clergue* v. *Murray* (3).

George A. Elliott for the respondent cited *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.* (4).

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

(1) 14 Man. L. R. 232.
(2) 19 Times L. R. 620.
(3) 32 Can. S. C. R. 450.
(4) 10 Ch. App. 515.

1903

MANITOBA AND NORTH-WEST LAND CORPORATION v. DAVIDSON.

The judgment of the court was delivered by

NESBITT J.—This is an action for the recovery of a commission for the sale of land. The defendants are a company incorporated in England for the purpose of holding and selling real estate in the Province of Manitoba, and one Fry was the manager at Winnipeg with full authority to make contracts with reference to the sale of the company's lands. It appears by the evidence that the plaintiff represented to Fry that he had been in St. Paul, in the United States, and in communication with parties for buying land in Canada, and contemplated going back there shortly to effect sales to them. Plaintiff says that on the 21st January, 1902, Fry reserved or set aside some eighteen thousand acres of land near Churchbridge giving the plaintiff the exclusive right to sell the land until the 6th February. This was necessary in order to enable plaintiff to see the parties he had in view and give them time to examine the land and make up their mind as to purchasing as otherwise they might have their trip from St. Paul to the lands and after inspection come back to Winnipeg to find them sold to some other parties. This was on a Tuesday. On Friday, 24th January, one Grant came to the company's office and wanted to buy some land and eventually purchased ten thousand acres and thereupon stated to Mr. Fry that he would like to secure the other eighteen thousand acres, but he was not then in a position to deal. Mr. Fry then informed him that he could not deal with him as he had reserved the eighteen thousand acres for Mr. Davidson to have the opportunity up to the 6th February to make sales to parties in St. Paul Grant inquired where Davidson was and Fry went to the telephone and found that he was in Winnipeg and had not gone to St. Paul, and

stated to Grant that he would probably meet Davidson on the train going to St. Paul. On the evidence it was argued that this was in order to excite Grant to the belief that unless he closed at once the lots would be immediately put up to $4 per acre instead of $3.60, and as soon as the reservation to Davidson expired the instructions were to put up the price of the land to $4.00 per acre. On the following morning Davidson and Grant met in the Railway Securities Co's office and Fry, who happened into the room and immediately withdrew, stated that Davidson then informed him that the parties interested were the parties he had been in communication with in St. Paul, and gives this as a reason why he did not himself make the sale which was subsequently effected to Grant instead of stepping aside and allowing Davidson to take up the negotiations with Grant and complete the sale to Grant of the 18,000 acres. This is denied by Davidson, and the trial judge did not find that it was proven; and while the circumstances of the case would rather lead one to believe that Fry's conduct was otherwise unaccountable, I do not think it is necessary for the disposition of this appeal to deal with that phase of the question. Davidson stated that he ascertained in the Railway Securities office that Grant had already been buying real estate from Fry and that Grant wanted to buy 18,000 acres more; in fact he says 'I knew that he was very anxious to secure the 18,000 acres.' He says that Grant wanted time in which to make financial arrangements and to look over the lands, and Davidson then stated that he would not deal with any one else before the following Friday, 31st January, and what occurred is best said in Davidson's own language:

Q. What did you get for giving him this time?—A. From Mr. Grant?
Q. Yes?—A. $200. I didn't get anything.

1903

MANITOBA AND NORTH-WEST LAND CORPORATION v. DAVIDSON.

Nesbitt J.

Q. Which do you mean?—A. You say what did I get?

Q. Yes. You say you got $200?—A. Yes. I didn't get anything.

Q. You really mean you got a promise of $200?—A. Put it in that way.

Q. You asked for that $200 did you?—A. Well I will give you the conversation if you wish.

His Lordship—That will be the most satisfactory way.

Mr. Ewart—What was it?—A. When he spoke of the fact that they were not yet, or he was not yet, in a position to know definitely whether he could carry it out or not, and requested a sufficient time in which to go south and complete his organization, I told him that that was cutting off a large portion of my time-limit on the option I had to sell these lands, and if at that time they did not purchase why I might possibly fail in carrying out my negotiations with other people, and lose my sale. It was cutting off part of my time, and for that reason I thought it was worth something.

Q. The risk of losing a purchaser? A. The risk of granting that much of the time out of my time to negotiate with somebody else. And he said yes. He said yes it is, and he says I will just add $300 to that, and make it $500. I told him I thought it was worth $200. That was my suggestion, and he said, yes it is reasonable enough, I will just add $300 to that and make it $500. He said yes to my proposition of $200, that is reasonable enough; I will make it $300 more; that will make it $500 in all. He was very anxious to get the lands and secure them at that time.

Q. What did you say to that?—A. I said well it is purely optional with you. If you wish to give me the $500 why it is all right.

Q. Now you saw Mr. Fry the next day didn't you?—

Mr. Wilson.—The next day was Sunday.

Mr. Ewart.—Did you see Mr. Fry the same day?—A. Yes.

Q. Where?—A. At the office.

Q. Did you tell him about this $200?—A. No.

Q. Thought better not?—A. I did not consider the thing at all. I thought it was purely a matter between me and Mr. Grant.

Q. You told him about giving Grant the time?—A. Yes because he was interested in that feature of it.

Q. But you think that he was not interested in the $200?—A. No I could not see how he was.

Q. You never told him anything at all about it until he found it out?—A. I never told him, no.

Grant bought the land and paid the price $3.60 per acre. Davidson did not ask for his commission at the time of the closing of the sale, and if he had Fry says

that he would have paid it without demur. Fry was subsequently told by Mr. Grant about the $500 which had been referred to. I think that the non-receipt of the money makes no difference; the bargain was that he should get the money and it is that which would affect the mind of Davidson; he expected to get the money at the time and the question is: Does such a transaction as this disentitle him to the payment of his commission assuming that he is otherwise entitled to such a commission? I think the test is: Has the plaintiff by making such an undisclosed bargain in relation to his contract of service put himself in such a position that he has a temptation not faithfully to perform his duty to his employer? If he has, then the very consideration for the payment for his services is swept away. I think that the making of such a bargain necessarily put Davidson in a position where it was to his interest that Grant should become the purchaser, in which case he would receive not only the commission but $500 commission as a secret profit. It put him in a position where he was getting pay for the very time which the company were agreeing to pay him for while securing the purchaser, and his duty as agent was to get the highest price possible for his employer; and it is perfectly evident from his own statement that Grant was a person who was willing to pay at least $500 more for the property and probably a considerable advance on that. I cannot do better than quote the language of Lord Justice Cotton in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1).

It is suggested that we should be laying down new rules of morality and equity if we were to so hold. In my opinion if people have got an idea that such transactions can be properly entered into by an agent, the sooner they are disabused of that idea the better. If a servant, or a managing director, or any person who is authorized to act, and is acting, for another in the matter of any contract, receives, as

(1) 39 Ch. D. 339 at p. 357.

1903

MANITOBA AND NORTH-WEST LAND CORPORATION v. DAVIDSON.

Nesbitt J.

regards the contract. any sum, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and, in my opinion, it is a sufficient act to show that he cannot be trusted to perform the duties which he has undertaken as servant or agent. He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer.

And also in the same case Lord Justice Bowen says:

Now, there can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it.

And in a very recent case of *Andrew* v. *Ramsay & Co.* Lord Chief Justice Alverstone says:

This case turns on the broad principle that where a person was not entitled to say, "I have been acting as your agent and doing the work you have employed me to do," he cannot recover the commission promised to him. I consider that a principal is entitled to have an honest agent and that only an honest agent is entitled to receive his commission. If it turned out that a man was not acting entirely as agent for his principal, but was directly or indirectly working for the other party to the contract, in such a way as possibly to sacrifice, in whole or in part, the interests of his principal, he is not entitled to his commission.

I think that a person acting in a position of trust and confidence cannot too well understand that the above rules will be rigidly enforced.

The appeal should be allowed with costs in all courts.

Appeal allowed with costs.

Solicitors for the appellants: *Bradshaw, Richards & Affleck.*

Solicitor for the respondent: *George A. Elliott.*

(1) 19 Times L. R. 620.

WILLIAM THOMPSON AND ADAM PINCH, EXECUTORS OF THE LAST WILL AND TESTAMENT OF JOHN DAVID THEWES, DECEASED (PLAINTIFFS) ..... } APPELLANTS;

1903
*Nov. 18,19.
*Nov. 30.

AND

THOMAS COULTER (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action by executors — Evidence — Corroboration — R. S. O. [1897] *c. 73, s. 10.*

In an action by executors to recover money due from C. to the testator it was proved that the latter when ill in a hospital had sold a farm to C. and $1000 of the purchase money was deposited in a bank to testator's credit; that subsequently C. withdrew this money on an order from testator who died some weeks after when none was found on his person nor any record of its having been received by him. C. admitted having drawn out the money but swore that he had paid it over to testator but no other evidence of any kind was given of such payment.

Held, reversing the judgment of the Court of Appeal, that a *primâ facie* case having been made out against C. and his evidence not having been corroborated as required by R. S. O. [1897] ch. 73, sec. 10, the executors were entitled to judgment.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court in favour of the plaintiffs the verdict for defendant at the trial having been set aside.

The action by the executors of J. D. Thewes was to recover money alleged to be retained by defendant under the circumstances mentioned in the above headnote. Though respondent's counsel on the appeal contended that there was not sufficient proof of defend-

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

1903

THOMPSON v. COULTER.

ant having drawn the money out of the bank, the only substantial question to be decided was as to whether or not he had paid it over to Thewes, as his evidence of such payment was an admission that he had received it and he had also admitted it in other ways.

Hodgins K.C. for the appellants. Coulter having admitted that he obtained the money from the bank, the onus is on him to shew that he paid it over and his own testimony to that effect must be corroborated. *Stoddart* v. *Stoddart* (1); *In re Finch* (2); *McKay* v. *McKay* (3); *Tucker* v. *McMahon* (4); *Rawlinson* v. *Scoles* (5).

Aylesworth K.C. for the respondent. Plaintiffs only proved receipt of the money by defendant's admission and, if they take his evidence, they must accept it in full.

The conduct of Thewes in refraining from any inquiry about the money after he gave defendant the order is sufficient corroboration. *Radford* v. *MacDonald* (6); *Green* v. *McLeod* (7).

The judgment of the court was delivered by

KILLAM J.—It was argued before us that there was not such evidence of the defendant's liability as to enable the plaintiffs to invoke the aid of the statute preventing the defendant from obtaining a verdict or decision in his favour upon his own uncorroborated evidence, but I am of opinion that there was.

The defendant's depositions admitted that he had withdrawn the money from the bank, though he stated that this had been done at the request of Thewes who had informed him that he wished to use it. There was no clear statement that he had paid it to Thewes

(1) 39 U. C. Q. B. 203.
(2) 23 Ch. D. 267.
(3) 31 U. C. C. P. 1.
(4) 11 O. R. 718.
(5) 79 L. T. 350.
(6) 18 Ont. App. R. 167.
(7) 23 Ont. App. R. 676.

His own subsequent conduct in setting up the payment to the bank, both in conversation with the plaintiff Thompson and in his correspondence with the plaintiff's solicitor, without mentioning the withdrawal, and in failing to give any account or explanation when charged by the solicitor, over two months before action, with the withdrawal, was in my opinion clearly sufficient to enable the court to draw an inference against him.

A *primâ facie* case of liability for the money withdrawn was made out and the only direct evidence of its payment to Thewes was given by the defendant, who was not entitled to a decision in his favour without the corroboration which the statute requires.

The provision (R.S.O. [1897], c. 73, s. 10) is as follows:

In any action or proceeding by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

In my opinion this enactment demands corroborative evidence of a material character supporting the case to be proved by such "opposite or interested party" in order to entitle him to a "verdict, judgment or decision." Unless it supports that case, it cannot properly be said to "corroborate." A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case.

The direct testimony of a second witness is unnecessary; the corroboration may be afforded by circumstances. *McDonald* v. *McDonald* (1).

The expressions used by the learned judges of the Court of Appeal in *In re Finch* (2) appear to me applicable under this statute. Jessel, M.R., there said,

(1) 33 Can. S. C. R. 145. (2) 23 Ch. D. 267.

1903

THOMPSON v. COULTER.

Killam J.

as I understand, corroboration is some testimony proving a material point in the tertimony which is to be corroborated. It must not be testimony corroborating something else—something not material.

And Lindley L.J., said,

evidence which is consistent with two views does not seem to me to be coroborative of either.

In the present case there does not seem to me to be any evidence which can properly be treated as corroborating the defendant on the only point on which the onus was upon him, that as to the payment of the money to Thewes.

Except for the defendant's own testimony, all the evidence was consistent with the retention of the money by the defendant. The circumstances on which the Court of Appeal have relied as corroborative may possibly tend to make it seem improbable that the defendant took away and kept the money without Thewes' approval or consent, but they seem to me in no way inconsistent with the hypothesis that Thewes assented at the time to its retention by the defendant at his own request or for some purpose of Thewes.

In view of the course followed in this case, if anything had been presented on behalf of the defendant calculated to show that corroborative evidence could still be obtained, I think that he should have had a chance to produce it. This, however, has not been suggested, and I think that the appeal should be allowed and the judgment of the Divisional Court restored.

Appeal allowed with costs.

Solicitors for the appellants: *Davis & Healy.*

Solicitor for the respondent: *J. W. Hanna.*

ALFRED DICKIE (DEFENDANT).....APPELLANT; 1903

*Dec. 3.

AND

FOSTER CAMPBELL AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Rivers and streams—Floating logs—Damage by R. S. N. S. (1900) *c.* 95 *s.* 17—*Procedure—Charge to jury—New trial.*

Persons engaged in the floating or transmission of logs down rivers and streams under the authority of R.S.N.S. (1900) ch. 95 sec. 17 are liable for all damage caused thereby whether by negligence or otherwise, and the owner of the logs is not relieved from liability because the damage was done while the logs were being transmitted by another person under contract with him.

One ground of a motion for a new trial was misdirection in the charge to the jury. The trial judge reported to the full court that he had not made the remarks claimed to be misdirection and stated what he actually did say.

Held, that this proceeding was not objectionable and moreover it was a matter to be dealt with by the court appealed from whose ruling was not open to review.

Judgment of the Supreme Court of Nova Scotia (36 N. S. Rep. 40) affirmed.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) maintaining the judgment entered on a verdict for the plaintiff at the trial.

The plaintiffs are farmers residing and owning lands on the Stewiacke River, in the Municipality of Colchester, and the defendant is the owner of a mill lower down on the said river. The action was brought to recover damages from the defendant for injuries alleged to have been done to the plaintiffs' lands by logs of the

*PRESENT.—Sir Elzéar Taschereau C. J. and Sedgewick, Davies, Nesbitt and Killam JJ.

(1) 36 N. S. Rep. 40.

1903

DICKIE v. CAMPBELL.

defendant, on the drive in the Stewiacke River, floating on to the lands of the plaintiffs, and for injuries done to said lands in the removal of said logs.

The defendant by his pleadings denied specifically the acts alleged and set up that, in doing the several acts alleged, he was lawfully engaged in lumbering operations on the Stewiacke River, and that he was acting lawfully and did no damage,—that, if any damage was done, it was the result of inevitable accident. He also justified his acts under the provisions of section 17 of chapter 95 of the Revised Statutes of Nova Scotia, 1900, and under regulations adopted by the municipal council for the Municipality of Colchester.

Section 17, chapter 95, R. S. N. S., 1900, reads as follows:—

"Persons engaged in the floating and transmission of saw-logs and timber of every kind, down rivers, lakes, creeks, and streams, shall be entitled to have the reasonable use of and access to the banks of such rivers, creeks and streams, during such floating or transmission, and for the purpose of enabling such saw logs and timber to be floated or transmitted, and shall also have the right to enter into and upon the banks of, and lands adjoining such rivers, streams or creeks for the purpose of taking therefrom any saw-logs or timber that have come upon such banks and lands during such floating or transmission, and they shall not be liable for any but actual damage done by the floating, transmission, or removal of such saw-logs and timber, nor for any discoloration or impurity of the water caused by the floating or transmission of such saw-logs or timber, nor for any discoloration or impurity of the water caused by the floating or transmission of such saw-logs or timber, unless the same is caused by their wilful act."

1903

DICKIE v. CAMPBELL.

On the findings of the jury, which are set out in the judgment of the court, a verdict was entered for plaintiffs for $135. Defendant moved the full court for a new trial which was refused and he then appealed to the Supreme Court of Canada.

Harris K.C. for the appellant.

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

The judgment of the court was delivered by :—

THE CHIEF JUSTICE :—By section 17 of chap. 95 R. S. N. S. 1900, it is enacted that :

Persons engaged in the floating and transmission of saw-logs and timber of every kind, down rivers, lakes, creeks and streams, shall be entitled to have the reasonable use of and access to the banks of such rivers, creeks and streams, during such floating or transmission, and for the purpose of enabling such saw-logs and timber to be floated or transmitted, and shall also have the right to enter into and upon the banks of, and lands adjoining such rivers, streams or creeks for the purpose of taking therefrom any saw-logs or timber that have come upon such banks and lands during such floating or transmission, and they shall not be liable for any but actual damages done by the floating transmission or removal of such saw-logs and timber, nor for any discolouration or impurity of the water caused by the floating or transmission of such saw-logs or timber, unless the same is caused by their wilful act.

This action was brought by the respondents to recover damages from the appellant for damages caused to their lands, as they allege, in consequence of the appellant's doings in floating up and down the Stewiacke river logs belonging to the said appellant, and for damages done to respondents' lands by the removal of said logs.

The case was tried by Mr. Justice Townshend with a jury.

The learned trial judge submitted certain questions to them, which they answered as follows :

1. Did defendant's logs cause damage to the plaintiffs' lands by injuring and carrying away any portion of the banks of the river ?

1903

DICKIE v. CAMPBELL.

The Chief Justice.

Ans. They did.

If they did, what damages have plaintiffs suffered in consequence?

Ans. $100.

2. Did defendant use reasonable care in having his logs brought down the river to prevent them causing injury to plaintiffs' lands on the river bank?

Ans. No.

3. Did defendant use all proper care to keep his logs from going on the plaintiffs' lands?

Ans. No.

4. Did defendant remove logs which went on plaintiffs' land with all reasonable expedition?

Ans. No.

5. What damage was done to plaintiffs' land by the logs?

(1.) In the month of April?

Ans. $15.

(2.) In the month of May?

Ans. $20.

(3.) In years previous to 1900?

Ans. No damages proven.

Upon these findings judgment was subsequently entered in favour of the respondents for $135.

The appellant moved the court *in banco* to set aside the findings of the jury and for a new trial, but his motion was disallowed.

Hence the present appeal.

The first ground of the appellant's motion is on an alleged misdirection in the learned trial judge's charge to the jury. We disposed of that objection instanter at the hearing. It is based on a supposed charge by the learned judge, which he later reported to the full court not to have been made, sending at the same time the correct report of his charge. Now we do not see anything objectionable in this, as it appears on the record. Then this is a matter entirely within the province of the court appealed from, which cannot be reviewed by this court.

Another ground taken by the appellant is that damages were awarded against him for a period of five

years and that during some portion of that time the conveyance and floating of these logs was not done by him but by contractors. That contention is, under the circumstances of this case, unfounded.

There are no doubt cases whereby it is held, and we may assume it to be the law as a general rule, that when any one employs an independent contractor to do a lawful work he is not responsible for damages caused by the collateral negligence of the contractor. But there is no question of negligence in this case. The statute imposes upon the appellant the liability to all the damages that follow his exercise of the right thereby given to him whether he exercised all the care and diligence possible to avoid such damages or not. He, it is in evidence, was aware of the risk that attended his operations, and was under the law bound to see that proper means were taken to prevent injurious consequences thereof, and could not discharge himself of that liability upon the shoulders of his contractors. It cannot be that any one who intends to carry on operations which, though lawful, are of a nature to cause damages for which the law makes him liable, could have it in his power to get rid of the risks of such damages and of his liability therefor by simply having the operations put into execution by a contractor.

There are a number of cases cited in the respondents' factum on this point to which I need not refer in detail. The following may be added to them: *Maxwell* v. *British Thompson Houston Co.* (1); *Hill* v. *Tottenham Urban Dist. Coun.* (2); *Holliday* v. *The National Telephone Co.* (3); *The Snark* (4).

As to the ground of excess of damages, I do not believe it has been seriously taken. The jury under

(1) 18 Times L. R. 278.
(2) 15 Times L. R. 53.
(3) 15 Times L. R. 483.
(4) 16 Times L. R. 160.

1903

DICKIE v. CAMPBELL.

The Chief Justice.

the evidence did not show great excess of generosity in allowing the respondents $135.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Hugh Mackenzie.*

Solicitor for the respondents: *F. A. Lawrence.*

1903

*Dec. 2.
*Dec. 9.

THE CITY OF MONTREAL (PLAINTIFFS)..... ..... } APPELLANT;

AND

THE LAND AND LOAN COMPANY (DEFENDANTS)..... } RESPONDENT.

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

Appeal—Amount in dispute—Local improvements—Assessment—Title to land—Future rights.

In proceedings by the City of Montreal to collect the amount assessed on defendants' land together with other lands assessed for local improvements, the defendants filed an opposition to the seizure of their land, alleging that the claim was prescibed. The opposition was maintained and the city appealed to the Supreme Court of Canada.

Held, that there was nothing in controversy between the parties but the amount assessed on defendant's land and, that amount being less than $2,000, the Court had no jurisdiction to entertain the appeal.

APPEAL from a decision of the Court of King's Bench appeal side, affirming the judgment of the Superior Court (1) in favour of the defendants.

The company, together with other land owners, were taxed under a special assessment for municipal purposes in Montreal in the sum of $316.88 and the sheriff was directed to levy for the amount of the

* PRESENT.—Sir Elzéar Taschereau, C.J. and Girouard, Davies, Nesbitt and Killam JJ.

(1) Q. R. 23 S. C. 461.

assessment by the seizure and sale of certain of their lands. The total amount to be levied upon all the property affected by the special assessment roll for this tax exceeded $50,000 and the value of the defendants' land seized, under the proceedings taken, exceeded $2,000.

An opposition to the seizure was filed by the company alleging that the city's claim was prescribed. This opposition was maintained by the Superior Court (Doherty J.) and his judgment was affirmed by the Court of King's Bench. The city then appealed to the Supreme Court of Canada.

Elliott, for the respondents, moved to quash the appeal, contending that the sum of $316.88 only was in dispute and citing *Gilbert* v. *Gilman* (1); *Dominion Salvage Co.* v. *Brown* (2); *Rodier* v. *Lapierre* (3); *Raphael* v. *Maclaren* (4), and *Macdonald* v. *Galivan* (5).

Atwater K. C. contra. The validity of the whole assessment is involved in this appeal and future rights are bound by the judgment of the Court of King's Bench. See *Ecclésiastiques de St. Sulpice* v. *City of Montreal* (6); *Turcotte* v. *Dansereau* (7).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—Motion to quash upon the ground that, under sec. 29 of the Supreme Court Act, the case is not appealable.

The proceedings in question originated under the enactments of sec. 396 *et seq.* of the charter of the City of Montreal, by a demand from the city, appellant, calling upon the sheriff to seize in execution and sell certain of the respondents' lands upon which the city

(1) 16 Can. S. C. R. 189.
(2) 20 Can. S. C. R. 203.
(3) 21 Can. S. C. R. 69.
(4) 27 Can. S. C. R. 319.
(5) 28 Can. S. C. R. 258.
(6) 16 Can. S. C. R. 399.
(7) 26 Can. S. C. R. 578.

1903

CITY OF MONTREAL v. LAND AND LOAN CO.

THE Chief Justice.

claimed the sum of $316.88 for a special assessment thereon.

The total amount of the assessment roll upon all the properties affected thereby exceeds $50,000. The property seized by the sheriff at the appellants' said demand exceeds $2,000 in value.

The respondents filed an opposition to the said seizure by which they alleged that the appellants' claim was prescribed, and could not be enforced, and asked that the sheriff's proceedings be therefore set aside.

Upon issue joined, the Superior Court maintained the respondents' opposition, and that judgment was affirmed by the Court of King's Bench. The City have brought the present appeal from the judgment of the Court of King's Bench.

We have no jurisdiction to entertain it. There has been and there is nothing more in controversy between the parties than a sum of $316. The whole amount of the roll is not in controversy. The roll itself is not controverted and the judgment in this case cannot affect in any way the other parties to it. The appellants invoke the rights of third parties, or rather their own rights against third parties in support of their right to appeal, but those rights *inter alios* or *contra alios* cannot be looked at as a criterion of our jurisdiction. It is the amount in controversy between the parties to the record that governs in this case on the subject. *Flatt* v. *Ferland* (1); *Lachance* v. *La Société de Prêts, etc.* (2); *Gendron* v. *McDougall* (3) as explained in *Kinghorn* v. *Larue* (4). The value of the land seized in execution is not the amount in controversy, as the appellant would contend. *Bank of Toronto* v. *Les Curé etc. de la Nativité* (5); *Champoux* v. *Lapierre* (6); *Flatt* v. *Ferland* (1);

(1) 21 Can. S. C. R. 32.
(2) 26 Can. S. C. R. 200.
(3) Cas. Dig. 2 ed. 429.
(4) 22 Can. S. C. R. 347.
(5) 12 Can. S. C. R. 25.
(6) Cas. Dig. 2 ed. 426.

The County of Verchères v. *The Village of Varennes* (1). Nor does the controversy relate to any title to lands, annual rents and other matters or things where the rights in future, *ejusdem generis of the parties to the controversy*, might be bound. *O'Dell* v. *Gregory* (2); *Raphael* v. *Maclaren* (3); *Jermyn* v. *Tew* (4); *Canadian Mutual Loan and Investment Co.* v. *Lee* (5); *Waters* v. *Manigault* (6).

It is settled law that neither the probative force of a judgment nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment, are to be taken into consideration when our jurisdiction depends upon the pecuniary amount or upon any of the subjects mentioned in sec. 29 of the Act. *Toussignant* v. *Nicolet* (7).

Motion to quash granted with costs.

Appeal quashed with costs.

Solicitor for the appellants: *Coyle & Tétreau.*

Solicitor for the respondents: *Henry J. Elliott.*

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(1) 19 Can. S. C. R. 365.
(2) 24 Can. S. C. R. 661.
(3) 27 Can. S. C. R. 319.
(4) 28 Can. S. C. R. 497.
(5) 34 Can. S. C. R. 224.
(6) 30 Can. S. C. R. 304.
(7) 32 Can. S. C. R. 353.

1903

*Dec. 2.
*Dec. 9.

ANTONIA WINTELER (PLAINTIFF) } APPELLANT;

AND

RANDALL J. DAVIDSON AND OTHERS (DEFENDANTS)..... } RESPONDENTS;

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

Appeal—Jurisdiction—Amount in controversy—Future rights.

Though the amount in controversy on an appeal from the Province of Quebec may exceed $2,000, yet if the amount demanded in the action is less, the Supreme Court of Canada has no jurisdiction to entertain the appeal.

In an action *en séparation de corps*, the decree granted $1,500 per annum as alimony to the wife and, her husband having died, she brought suit to enforce the judgment as executory against his universal legatees. Judgment having been given against her by the Court of King's Bench, she sought an appeal to the Supreme Court of Canada.

Held, that the further payments to which she would have been entitled had she been successful in her suit were not "future rights" which might be bound within the meaning of R. S. C., ch. 135, sec. 29.

APPEAL from a decision of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court in favour of the plaintiff.

The material facts of the case are stated in the above head-note, the only question between the parties being whether or not the plaintiff could enforce a decree obtained against her deceased husband for alimony, against his executors and universal legatees, the annuity having been paid to her for several years and less than one year's payment being due when the suit was commenced.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

1903

WINTELER v. DAVIDSON.

Lafleur K.C. for the respondents, moved to quash the appeal, citing *La Banque du Peuple* v. *Trottier* (1); *Rodier* v. *Lapierre* (2); *O'Dell* v. *Gregory* (3); *Raphael* v. *Maclaren* (4).

Hibbard contra. If we succeed on this appeal we will be entitled to over $3,000 which is more than the Act requires to entitle us to an appeal. Moreover, future rights are bound by the judgment. See *Donohue* v. *Donohue* (5); *Turcotte* v. *Dansereau* (6).

The judgment of the court was delivered by:

THE CHIEF JUSTICE:—This is a motion by respondents to quash the appeal for want of jurisdiction.

The case is presented upon the following admitted facts.

In June 1891, the late Thomas Davidson was condemned by a judgment of the Superior Court to pay to his wife, the present appellant, during her life time, an annuity of $1,500 in quarterly payments of $375. Davidson died in November 1901. The respondents are his universal legatees; and the appellant claims the right to execute against them her said judgment against her late husband for the instalments of her annuity accrued since his death.

A joint case to have her contentions judicially determined was agreed upon between the parties under secs. 509 *et seq.* of the Code of Procedure, and submitted to the Superior Court in February 1902. After hearing the parties, the Court, in October 1902, upheld the appellant's contention, but the Court of King's Bench reversed that judgment and declared that the respondents were not liable for her said annuity. She now brings the present appeal from that judgment of

(1) 28 Can. S. C. R. 422.
(2) 21 Can. S. C. R. 69.
(3) 24 Can. S. C. R. 661.
(4) 27 Can. S. C. R. 319.
(5) 33 Can. S. C. R. 134.
(6) 26 Can. S. C. R. 578.

1903

WINTELER v. DAVIDSON.

The Chief Justice.

the Court of King's Bench. The respondents move to quash it on two grounds: 1st. That no appeal lies from decisions or judgments rendered under the said sections of the Code of Procedure, citing *Attorney General of Nova Scotia* v. *Gregory* (1); *Canadian Pacific Railway Co.* v. *Fleming* (2); *Union Colliery Co.* v. *Attorney General of British Columbia* (3). See also *The City of Halifax* v. *Lithgow* (4):—2ndly. That, in this case, the amount originally demanded by the appellant from them, and then in controversy, was less than $2,000 and that, therefore, the case is not appealable, though the amount for the instalments of the said annuity accrued since the date of the submission to the Superior Court would now exceed $2,000.

The motion to quash has to be allowed upon this last ground; it is unnecessary, therefore, to pass upon the first ground.

The statute is clear that as to Quebec appeals when the right of appeal is dependent upon the amount in dispute, as in this case, such amount must be understood to be the amount demanded and not the amount recovered and in controversy upon the appeal, if they are different. It is not the amount *involved* that governs but the actual amount originally in controversy in the case between the parties

So that in a case where the amount originally demanded exceeded $2,000, but where the amount recovered was but $100, as we had lately in the case of *Coghlin* v. *La Fonderie de Joliette*, (5) for instance, we have jurisdiction, though the amount in controversy on the appeal is but $100. And, *a converso*, in a case where the amount demanded was under $2,000, but the amount in con-

(1) 11 App. Cas. 229.
(2) 22 Can. S. C. R. 33.
(3) 27 Can. S. C. R. 637.
(4) 26 Can. S. C. R. 336.
(5) 34 Can. S. C. R. 153.

troversy on the appeal here is over that sum, say for accrued interest or, as in this case, for instalments accrued since the date of the action, the case is not appealable. In both cases it is the amount originally demanded that governs. *Dufresne* v. *Guevremont* (1); *The Citizens' Light & Power Co.* v. *Parent* (2).

Now here, the pecuniary amount of the appellant's claim at the date of the stated case or submission to the Superior Court, three months only after her husband's death, was less than $2,000 and the submission must be taken as an action of that date. Consequently, the amount originally demanded by her being less than $2,000, no appeal lies from the judgment of the Court of King's Bench, though the amount of the instalments of her annuity accrued since her original demand now exceeds $2,000.

The appellant further contended at bar that her appeal lies on the ground that future rights are involved in the controversy, because, as argued in support of that contention, the judgment of the Court of King's Bench, irrespectively of amount, will in the future be *res judicata* against her claim. But the constant jurisprudence of the Court militates against that contention. An action claiming the right to an annuity is not appealable. In fact, it is not the amount that is in controversy here. It is the abstract right to the annuity. The amount would be but the consequence of the judgment if the appellant succeeded in having her judgment against her late husband declared executory against the respondents. I refer to amongst others: *Chagnon* v. *Normand* (3); *Rodier* v. *Lapierre* (4); *O'Dell* v. *Gregory* (5); *Macdonald* v. *Galivan* (6); *La Banque du Peuple* v. *Trottier* (7); *Talbot* v. *Guilmartin*

(1) 26 Can. S. C. R. 216.
(2) 27 Can. S. C. R. 316.
(3) 16 Can. S. C. R. 661.
(4) 21 Can. S. C. R, 69.
(5) 24 Can. S. C. R. 661.
(6) 28 Can. S. C. R. 258.
(7) 28 Can. S. C. R. 422.

1903

WINTELER v. DAVIDSON.

The Chief Justice.

(1); Comp. *Brown* v. *The Dominion Salvage and Wrecking Co.* v. *Brown* (2); *In re Marois* (3).

A case that is not appealable and a case appealable but not appealed from, are on the same footing as to *res judicata*. If the simple fact that a judgment is *res judicata* when any *solvendum in futuro* is affected by it, made it appealable, an appeal would lie in every such case even where the payments in future would amount to less than $2,000. But that is not so where as in this case the amount in controversy, the *debitum in præsenti* is the criterion of our jurisdiction. And where rights in future are involved in support of the right of appeal, they must not be, under the authorities above quoted, merely personal rights as the appellant's here clearly are.

The motion to quash must be allowed with costs.

Appeal quashed with costs.

Solicitor for the appellant: *F. W. Hibbard.*

Solicitors for the respondents: *Lafleur, MacDougall & MacFarlane.*

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(1) 30 Can. S. C. R. 482. (2) 20 Can. S. C. R. 203.
(3) 15 Moo. P. C. 189.

F. D. CREESE AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

TOBIAS FLEISCHMAN AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1903
*Dec. 2, 3.
*Dec. 9.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Appeal—Discretion—Amendment—Formal judgment.

The Supreme Court should not interfere with the exercise of discretion by a provincial court in refusing to amend its formal judgment. Such amendment is not necessary in a mining case where the mining regulations operate to give the judgment the same effect as it would have if amended.

APPEAL from a decision of the Territorial Court of the Yukon Territory refusing to amend the certificate of judgment on application of the defendants.

The action between plaintiffs and defendants was to define the boundary between the plaintiffs' hill-claim and the defendants' creek-claims, under sections 10 and 13 of the placer mining regulations of 18th January, 1898. The plaintiffs claimed that this should be a line along the surface and established by surface indications. The defendants claimed that this line should be a line along bed-rock established where bed-rock rose three feet above the lowest general level of the opposite gulch.

The reasons for judgment of the trial judge established the defendants' claim and the judgment as drawn up contained the following paragraph:

"And it is also adjudged and declared, that the side boundaries of said defendants' gulch-claims, as against the plaintiffs, are lines three feet higher than the lowest general level of the gulch existing on the surface of said claims at the time of plaintiffs' staking."

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Nesbitt and Killam JJ.

1903

CREESE v. FLEISCHMAN.

The application was to correct the certificate of judgment so that the date thereof might read the 5th day of August, 1901, instead of the 26th day of August, 1901, and by inserting the words "along bed-rock" between the words "lines" and "three," in the above clause of said certificate

After this judgment was entered, one Berry bought into the plaintiff's claim knowing, as he admitted at the trial, of the alleged defect in the judgment and wishing to take advantage of it. The Territorial Court refused the amendment as Berry was not before them. The plaintiffs appealed.

J. Travers Lewis for the appellants. As to the power of the court to amend, see *Wilding* v. *Sanderson* (1); *Norris* v. *Lord Dudley Stuart* (2).

Berry was not a *bonâ fide* purchaser and the amendment may be made in his absence. See *In re Swire* (3); *Hatton* v. *Harris* (4); *Stewart* v. *Rhodes.* (5).

Russell K.C. and *Haydon* for the respondents. This is purely a question of procedure with which this court will not interfere. *Toronto Railway Co.* v. *Balfour* (6); *Attorney General of Ontario* v. *Scully* (7).

Moreover, it was a matter for the exercise of discretion by the Territorial Court. *Ryan* v. *Fish* (8).

The amendment cannot be made in the absence of Berry. *Hatton* v. *Harris* (4); *Gorton* v. *Hall* (9).

THE CHIEF JUSTICE.—I would dismiss this appeal (assuming that we have jurisdiction to entertain it), on the ground that a motion, like this one, to a court asking that court to vary, add to, or alter its judgment as entered so as to make it determine what the court intended to determine is particularly within the pro-

(1) [1897] 2 Ch. 534.
(2) 16 Beav. 359.
(3) 30 Ch. D. 239.
(4) [1892] A. C. 547.
(5) [1900] 1 Ch. 386.
(6) 32 Can. S. C. R. 239.
(7) 33 Can. S. C. R. 16.
(8) 9 Ont. P. R. 458.
(9) 11 W. R. 281.

vince of that court, and its ruling on such a motion should not be interfered with. I refrain from adding any other remark, as Berry is not a party to this record and his contentions cannot be passed upon in his absence.

1903
CREESE
v.
FLEISCHMAN.
The Chief Justice.

GIROUARD J.—In this case, involving a point of local practice, we feel that we cannot interfere, especially as that part of the judgment sought to be rectified cannot cause any injury to the appellants. By that judgment the Territorial Court of the Yukon Territory has found that the appellants' claim was "a gulch" within the meaning of the regulations governing placer mining in the provisional district of the Yukon, approved by Order in Council of 18th January, 1898. Regulation 10 defines the nature, size and boundaries of such a gulch claim, which cannot be ignored by the court or the parties. There was not in our view any necessity for the motion to amend and it follows that third parties could not set up any claim involving a different interpretation in this case from that which would be applied as between the parties themselves, nor attempt to take possession of an area which, as the court below determined, was to be fixed by clause 10 of regulations. The appeal is dismissed, but under the special circumstances of the case and as the respondents opposed the motion to rectify and occasioned unnecessary costs, it is dismissed without costs in this court and in the court appealed from. Good faith demands such a conclusion even as to costs in the court below.

SEDGEWICK, NESBITT and KILLAM JJ. concurred for the reasons stated by Girouard J.

Appeal dismissed without costs.

Solicitors for the appellants: *Woodworth & Black.*

Solicitor for the respondents: *Herbert E. Robertson.*

1903
*Dec. 11.

THE ATTORNEY GENERAL FOR QUEBEC AND THE CITY OF HULL..... } APPELLANTS;

AND

JANET LOUISA SCOTT AND OTHERS..... } RESPONDENTS.

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

Appeal—Time for bringing appeal—Delays occasioned by the court—Jurisdiction—Controversy involved—Title to land.

An action *au petitoire* was brought by the City of Hull against the respondents claiming certain real property which the Government of Quebec had sold and granted to the city for the sum of $1000. The Attorney General for Quebec was permitted to intervene and take up the *fait et cause* of the plaintiffs without being formally summoned in warranty. The judgment appealed from was pronounced on the 25th of September, 1903. Notice of appeal on behalf of both the plaintiff and the intervenant was given on 3rd November, and notice that securities would be put in no 10th November, 1903, on which latter date, the parties were heard on the applications for leave to appeal and for approval of securities before Würtéle J. who reserved his decision until one day after the expiration of the sixty days immediately following the date of the judgment appealed from and, on the 25th of November, 1903, granted leave for the appeals and approved the securities filed.

Held, that the appellants could not be prejudiced by the delay of the judge, in deciding upon the application, until after the expiration of the sixty days allowed for bringing the appeals and, following *Couture* v. *Bouchard* (21 Can. S. C. R. 281) that the judgment approving the securities and granting leave for the appeals must be treated as if it had been rendered within the time limited for appealing when the applications were made and taken *en delibéré*.

Held also, that as the controversy between the parties related to a title to real estate, both appeals would lie to the Supreme Court of

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Nesbitt and Killam JJ.

Canada notwithstanding the fact that the liability of the intervenant might be merely for the reimbursement of a sum less than $2000.

MOTION to quash appeal from the judgment of the Court of King's Bench, appeal side, rendered on the 25th of September, 1903, affirming the judgment of the Superior Court, District of Ottawa, Curran J. (1), which dismissed the plaintiff's action and the intervention therein, with costs.

The circumstances of the case are fully stated in the Superior Court judgment (1), and summarized in the judgment of the court delivered by His Lordship Mr. Justice Girouard which is now reported.

Aylen K.C. for the motion.

Belcourt K.C. contra.

The judgment of the court was delivered by

GIROUARD J.—This is a motion to quash an appeal for two reasons: First, because the security was not put in within sixty days after the rendering of the judgment appealed from and; Secondly, because the judgment does not come within the provisions of the Supreme Court Act.

As to the first point, it is sufficient to say that notice of security was given on the 3rd November, 1903, to be put in on the 10th. Parties appeared on that day, but after hearing them, the judge took the application *en délibéré* till the 25th November, that is one day after the sixty days, when the security was allowed. We have already held in a case like this that parties cannot be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the day that the case was taken *en délibéré*. *Couture* v. *Bouchard* (2).

(1) Q. R. 24 S. C. 59.

(2) 21 Can. S. C. R. 281.

1903

ATTORNEY GENERAL FOR QUEBEC AND THE CITY OF HULL v. SCOTT.

Girouard J.

As to the second point, we are also against the respondents. An action in the nature of a petitory action was taken against respondents claiming, under a grant from the Quebec Government of the 2nd April, 1902, a certain bed of a creek known as Brigham's or Brewery creek, in the City of Hull. The Attorney General of Quebec was allowed to intervene in the case and to take *fait et cause* for the City of Hull, the plaintiffs, and thereby became plaintiff in the case without waiting till he was called in warranty.

The City of Hull has appealed and the respondents admit that this appeal exists, but contend that the Attorney General has no such appeal. The authorities quoted by them have no application. There is nothing in dispute in this case between the Government and the respondents but a title to land. The fact that this land may possibly remain in the hands of the respondents which would render the Quebec Government liable only for the reimbursement of the purchase money, namely, $1,000, and probably interest, is of no consequence, for this is not the point in dispute between the parties. The sole point in issue is the title to the bed of the creek. The motion, therefore, is dismissed with costs.

Motion dismissed with costs.

Solicitor for the Attorney General for Quebec, appellant: *L. J. Cannon.*

Solicitors for the City of Hull, appellant: *Foran & Champagne.*

Solicitors for the respondents: *Aylen & Duclos.*

HYACINTHE BEAUCHEMIN (DEFENDANT) ..... } APPELLANT;

AND

CHARLES N. ARMSTRONG (PLAINTIFF) ..... } RESPONDENT.

1904
*Feb. 16.
*Feb. 25.

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

Appeal— Jurisdiction—Amount in controversy—Supreme Court Act s. 29, s-s. 4.

Where the Court of King's Bench affirmed the judgment of the Superior Court dismissing the action but varied it by ordering the defendant to pay a portion of the costs :—

Held, that, though $2,217 was demanded by the action, the defendant had no appeal to the Supreme Court of Canada as the amount of the costs which he was ordered to pay was less than $2,000. *Allan* v. *Pratt* (13 App. Cas. 780), and *Monette* v. *Lefebvre* (16 Can. S. C. R. 387) followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming in part the judgment of the Superior Court, District of Montreal, which dismissed the plaintiff's action with costs.

The action was for $2,217, and was dismissed with costs by the trial court. On appeal, the trial court judgment was affirmed, except as to the condemnation against the plaintiff for costs, and a portion of the costs, amounting with interest to $631, was ordered to be borne by the defendant. The plaintiff acquiesced in the judgment of the Court of King's Bench and the present appeal was sought by the defendant.

N. K. Laflamme moved to quash the appeal for want of jurisdiction.

Perron, contra.

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*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

1904

BEAUCHEMIN v. ARMSTRONG.

The Chief Justice.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The respondent, Armstrong, brought the action to recover from the appellant, Beauchemin, a balance amounting to $2,217, claimed for the hire of a locomotive engine and two railway cars. In the Superior Court, the action was dismissed with costs. On appeal, the Superior Court judgment was in part affirmed by the court below, but the appeal was allowed as to costs and the present appellant was condemned to bear a portion of the costs incurred in the trial court. The amount of these costs and interest is $631.

The respondent, Armstrong, acquiesced in the judgment dismissing his action, but Beauchemin now attempts to assert an appeal from that portion of the judgment in the court below which condemned him to pay $631 of the costs although it had affirmed the dismissal of the action against him.

This is not a case where the amount demanded originally governs as to the jurisdictional pecuniary limitation under subsection 4 of section 29 of the Supreme Court Act, but it is a case falling within the decision of the Privy Council in *Allan* v. *Pratt* (1) which was followed by this court in the case of *Monette* v. *Lefebvre* (2).

The interest of the party appealing is for a sum less than $2,000 and, therefore, the appeal must be quashed.

Appeal quashed with costs.

Solicitors for the appellant: *Archer & Perron.*

Solicitor for the respondent: *N. K. Laflamme.*

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(1) 13 App. Cas. 780.

(2) 16 Can. S. C. R. 387.

THE ATTORNEY GENERAL FOR MANITOBA (PLAINTIFF)..... APPELLANT;

AND

THE ATTORNEY GENERAL FOR CANADA (DEFENDANT)..... RESPONDENT.

1903
*Nov. 30.

1904
*Feb. 16.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown lands—Settlement of Manitoba claims—48 & 49 *V.* c. 50 (*D.*)—49 *V.* c. 38 (*Man.*)—*Construction of statute—Title to lands—Operation of grant—Transfer in præsenti—Condition precedent—Ascertainment and identification of swamp lands—Revenues and emblements—Constitutional law.*

The first section of the "Act for the final Settlement of the Claims of the Province of Manitoba on the Dominion" (48 & 49 Vict. ch. 50) enacts that "all Crown Lands in Manitoba which may be shewn, to the satisfaction of the Dominion Government, to be swamp lands shall be transferred to the province and enure wholly to its benefit and uses."

Held, affirming the judgment appealed from (8 Ex. C. R. 337) Girouard and Killam JJ. dissenting, that the operation of the statutory conveyance in favour of the Province of Manitoba was suspended until such time or times as the lands in question were ascertained and identified as swamp lands and transferred as such by order of the Governor-General-in-Council, and that, in the meantime, the Government of Canada remained entitled to their administration and the revenues derived therefrom enured wholly to the benefit and use of the Dominion.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the plaintiff's action with costs.

The action was by statement of a claim made, on behalf of the Province of Manitoba, that on the proper

*PRESENT :—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

(1) 8 Ex. C. R. 337.

1903

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

construction of the "Act for the final Settlement of the Claims of the Province of Manitoba on the Dominion," (1) that province was entitled, as of right, to all the surface rights, hereditaments, timber, wood, hay and emblements upon and appertaining to all Crown lands in Manitoba which might, at any time, be shewn to the satisfaction of the Dominion Government to be swamp lands pursuant to the above mentioned statute and to various orders-in-council in relation to the selection and identification of the lands in question, and that the province was also entitled to certain moneys received by the Government of Canada through sales of the timber, wood, hay and emblements of the said lands, since the 20th day of July, 1885, (date of the assent to the statute,) with interest, subject only to the costs of administration and collection of revenues.

The contention on the part of the Government of Canada was that the statutory grant took effect only on the happening of the event of Crown lands in Manitoba being shewn, to the satisfaction of the Dominion Government, to be swamp lands and such lands, so ascertained, being identified and transferred to the province as such in the usual manner, by order-in-council, and that, until such transfer, the revenues from the lands in question enured wholly to the benefit and use of the Dominion of Canada.

In relation to the selection and transfer of the lands in question, an order by the Governor-General-in-Council was passed, on 19th June, 1896, as follows:

"On a Memorandum dated 14th May, 1886, from the Minister of the Interior, representing that it is expedient to settle the method to be adopted of making a selection of the swamp lands to be granted to the Government of the Province of Manitoba, under the Act passed in that behalf at the session of Parliament

(1) 48 & 49 Vict. ch. 50.

held in 1885 (48 & 49 Vict. ch. 50, sec. 1). The Minister observes that section 3 of chapter 84 of the "United States Statutes at Large," part 1, Public Laws 1845-1851, contains a provision having reference to the selection of swamp lands to be granted to certain states of the Union, which reads as follows: 'All legal sub-divisions, the greater part of which are subject to overflow and thereby rendered unfit for cultivation, shall be included in the list, but when the greater part of a sub-division is not of that character, the whole of it shall be excluded therefrom; (the legal sub-division in the United States' system of survey, as in the Canadian, consists of forty acres.) That the definition seems a fairly good one and would apply to the case now under consideration, and he, the Minister, recommends that it be adopted as applicable to the lands to be selected for the purpose of being granted to the Province of Manitoba, under the provisions of the Act 48 & 49 Vict. ch. 50, sec. 1, hereinbefore referred to.

"The Minister further observes that the United States' statute provides that the selection shall be subject to the approval of the Secretary of the Treasury; and the lands to be selected shall be such as are not held or claimed by individuals; that the selection shall be made by surveyors appointed for that purpose by the United States; that the expense of the selection shall be defrayed by the states interested; and that the lists and surveys, where surveys are necessary, shall also be made at the expense of the states interested.

"The Minister recommends that the selection necessary to make the grant to the Province of Manitoba shall be made by two surveyors, appointed for that purpose by the Minister of the Interior; that the two surveyors so appointed shall be paid, and the other expenses incident to the selection defrayed, by the Province of Manitoba; that the lands to be selected

1903

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

shall be swamp lands according to the definition hereinbefore recommended for adoption, and shall consist of unoccupied and unclaimed lands at the disposal of the Government of Canada; that the selection shall not commence to be made before the 20th of May in any one year and that whatever portion of such work is not completed by the 1st of October in the said year shall remain in abeyance until after the 20th of May in another year, and so on until the selection has been completed.

"That the surveyors, appointed as hereinbefore provided, shall report from time to time to the Minister of the Interior, until the whole grant to which the Government of Manitoba is entitled under the said Act 48 & 49 Vict., ch. 50, sec. 1, has been made up, and they shall furnish lists of the lands selected by them, and the said lists shall be subject to the approval of the Governor-in-Council upon reports made from time to time by the Minister of the Interior; and the signification in writing to the Lieutenant-Governor of Manitoba of the approval of such lists by His Excellency shall operate to vest the title in the lands described in the said lists in Her Majesty for the purposes of the Province of Manitoba.

"The committee concur in the foregoing report of the Minister of the Interior and the recommendations therein made, and they advise that the requisite authority be granted to carry the same into effect."

On the 16 April, 1888, the Minister of the Interior reported that the surveyors appointed for the purposes mentioned in the foregoing order-in-council had made a joint report on 16th Feb., 1888, submitting a revised and corrected list of certain lands selected by them as "swamp lands" for approval in accordance with the terms of the order-in-council, and the Governor-General-in-Council, thereupon, under the provisions of the

satute, 48 & 49 Vict., ch. 50, ordered that the lands mentioned in said list should be and become "vested in Her Majesty for the purposes of the Province of Manitoba." Subsequently other lands selected as "swamp lands" in like manner were transferred to the provincial government.

The defendant for the purposes of the suit admitted that: (1) Certain Crown lands in Manitoba were, in pursuance of 48 & 49 Vict., ch. 50, sec. 1, shewn to the satisfaction of the Dominion Government to be swamp lands and transferred to the province accordingly: (2) Between the 20th July, 1885, when the said Act received assent, and the various dates when the above mentioned transfers were made to the province, the Dominion Government received certain sums of money produced by the sale of timber, hay and other emblements off some of the said lands so transferred as aforesaid: (3) The Government of the Dominion has retained such sums of money to the use of the Crown for the purposes of the Dominion of Canada.

By the judgment appealed from (1) the Exchequer Court of Canada decided in favour of the defendant and the present appeal is asserted on behalf of the Province of Manitoba.

Daly K.C. and *J. Travers Lewis* for the appellant. To fully appreciate the question reference should be made to the orders-in-council passed prior to 48 & 49 Vict. ch. 50, and to the debates which took place in the House of Commons. The appellant craves leave to refer to these orders-in-council and debates, as found in "Hansard," because this is merely a controversy between the Crown, as represented in one right by the Dominion, and in the other by the Province of Manitoba, and not between subject and subject. The

(1) 8 Ex. C. R. 337.

1903

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

question in controversy concerns land vested in the Crown. No subject of the Crown is a party to this action; and, for these reasons, counsel should be permitted to refer to these orders-in-council in the "Hansard" debates.

It clearly appears, from the reference to and quotations made from the statutes of the United States, in the orders-in-council of 19th June, 1886, that it was the express intention and desire of the Government of Canada to pursue the same "policy" towards Manitoba in reference to these swamp lands that the Government of the United States had pursued towards the Western States of the Union, that Canada was to adopt the "American system," in dealing with the swamp lands in Manitoba. There were good reasons for this. The United States statute was passed in 1850. Numerous controversies had arisen in connection with the selection and administration of swamp lands, and valuable precedents were thus available, to which the Government might have reference in dealing with the lands. The physical features were similar and the system of surveys in the states affected is identical with the Dominion Lands surveys in Manitoba.

In the Act of Congress, granting the swamp lands to Arkansas and other states, the words "that there be and is hereby granted" are used in the enacting clause. These and other words of similar purport were advisedly omitted from the first section of the Dominion Act, as it was not necessary to use operative words of grant. See *The Queen* v. *Farwell* (1); *Attorney-General for British Columbia* v. *The Attorney-General for Canada* (2).

The words "shall be transferred to the province and enure wholly to its benefit and uses," in the Act

(1) 14 Can. S. C. R. 392.

(2) 14 Can. S. C. R. 345: 14 App. Cas. 295.

of 1885, have the same force and operative effect as the words, "that there be and is hereby granted," in the United States statutes, and, consequently, amounted to a grant *in præsenti*, of all "swamp lands" in the Province of Manitoba to the province, subject only to the Dominion Government being satisfied as to the character of lands. The lands passed to Manitoba on the day when the Act was assented to. The title became perfected when the lands were identified and vested by orders-in-council, the latter merely giving precision to the title. A statute amounting to a present grant does not require the formalities required in an ordinary grant of land to make it effective. *Rutherford* v. *Greene's Heirs* (1); *Lessieur etal* v. *Price* (2) at page 76 per Catron J.; *Railroad Co.* v. *Freemont County* (3); *Railroad Co.* v. *Smith* (4); *Schulenberg* v. *Harriman* (5); *Missouri K. & T. Railway Co.* v. *Kansas Pacific Railway Co.* (6).

The title to the lands remaining in the province, and the lumber and hay cut upon the land, as well as any other emblements, belong to the province.

In *Langdeau* v. *Hanes* (7) Field J. held (p. 530) that a legislative confirmation of a claim to land was a recognition of the validity of the claim, and operated as effectually as a grant or quitclaim and that the title there questioned was perfect long before the issue of a patent. *French* v. *Fyan* (8) follows the same construction as to the grant *in præsenti*. In *Wright* v. *Roseberry* (9) Field J. held that the grant of swamp lands to the several states was one *in præsenti* passing title to the lands from the date of the Act and requiring only identification to render title perfect. In

(1) 2 Wheat. 196.
(2) 12 How. 59.
(3) 9 Wall. 89.
(4) 9 Wall. 95.
(5) 21 Wall. 44.
(6) 97 U. S. R. 491.
(7) 21 Wall. 521.
(8) 93 U. S. R. 169.
(9) 121 U. S. 488.

1903

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

San Francisco Sav. Union v. *Irwin* (1) Field, J. held it to be a grant *in præsenti*, to each state then in the Union, of lands situated within its limits of the quality described, which could not be defeated, nor impaired, by the delay or refusal to have the list made and patent issued. See also *Southern Pacific Railroad Co.* v. *Orton* (2) at page 479; *Railroad Co.* v. *Baidwin* (3) at page 429; *Leavenworth L. & G. Railroad Co.* v. *United States* (4); *Denny* v. *Dodson* (5).

If this contention prevails, and the grant to Manitoba be held to have been a present grant, operating as an immediate transfer of the lands afterwards shewn to be swamp lands, then, from and after the 20th July, 1885, Manitoba became and was entitled to all income and profits derived from said lands, and, consequently, the Dominion Government should account to Manitoba therefor. The Act of 1885 does not contain any reservation of exception in favour of the Dominion. The grant is absolute and Manitoba should enjoy the same relationship to the Dominion as an ordinary purchaser; the rules between vendor and purchaser should apply. See Leake's Uses and Profits of Land, p. 29; Dart's Vendors and Purchasers (6 ed.) p. 611. The grantor cannot derogate from his own absolute grant, so as to claim rights over the thing granted. *Suffield* v. *Brown* (6), per Westbury L. J. at page 190; *Wheeldon* v. *Burrows* (7), at page 42; *Crossley & Sons* v. *Lightowler* (8); at page 486; *Russell* v. *Watts* (9), at page 572.

Manitoba contends that, from and after the 20th July, 1885, the Dominion was a trustee in the premises. There was an implied trust created by the Act and the

(1) 28 Fed. Rep., 708.
(2) 32 Fed. Rep. 457.
(3) 103 U. S. R. 426.
(4) 92 U. S. R. 733.
(5) 32 Fed. Rep. 899.
(6) 4 DeG. J. & S. 185.
(7) 12 Ch. D. 31.
(8) 2 Ch. App. 478.
(9) 25 Ch. D. 559.

ordinary equitable rules as between subject and subject should apply. Perry on Trusts (5 ed.) sec. 30. The Crown may be a trustee; *Canada Central Ry. Co.* v. *The Queen* (1); Lewin on Trusts (10 ed.) 68, 153; *Acland* v. *Gaisford* (2) at page 32; *Wilson* v. *Clapham* (3); *Ferguson* v. *Tadman* (4). If the settlor proposes to convert himself into a trustee, then the trust is perfectly created; and whenever a person, having a power of disposition over property, manifests any intention with reference to it in favour of another, the court, when there is a sufficient consideration, will execute that intention through the medium of a trust, however informal the language in which it happens to be expressed. *Holroyd* v. *Marshall* (5), per Westbury L. J. at page 209. The Dominion, being trustee for Manitoba, has no right to retain the profits of these lands. No trustee can derive a profit from the exercise of his office, or derive any personal advantage from the trust property. Lewin on Trusts (10 ed.) 296, 328; *Wightwick* v. *Lord* (6); *Heathcote* v. *Hulme* (7), at page 131. We cite also Williams on Real Property (19 ed.) 171; Washburn, Real Property, (ed. 1902) vol. ii. secs. 1441—2, 1150, 1501; *Aberdeen Town Council* v. *Aberdeen University* (8).

Turning once more to the statute, even the marginal note to the section in question reads: "Swamp lands to belong to the province;" *Sheffield Waterworks Co.* v. *Bennet* (9), at p. 421; *Venour* v. *Sellon* (10); and it is to be observed that by sec. 7 it is provided that "the grants of land . . . authorized by the foregoing sections shall be on the condition that they be accepted by the province . . . as a full settlement of all claims made by the said province . . ."

(1) 20 Gr. 273.
(2) 2 Mad. 28.
(3) 1 Jac. & W. 36.
(4) 1 Sim. 530.
(5) 10 H. L. Cas. 191.
(6) 6 H. L. Cas. 217.
(7) 1 Jac. & W. 122.
(8) 2 App. Cas. 544.
(9) L. R. 7 Ex. 409.
(10) 2 Ch. D. 522.

1903

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

The expression deliberately used is "the *grants* of land." The statute did not, therefore, merely provide for a *future* transfer of the swamp lands, but itself characterized the consideration for the settlement of all provincial claims as statutory grants *in præsenti*.

Newcombe K.C. for the respondent. The American cases cited by the appellant have no authority in this court; at best, they may be used only to support arguments. Besides, the Statute at Large, referred to, is, *quâ* the point now in issue, essentially different from the Canadian Act, as will appear from a comparison of the two enactments.

There is a long series of decisions in the United States courts upon their statute of which it will be sufficient to mention the leading cases of *Railroad Company* v. *Smith* (1); *French* v. *Fyan* (2); *Wright* v. *Roseberry* (3). In these cases it was held that the plain and indisputable grant made by the words in section 1, must be considered to govern the whole statute which was a grant *in præsenti* and this notwithstanding the very strong grounds for negativing such a construction contained in the provisions of section 2. Were it not for the express grant in section 1, it would seem that none of the courts would have been disposed to favour such an interpretation for we find that, notwithstanding the distinct terms of grant in section 1, Mr. Justice Clifford of the Supreme Court in the case of *Railroad Company* v. *Smith* (1) dissented from the judgment of the court. There are also judgments in opposite sense in the United States. See *Thompson* v. *Prince* (4), where, though overruled in *Keller* v. *Brickey* (5), Mr. Justice Scott adhered to his opinion given in the former case.

(1) 9 Wall. 95.
(2) 93 U. S. R. 169.
(3) 121 U. S. R. 488.
(4) 67 Ill. 281.
(5) 78 Ill. 133.

In the Canadian Act there is absolutely no grant nor anything equivalant to a grant and nothing from which an intention to make one could be inferred. It has been suggested that it was the intention of the Dominion Government to follow the course of the United States Congress in assigning swamp lands in the State of Arkansas and other states to the Government of such states, and the official debates of the House of Commons have been cited. There is nothing in the official debates to support this contention. It appears, on the contrary, from several passages, that the Dominion Government understood that the swamp lands would not be transferred to the province until they had been shewn to the satisfaction of the Dominion Government to be such. See debate on the bill reported in the official debates, 1885, vol. II, at page 2794.

The swamp lands which, until the passing of the statute, were undoubtedly vested in the Crown in right of the Dominion remained vested in the Crown after any transfer under the Act. The only change, therefore, is that, after transfer, they enure to the benefit of the province. There is in this Act nothing but a direction that, after the happening of a future event, viz., the lands having been shewn to be swamp lands, they shall be transferred to the provincial administration. If any lands which are swamp lands are never shewn, to the satisfaction of the Dominion Government, to be such, they will never be transferred.

As will be seen by section 2 of the United States statutes it is the duty of the Secretary of the Interior to take the initiative in the necessary proceedings for ascertaining the lands to be granted and for completion of the conveyance. By the Canadian statutes no such duty is imposed upon the Dominion Government. All that is provided is that the "lands which may be

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred."

The method actually adopted for determining which were swamp lands to be transferred is shewn by the order-in-council. It would seem that the Minister of the Interior somewhat gratuitously accepted the task of ascertaining what were swamp lands which would come under the operation of the statute. How, exactly, the transfer was carried out does not appear to be material. The Act has provided that the lands shall be transferred and the order-in-council is sufficient evidence that all requisite preliminaries have been carried out and the transfer duly completed.

The respondent refers to *Thompson* v. *Prince* (1); *Keller* v. *Brickey* (2); *Rutherford* v. *Greene's Heirs* (3); *The Queen* v. *Farwell* (4); *Railroad Company* v. *Smith* (5).

THE CHIEF JUSTICE.—I would dismiss this appeal.

The appellant contends that this statute should be read as if it enacted an actual and unconditional grant of the swamp lands in question in favour of Manitoba. Now, upon the very wording of the statute, that contention cannot prevail. The grant is conditional. It takes effect only if there are any swamp lands, and so, necessarily, only when it has been ascertained if there are any, and where they are. *Shall be transferred* when ascertained to be swamp lands cannot mean *are transferred in præsenti.*

The statute does not say "are transferred," simply because parliament did not intend to transfer the title *in præsenti.* The words are plain, and cannot receive the forced construction for which the appellant contends.

(1) 67 Ill. 281.
(2) 78 Ill. 133.
(3) 2 Wheat. 196.
(4) 14 Can. S. C. R. 392.
(5) 9 Wall. 95.

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

Girouard J.

I agree in my brother Davies' reasoning and conclusions.

GIROUARD J. (dissenting).—The first section of chapter 50 of 48 & 49 Vict. enacted on the 20th July, 1885, by the Parliament of Canada,

An Act for the final Settlement of the Claims of the Province of Manitoba on the Dominion,

provides that

all Crown lands in Manitoba which may be shewn to the satisfaction of the Dominion Government to be swamp lands, shall be transferred to the province and enure wholly to its benefit and uses.

It is re-enacted almost word for word in section four of chapter 47 of the Revised Statutes of Canada, 1886, with a slight variation which I believe is of no importance. The words "which may be shewn," etc., are replaced by the following: "which are shewn, etc."

Section two provides for "an allotment of land," etc., which

shall be selected by the Dominion Government and granted as an endowment to the University of Manitoba,

founded a few years previously.

By sections three and five, a certain annual pecuniary indemnity, "for the want of public lands" is increased to $100,000 such increase to date from the 1st July, 1885.

Sections four and six authorize the advance of certain sums of money and the re-adjustment of the yearly or semi-yearly subsidies and allowances to be calculated also from the 1st July, 1885. Doubts having arisen as to the true construction of section six, an interpretation Act was passed during the following session of 1886, which affects only the money payments.

Clause seven provides that

the grants of land and payments authorized by the foregoing sections shall be made on the condition that they be accepted by the province

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

Girouard J.

(such acceptance being certified by an Act of the Legislature of Manitoba) as a full settlement of all claims made by the said province for the reimbursement of costs incurred in the government of the disputed territory, or the reference of the boundary question to the Judicial Committee of the Privy Council, and all other questions and claims discussed between the Dominion and the Provincial Government, up to the tenth day of January, one thousand eight hundred and eighty-five.

On the 26th May, 1886, by 49 Vict. ch. 38, sec. 1, the Legislature of Manitoba passed the following acceptance:

The Legislature of the Province of Manitoba accepts the grants and payments as authorized and construed by the above recited Acts as a full settlement of all claims by the said Province upon the Dominion, as therein set forth, up to the tenth day of January, one thousand eight hundred and eighty-five.

The Dominion statute does not provide for any means or method of selecting these swamp lands "to the satisfaction of the Dominion Government;" evidently this was considered to be a mere matter of administration and left to the action of the Dominion Government. It was eventually settled by an order-in-council of the 19th June, 1886. The order-in-council recites that it is expedient to make "a selection of the swamp lands to be granted" to Manitoba, provides for the appointment of two surveyors or commissioners by the Minister of the Interior, who are empowered to select the lands in the manner indicated in the American statutes relating to the grant of federal swamp lands (which is recited in the order-in-council), and to furnish from time to time lists of the lands so selected, the whole at the expense of Manitoba, and finally declares that

the signification in writing to the Lieutenant Governor of Manitoba of the approval of such lists by His Excellency shall operate to vest the title in the lands described in the said lists in Her Majesty for the purposes of the Province of Manitoba.

Of course anything in this or any order-in-council contrary to the statute is *ultra vires*.

The surveyors proceeded with their work (which is yet unfinished) and reported lists from time to time which were duly transmitted to Manitoba with the approbation of His Excellency. In these orders in Council the Canadian Government declares

> that the lands mentioned in the said annexed list * * * be and the same are hereby vested in Her Majesty for the purposes of the Province of Manitoba.

The appellant contends that all Crown lands in Manitoba shown at any time to the satisfaction of the Dominion Government to be Crown swamp lands, became from the date of the passing of said Act the property of Manitoba, including all surface rights, timber, hay crops, baser metals and all other territorial revenues derived from the said lands on and after the 20th July, 1885, the date of the passing of the statute, after deducting costs and charges which the department of the Interior incurred in administering the said lands. By his action he demands that an account be taken and payment be ordered.

The question is whether section one of the Canadian statute constitutes a transfer *in præsenti* of the swamp lands or whether it is a grant stipulated to take effect only on and at the time of the happening of a future event, viz., the selection of the lands to the satisfaction of the Dominion Government as swamp lands.

The court below held that this trausfer dates only from the orders-in-council. Mr. Justice Burbidge remarks:

> The statute provides that all Crown lands in Manitoba which may be or (as enacted in the Revised Statutes) are shown to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the province and enure wholly to its benefits and uses. But when shall such lands enure to the benefits and uses of the province? The answer, it seems to me, must be, when they have been shewn to the

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

satisfaction of the Dominion Government to be swamp lands and have been transferred; and until they are so transferred the Government of Canada have, I think, not only the right to administer such lands, which, as has been said, is not disputed, but also the right to take the revenues arising therefrom to the use of the Dominion.

Girouard J.

With due deference, it seems to me that this argument goes to the delivery and actual possession of the lands and not to the title or transfer which is in the statute.

The appellant has referred us to several American decisions rendered in interpretation of a statute (U. S. Statutes at Large, vol. 9, 519, [1850], respecting swamp lands) similar in many respects to the one under consideration, but apparently very different as to clause one. The language of the American statute is "that there be and is hereby granted to the State of," etc., the swamp lands intended to be conveyed. The expression in the American statute "hereby," that is by means of this, leaves little room for doubt that a transfer *in præsenti* was contemplated by Congress, and for this reason I consider that the numerous American decisions defining the nature of the grant under that statute are of little value in the determination of the meaning of clause one of the Canadian Act.

Other American decisions, however, are quoted by the appellant which seem to me to be quite in point. They were rendered in interpretation of legislative land grants worded in the very language of our Canadian statute. The oldest and leading case is undoubtedly *Rutherford* v. *Greene's Heirs*, (1) decided in 1817 by the Supreme Court of the United States when that high tribunal was presided over by one of the greatest jurists of modern times, Chief Justice Marshall.

(1) 2 Wheat 196.

Almost every word of his elaborate judgment applies to the case before us, and I cannot do better than reproduce part of it in support of the view I take of the question. Referring to an Act passed in 1782 by the State of North Carolina "for the relief of the officers and soldiers of the continental line and for other purposes therein mentioned," the eminent judge says:—

The 10th section enacts: "that 25,000 acres of land shall be allotted for, and given to, Major General Nathaniel Greene, his heirs and assigns. within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this state entertains of the extraordinary services of that brave and gallant officer."

This is the foundation of the title of the appellees.

On the part of the appellant it is contended that these words give nothing. They are in the future, not in the present tense, and indicate an intention to give in future, but create no present obligation on the state, nor present interest in General Greene. The court thinks differently. The words are words of absolute donation, not indeed of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers.

"Be it enacted that 25,000 acres of land shall be allotted for and given to Major General Nathaniel Greene." Persons had been appointed in a previous section to make particular allotments for individuals, out of this large territory reserved, and the words of this section contain a positive mandate to them to set apart 25,000 acres for General Greene. As the act was to be performed in future, the words directing it are necessarily in the future tense.

"Twenty-five thousand acres of land shall be allotted for, and given to Major General Nathaniel Greene." Given when? The answer is unavoidable—when they shall be allotted. Given how? Not by any future act,—for it is not the practice of the legislatures to enact that a law shall be passed by some future legislature,—but given by force of this Act.

It is suggested that the answer to the question, "Given when?" indicates that a gift *in præsenti* was not intended. Evidently here Chief Justice Marshall refers to the lands with metes and bounds. But the answer to the question: "Given how?" shews that

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

Girouard J.

the gift was created not by the operation of the allotment or survey but by force of the statute. This is made more clear from his following remarks :—

It has been said that to make this an operative gift, the words "are hereby" should have been inserted before the word "given" so as to read, "shall be allotted for, and are hereby given to," &c. Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends, in no degree, on its containing the technical terms used in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment, and to give the land when allotted to General Greene.

The 11th section authorizes the commissioners to appoint surveyors, for the purpose of surveying the lands given by the preceding sections of the law. In pursuance of the directions of this act, the commissioners allotted 25,000 acres of land to General Greene, and caused the track to be surveyed. The survey was returned to the office of the legislature on the 11th of March in the year 1783. The allotment and survey marked out the land given by the Act of 1782, and separated it from the general mass liable to appropriation by others. The general gift of 25,000 acres lying in the territory reserved for the officers and soldiers of the line of North Carolina, and now become a particular gift of the 25,000 acres, contained in this survey * * *

It is clearly and unanimously the opinion of this court that the Act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March, 1783, gave precision to that title and attached it to the land surveyed.

The soundness of this doctrine has never been questioned in any court of the American Union ; on the contrary it has since been frequently reaffirmed by the United States Supreme Court, and more particularly in *Lessieur* v. *Price* (1) ; *Langdon* v. *Hanes* (2) ; *Schulenberg* v. *Harriman* (3) ; *Wright* v. *Roseberry* (4).

American decisions, although not binding, have always been of great weight with English and Canadian courts in the absence of any jurisprudence

(1) 12 How. 59 at p. 76.
(2) 21 Wall. 521.
(3) 21 Wall. 44 at p. 60.
(4) 121 U. S. R. 488.

of their own, as in this particular instance. See *Niagara District Fruit Growers Stock Co.* v. *Walker* (1); *Scaramanga & Co.* v. *Stamp* (2); *Itter* v. *Howe* (3); *Skillings* v. *Royal Ins. Co.* (4), part 2; *In re Missouri Steamship Co.* (5); *Wells* v. *Gas Float Whitton No.* 2 (6).

The reasons advanced by Chief Justice Marshall commend themselves to my mind; they are convincing, and I have no hesitation in coming to the conclusion that the grant to the Province of Manitoba dates from the statute and not from the respective orders-in-Council.

Although we have no jurisprudence directly in point, yet it cannot be said that we are entirely without authority. In two well considered cases decided by this court a few years ago, I find dicta, propositions and principles which seem to agree with the American decisions. I refer to *The Queen* v. *Farwell* (7) and especially *The Attorney General of British Columbia* v. *The Attorney General of Canada* (8), as the latter went to the Judicial Committtee of the Privy Council. As in this instance public lands had been granted by statute by one government to another in Canada for consideration; 1st, by the order-in-Council or Articles of Union (Art. 11) of British Columbia, agreed to in 1871 and having the force of an Imperial Statutute; 2ndly, by an Act of the British Columbia Legislature, 43 Vict. ch. 11, passed in 1880; and 3rdly, by another Act of the same legislature, 47 Vict. ch. 14, section 2, passed in December, 1883, in substitution of 43 Vict. ch. 11. All three enactments purport to aid in the construction of a railway through the province, since built and known as the Canadian

(1) 26 Can. S. C. R. 629.
(2) 5 C. P. D. 295.
(3) 23 Ont. App. R. 256 at p. 275.
(4) 6 Ont. L. R. 401 at p. 405.
(5) 42 Ch. D. 321.
(6) [1897] A. C. 337.
(7) 14 Can. S. C. R. 392.
(8) 14 App. Cas. 295.

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

Girouard J.

Pacific, and for that purpose grant to Canada in trust a large tract of public lands in British Columbia along the line of the railway before mentioned wherever it may be finally located, to a width of twenty miles on each side of the line, as provided in the order in Council, section 11, admitting the Province of British Columbia into Confederation. (47 Vict. ch. 14. sec. 2.)

These public lands had never been surveyed, and even in 1883, when the last provincial statute was enacted in settlement of long pending difficulties and disputes between the two governments, the line of railway had been only partly located. The wording of the grant is not the same in all the enactments, although I am not prepared to admit that the meaning is different in any of them. Section 11 of the Articles of Union declares "that the Government of British Columbia agreed to convey to the Dominion Government, etc."; the Act 43 Vict. ch. 11 uses the expression "the lands being granted to the Dominion Government, etc."; and section 2 of 47 Vict. ch. 14, enacts that "there shall be and there is hereby granted to the Dominion Government," etc.

The Judicial Committee and this court, Henry J. dissenting, did not doubt that the grant was absolute and operated immediately. Judges were divided, not as to the date of the grant, but only as to whether it included precious metals. The Judicial Committee seems to hold that a transfer of the lands, including territorial revenues, was made by force of the 11th Article of Union rather than by the subsequent provisions of the provincial statutes, the difference in language not being noticed by their Lordships, probably as of no importance in the determination of the point before them. They quote only the Article of Union as the origin or creation of the grant. A few extracts from the reports of the elaborate opinions delivered in all the courts will show that they are at least high authorities in the determination of the point before us.

Mr. Justice Fournier who alone in the Supreme Court was of opinion that the grant did not include the precious metals, said:

Dans le traité, sec. 11, l'obligation est "to convey to Dominion Government, &c., &c., a similar extent of public lands," dans l'acte 43 Vict. ch. 11, "lands being granted to the Dominion for the purpose, &c., &c.", dans la 47 Vict. ch. 14 (Colombie), sec. 2. "there shall be, and there is hereby granted to the Dominion Government, in trust, &c., &c., to be appropriated as the Dominion Government may deem advisable, the *public lands* along the line of the railway, &c., &c." Dans la sec. 7 de ce dernier acte les expressions sont: "There is hereby granted to the Dominion Government, three and a half million acres of land, &c., &c." On voit que dans toutes les expressions employées pour faire l'octroi, il n'en est pas une seule qui comporte l'idée qu'il y ait autre chose que la terre qui soit octroyée. Toutes les expressions sont claires, précises, n'accordant qu'une seule chose, la terre, et ne laissent aucune place au doute. (page 368.)

And in *The Queen* v. *Farwell* (1), the eminent judge added:—

In the case of *Attorney General of British Columbia* v. *Attorney General of Canada*, p. 345, which was decided by this court yesterday, I had occasion to express my opinion upon the question of the ownership of the precious metals in these railway lands, but as regards the construction to be put upon the statute granting provincial lands in aid of the construction of the Canadian Pacific Railway, I think the expressions used are quite sufficient to convey the lands to the Dominion, and therefore Farwell's title from the Government of British Columbia is void; but I come to this conclusion with the reserve I made in the other case, that the conveyance does not cover the gold and silver mines. * * * (Page 428.)

Chief Justice Ritchie:—

It was a a statutory transfer or relinquishment by the Province of British Columbia of the right of that province in or to such public lands to the Dominion of Canada, to be managed, controlled and dealt with by the Dominion Government in as full and ample manner as the Provincial Government could have done had no such Act been passed * * * (Page 358).

Mr Justice Taschereau concurred with Mr. Justice Gwynne.

(1) 14 Can. S. C. R. 392.

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADE.

Girouard J.

Mr. Justice Gwynne:—

This language of the 11th article of the treaty with reference to the transfer from British Columbia to the Dominion of Canada of this tract of land never could be literally complied with, that is to say that by no species of conveyance could the land be conveyed to the Dominion Government as grantees thereof. That Government, from the nature of the constitution of the Dominion, could not take lands by grant or otherwise, nor could it have the power of appropriation of the tract in question, otherwise than under the direction and control of the Parliament of Canada. When, therefore, as part of the terms upon which British Columbia was received into the Dominion, it was agreed that a tract of the public lands of the Province of British Columbia should be conveyed in such manner as to be subjected to being appropriated as the Dominion Government may deem advisable, what was intended plainly was, as it appears to me, that the beneficial interest which the province had in the particular tract of land as part of the public domain of the province should be divested, and that the tract, although still remaining within the Province of British Columbia, should be placed under the control of the Dominion Parliament as part of the public property of the Dominion. * * * (Pages 375, 376.)

And in *The Queen* v. *Farwell* (1), the learned judge remarked:—

I concur with the majority of this court that the appeal should be allowed for the reasons sufficiently stated in the case of *Attorney General of British Columbia* v. *Attorney General of Canada* p. 345; the title of Canada is referable to the treaty alone, and the Acts of Parliament which were passed to carry out the provisions of the treaty. (Page 428.)

Mr. Justice Henry in *The Attorney General for British Columbia* v. *The Attorney General for Canada* (2) based his judgment upon his previous opinion in *The Queen* v. *Farwell* (1), decided in the Exchequer Court in 1886, in which he declared the grant to Canada void for, among other reasons, 1st. "That the land is not described or defined; 2nd. That the statute did not operate as an immediate transfer." But the learned judge is alone in taking this view of the case, at pages 403 and following.

(1) 14 Can. S. C. R. 392. (2) 14 Can. S. C. R. 345.

We have the advantage of the opinion of Mr. Justice, afterwards Chief Justice Strong, in the case of *The Queen* v. *Farwell* (1), where the Supreme Court held that the grant to Canada in aid of the construction of the Canadian Pacific Railway was absolute and operated immediately, and declared void a subsequent patent of a parcel of these lands by the province to one Farwell. This case was not appealed to the Privy Council and I presume is binding upon us, especially as it does not conflict with the decision of the Privy Council in *The Attorney General of British Columbia* v. *The Attorney General of Canada* (2), the point as to precious metals not being involved.

Mr. Justice Strong said :

I am of opinion that the objection that the statute required a grant or some subsequent instrument to carry it into execution wholly fails. It was clearly self executing and operated immediately and conclusively so soon as the event on which it was limited to take effect happened, that is as soon as the "line of railway was finally located." Whether upon that event occurring, it operated by relation from the date of its enactment so as to avoid intermediate grants by the Province of British Columbia is an inquiry which the facts of the present case do not require us to enter upon, for the respondent acquired no title to this land until after the line of railway was finally located. * * (Page 425.)

The result is that when the letters patent under the great seal of British Columbia issued on the 16th of January, 1885, assuming to grant this land to the respondent, the province had no title to the land and consequently nothing to grant, an absolute title thereto having previously vested in the Dominion under the statute 47 Vict. ch. 14, upon the final location and ascertainment of the line of railway. (Page 427.)

If I understand the learned judge correctly, the final location of the line of railway was a suspensive condition merely of the executed and complete title or possession of the particular lands granted, and not of the general grant or title which "was clearly self-

(1) 14 Can. S. C. R. 392. (2) 14 App. Cas. 295.

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

Girouard J.

executing and operated immediately." Of course we have not to deal in the present case with the rights of third parties. The effect of the grant has to be considered between the immediate parties to it and in that case the fulfilment of the suspensive condition had a retroactive effect from the day of the grant. *Conditio existans retrotrahitur ad tempus contractûs.* Such is the rule of the Roman law and of the English law also; so the learned judge tells us on another occasion; *Leblanc* v. *Robitaille* (1).

The Lords of the Judicial Committee did not express different views upon the nature of the grant, nor its perfection. They admit its validity and the immediate transfer of the lands and their territorial revenues, but declare that it did not include precious metals, which were distinct, they held, from lands and from part of the prerogative rights of the Crown.

Lord Watson, speaking for the court, first quoted in full article 11 of the order-in-council of 1871, and continued:

> Whether the precious metals are or are not to be held as included in the grant to the Dominion Government, must depend upon the meaning to be attributed to the words "public lands" in the 11th Article of Union. The Act 47 Vict. c. 14, s. 2, which was passed in fulfilment of the obligation imposed upon the province by that article and the agreement of 1883, defines the area of the lands, but it throws no additional light upon the nature and extent of the interest which was intended to pass to the Dominion. The obligation is to "convey" the lands, and the Act purports to "grant" them, neither expression being strictly appropriate, though sufficiently intelligible for all practical purposes. The title to the public lands of British Columbia has all along been, and still is, vested in the Crown, but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the province before its admission into the Federal Union.
>
> Leaving the precious metals out of view for the present, it seems clear that the only "conveyance" contemplated was a tranfer to the Dominion of the provincial right to manage and settle the lands, and

(1) 31 Can. S. C. R. 582 at p. 587.

to appropriate their revenues. * * * It therefore appears to their Lordships that a conveyance by the province of "public lands" which is, in substance, an assignment of its right to approximate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The 11th article does not appear to them to constitute a separate and independent compact. It is part of a general statutory arrangement, of which the leading enactment is, that, on its admission to the Federal Union, British Columbia shall retain all the rights and interests assigned to it by the provisions of the British North America Act, 1867, which govern the distribution of provincial property and revenues between the Province and the Dominion; the 11th article being nothing more than an exception from these provisions. The article in question does not profess to deal with *jura regia;* it merely embodies the terms of a commercial transaction, by which the one government undertook to make a railway, and the other to give a subsidy, by assigning part of its territorial revenues.

The exception created by the 11th Article of Union, from the rights specially assigned to the province by sect. 109, is of "lands" merely. The expression "lands" in that article admittedly carries with it the baser metals, that is to say "mines" and "minerals" in the sense of sect. 109. Mines and minerals in that sense, are incidents of land; and, as such, have been invariably granted, in accordance with the uniform course of provincial legislation, to settlers who purchased lands in British Columbia. But *jura regalia* are not accessories of land; and their Lordships are of opinion that the rights to which the Dominion Government became entitled under the 11th article did not to any extent derogate from the provincial right to "royalties" connected with mines and minerals under sect. 109 of the British North America Act.

I find the same principles laid down in another decision of the Privy Council. I refer to *The Government of Newfoundland* v. *Newfoundland Railway Co.* (1) decided in 1888. By contract confirmed by an Act of the legislature of the colony, the government covenanted and agreed to pay certain money subsidies in aid of the location, construction and operation, for a certain number of years, of 340 miles of a railway from St. John's to Hall's Bay and also

(1) 13 App. Cas. 199.

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

Girouard J.

to grant in fee simple to the Syndicate Company 5,000 acres of land for each one mile of railway completed throughout the entire length of 340 miles. The said fee simple grant of 5,000 acres of land per mile to be made to the said Syndicate Company upon completion of each section of five miles of railway, or fraction thereof, at the terminus at Hall's Bay.

The statute or contract then contains provisions for ascertaining the lands to be granted which were to be selected within a certain time by the railway company in alternate sections or blocks.

Lord Hobhouse said :

> As regards the grants of land, they (their Lordships) feel little difficulty. It does not appear quite clearly what has been done with respect to these lands, but the argument has proceeded on the footing that in some cases grants have been completed ; in some the company has selected blocks (as by the contract it has a right to do) but no grants have been made ; and in the rest there has been no selection of blocks.
>
> In their Lordships' views, the contract is not so framed as to make the grants of land dependent in any way on the completion of the whole line, or upon anything but the completion of each five-mile section. As each of these sections was completed, the right to twenty-five thousand acres of land became perfect. The company has time allowed to select its blocks, but may if it pleases make the selection at once. There may, or rather must, be delays in selection, and in the formalities of conveyance. But their Lordships think that it would not be in accordance either with the objects for which grants of this kind are intended, viz : the immediate attraction of settlers, or with the frame of the contract, if they were to hold that the perfect right which the company has gained on completion of each section is lessened by such delays (1).

The decree of the Supreme Court of Newfoundland that the Government should make the grants of the said lands was confirmed, although in some cases, as stated by Lord Hobhouse, no selection of blocks of land had been made.

The question in issue in *The Attorney General of British Columbia* v. *The Attorney General of Canada* (2)

(1) 13 App. Cas. at pp. 206-207. (2) 14 Can. S. C. R. 345.

does not present itself in the present case, and therefore it cannot be said that the case is in point. *The Queen* v. *Farwell* (1) is perhaps more so. Lord Watson and nearly all the Judges of the Court based their judgment upon the Articles of Union of British Columbia and not upon the statute of that Province. Whether *The Queen* v. *Farwell* (1) is in point or not, it cannot be denied that a great deal has been said by all the eminent judges which throws light upon the nature and effect of a statutory transfer or grant of public lands by one government to another like that of the swamp lands.

The language of the Canadian statute of 1885 now under consideration seems to me to be stronger than that of any other statute quoted above. The word "transferred" used in section one of the Dominion Act leaves less room for doubt than the words "agree to convey" in the Articles of Union of British Columbia, "agree to grant" in the Newfoundland statute, or "allotted" and "given" in the North Carolina Act, at least in the mind of the Canadian Parliament. That is made more clear when we compare it with sect. 2 which provides for an endowment to the University of Manitoba. The lands given must be selected first and granted after, probably by a patent, although a donation *in præsenti* may be contemplated, a point we are not called upon to decide. It cannot be denied that the language of sections 1 and 2 of the Canadian statute is different and much stronger in section one. The swamp lands are granted first and selected after and delivered without the necessity of a patent.

American statutes respecting swamp or other public lands require the issue of a patent, but in such a case it is held to operate merely as record evidence of a complete title, adding nothing to the legislative grant

(1) 14 Can. S. C. R. 392.

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

Girouard J.

beyond identification or delimitation. The Canadian statute, it is admitted, does not require a patent, which is looked upon as impracticable under our system of government, all public lands being held by one and the same sovereign, the King of England, although for different purposes, whereas the United States and the different states of the Union form distinct sovereignties. Transfers of lands from the Dominion to a Province are invariably made by force of the statute without a patent. In conformity with this practice, the Dominion Act of 1885 enacts that the swamplands in Manitoba shall be *transferred*, and by this I presume that Parliament did not mean only the mere power to transfer or even the naked transfer *or grant*, which is the expression used in section 7—the words "transfer" and "grant" being moreover synonymous—but the fee simple, right, title, estate, property, ownership and possession legally resulting upon a grant of land to the grantee, altogether distinct from the complete title and the actual possession of the particular lots of land resulting from the surveys, selection and delivery made under the statute.

These grants of public lands amounting to sales, as they were made for consideration, cannot be considered in the light of sales of things moveable sold by number or measure, which according to numerous decisions are not perfect till the counting or measuring is done. They are sales in the lump and not by number or measure; they have for object a specific kind of lands, namely, Crown swamp lands, which can easily be ascertained and selected. This selection is a mere incident in the transaction, which could be carried out even against the will of the Dominion Government. It is so far from being a condition precedent that if by any possibility the Dominion Government did refuse to select the lands, that selection could

be enforced by a decree of the Exchequer Court. It has nothing to do with the title, but merely with the delivery and actual possession of the lands. If before delivery the lands should disappear through an earthquake or any other Act of God, the loss would fall, not upon the Dominion, but upon Manitoba, who would have no claim for an indemnity; likewise, accretion would benefit Manitoba alone. This is the true test of ownership.

The Dominion Act, different in this respect from all American statutes, does not provide for the appointment of surveyors to select the lands. It merely enacts that the Dominion Government must be satisfied that the lands are swamp lands. That Government is not authorized to "vest" these lands in Manitoba, as was done by the order in Council of the 16th April, 1888; this took place by the operation of the statute. However, as these words affect only the actual possession and do no harm, no reasonable objection can be made against their use. But the Dominion Government cannot declare that they "vest the title in the lands" as was done in the order in Council of the 19th of June, 1886. This is contrary to the statute as I read it.

This order in Council shows that the Dominion Government has practically adopted the American method of selecting the lands, well aware that it was settled by a long standing jurisprudence and that it would be a safe guide for all concerned. They might, however, have adopted any other mode, the statute requiring in general terms only the expression of their satisfaction in the premises.

And if section one means only a grant *in futuro*, why the words at the end of it "and enure wholly to its benefits and uses?" If these words take effect only from the date of the orders in Council, they are useless

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

Girouard J.

and without meaning, for no one will dispute, and it is admitted by the respondent, that without them the Province of Manitoba would be entitled to all the territorial revenues of the swamp lands from the date of the orders in Council. They were not inserted to make that point clearer, for it is not disputable; they were used to emphasize that the grant preceding immediately was *in præsenti* and not *in futuro*.

It appears to me that section 7 indicates that the selection of the lands has nothing to do with the existence of the grant or title. It says that

> the grants of land and payments authorized by the foregoing section shall be made on the condition that they be accepted by the province (such acceptance being certified by an Act of the Legislature of Manitoba) as a full settlement of all claims made by the said province, etc.

That is the only expressed condition attached to the very existence of the grant which undoubtedly had the effect of suspending it till the condition had been accomplished. Under well settled rules of law it would be inoperative if the event does not happen; but if it does, the fulfilment of the condition makes the grant perfect from its date, for as Lord Bacon observes

> the assent of the grantee is presumed to an act which is for his benefit until he dissents.

Bacon's Abridg. vol 4, p. 537, Vo. *Grants*.

The selection of the lands to the satisfaction of the Dominion is not mentioned in section 1 as a condition suspensive of the title of the swamp lands; it is not available to the Dominion to defeat the grant; but even if it was, its fulfilment would have a retroactive effect from the date of the statute.

The respondent in his statement of defence alleges that "any right, title or interest whatever" of the province

did not accrue until such lands had been shown to the satisfaction of the Dominion Government to be swamp lands.

This is adding to the language of the statute, and I am not prepared to do so. It is contended that this language is implied from the expressions in section 1 which may be shown to the satisfaction of the Dominion Government to be swamp lands.

These words do not imply a suspensive condition as to the particular swamp lands with metes and bounds; they establish a mere covenant on the part of the Dominion authorities that they will select the lands; they do not support the contention advanced by the respondent; they do not create the right, title or interest of the province which is in the statute, and according to the rule of law that the proprietor is entitled to the territorial revenues of his property, these must reckon from the date of title, that is, of the statute. Such is the principle followed in all the American cases cited at the Bar, where it is shown that the grant is *in praesenti*, and I believe they are in accordance with the English common law. See Am. & Eng. Enc. of Law, (2 ed) vol. 14, p. 1113; vol. 26, pp. 326, 344 and notes.

I find in the Revised Statutes of Canada, 1886, ch. 47, unmistakable evidence that Parliament intended to grant *in præsenti*. Clause 4 of chapter 47 re-enacts this first section and immediately before we read in clause 3:

All ungranted or waste lands in the province shall be vested in Her Majesty, and administered by the Governor in Council for the purposes of Canada.

No one can doubt that this provision, although in the future tense, has a present operation. I cannot see any reason why the same Parliament, when using the same language in section 4 of the same statute, did not mean the same thing, especially as this inter-

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA

Girouard J.

pretation is the only one which meets the circumstances of the case.

I do not look upon the Canadian statute of 1885 as an ordinary piece of legislation, passed in the interest only of the Dominion at large. It is more a compromise of claims made by a Province against the Dominion, or perhaps more correctly an offer of settlement of claims proposed by the latter which the province has accepted. After this acceptance the statute is in the nature of an agreement or contract for consideration between the Dominion and Manitoba which, I take it for granted, could not very well be repealed or altered except with the consent of the province.

Moreover, the view I take of the meaning of that statute is the only one consistent with the circumstances of the case and any other construction would, it seems to me, partly defeat the object of the Act. The province has no public land like Ontario and Quebec and the other old provinces, and in compensation for this it is allowed a yearly indemnity which by that very statute is increased from $45,000 to $100,000. A large amount of land in the province, granted to the Canadian Pacific Railway Company and the Hudson Bay Company, was exempt from school and municipal taxes. Thereafter swamp lands shall belong to the province. The yearly and half yearly money subsidies and allowances based upon population are also increased. A fresh advance to the province of $150,000 was authorized to meet the cost of constructing a lunatic asylum and other exceptional services. Manitoba had incurred a large expenditure in the government of a vast disputed territory since known as New Ontario, which she lost by a judgment of the Judicial Committee of the Privy Council, thereby being deprived of extensive revenues derived from the

population settled in that territory. It is evident from the reading of the statute that she was entitled to some indemnity from the Dominion. All its provisions show that the increases in money were to commence at once, even before the Act was passed, namely, from the 1st July, 1885. If the interpretation given by the respondent is to prevail, one grant only, and a most important one, is to be beneficial *in futuro*, viz., the grant of swamp lands. The immediate revenue from this source was however needed to reclaim these very lands. The province had to provide for the costs of survey and selections, a course not generally pursued except when dealing with one's own lands. Great expense for draining and irrigation would be incurred, and if the province is to receive only the bare land, denuded of timber and other territorial revenues, it may be doubtful if the grant would be of any benefit. This could not have been intended by the Parliament of Canada. Substantial and immediate satisfaction was evidently demanded and accorded. Claims made against the Dominion had to be satisfied presently. To decide that these swamp lands would be available in five, ten, fifteen, twenty years, or even later, is to defeat the object of Parliament. It is especially in such a case that we must enforce the rule of law embodied in our Interpretation Act, viz:, that every Act of Parliament must receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of every provision or enactment thereof, according to its true intent, meaning and spirit.

Finally, the respondent has not contended in his factum, and I do not understand that he seriously advanced any contrary proposition at the Bar, that if the grant be *in præsenti* the appellant is not entitled to an account of the revenues and profits from the 20th

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

Girouard J.

July, 1885, till Manitoba was put in actual possession under the orders-in-council. Whether considered as a trustee in law or in fact, the Dominion Government having received revenues and profits which did not belong to it, must account for them to the Province of Manitoba.

For these reasons I am of opinion that the appeal should be allowed and the action of the appellant maintained with costs.

DAVIES J. — The question to be decided in this appeal is as to the proper construction of the Dominion statute 48 & 49 Vict. ch. 50, entituled "An Act for the final Settlement of the Claims made by the Province of Manitoba on the Dominion."

The first section of that statute reads as follows:

> All Crown lands in Manitoba which may be shewn to the satisfaction of the Dominion Government to be swamp lands, shall be transferred to the Province and enure wholly to its benefits and uses.

The section is substantially re-enacted in ch. 47 of the Revised Statutes of Canada. The dispute is as to the meaning of the section, whether it is to be construed as operating *in præsenti* so as immediately to confer the right on Manitoba to the swamp lands therein referred to or as doing so only as and when these lands were shewn to the satisfaction of the Dominion Government to be swamp lands. I agree with the learned judge of the Exchequer Court that the shewing of the lands to be swamp lands to the satisfaction of the Dominion Government is a condition precedent to their use and benefit enuring to Manitoba. There are no words of present transfer used in this section as was the case in *Farwell* v. *The Queen* (1), and as are to be found in many of the United States cases referred to during the argument. On the contrary the language

(1) 14 Can. S. C. R. 392.

used, I think, refers to the happening of some future necessary action to identify the lands and makes their transfer conditional upon that action taking place. It was impossible to locate, identify or describe in a statute the swamp lands of Manitoba or to separate them from the other lands of the Dominion Government. It was impossible even to approximate their acreage. They could only be identified and located after a careful survey by competent surveyors, shewing them to be "swamp" as distinguished from other lands; and it seems to me that by the very terms of the section it was only those lands shewn to be "swamp" to the satisfaction of the Dominion Government, which were to pass to Manitoba. They could not pass until the facts to enable the Dominion Government to reach a conclusion as to the character of the lands had first been obtained and submitted to the Government. What was to pass? All Crown lands shewn to the satisfaction, etc., to be swamp lands. When were they to pass? Surely only and as they were so shown. They clearly could not pass on the enactment of the Dominion statute, for apart from questions of identity in respect of the lands and satisfaction of the Government as to their quality, the seventh section expressly provided that the grants of land and payments of money authorized were made and authorized on the condition that they should be accepted by the province as a full settlement of its claims, etc. Nothing is said about the lands passing when Manitoba accepted which was not till the following year. We were referred to many United States cases on similar statutes granting lands from the United States to individual states of the Union. But they do not help, at all, in the construction of this statute, because the language used in them is quite different and could leave little, if any, doubt

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

Davies J.

that the grants were to be *in præsenti*. The language of the 9th United States Statutes at Large (1850) page 519, is "that there be and is hereby granted." Similar language was used in the British Columbia statute, 47 Vict. ch. 14, which came before this court for construction in the case of *The Queen* v. *Farwell* (1), and as Mr. Justice Strong there said:

> It (the statute) was clearly self-executing and operated immediately and conclusively *so soon as the event on which it was limited to take effect happened*, that is as soon as the line of railway was finally located.

We were pressed with the decision of Chief Justice Marshall in the United States case of *Rutherford* v. *Greene's Heirs* (2). I have read the decision most carefully, but confess that as read by me it is a strong authority for the respondent in this case. The only part of the judgment applicable to the case at Bar is that which puts a construction upon the statute as to the time when the gift of the lands attached. The distinguished jurist answering a contention that the words in the statute gave nothing to General Greene, expressed his opinion that they were words of absolute donation, not indeed of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers. The words of the section there in controversy were

> that 25,000 acres of land shall be allotted for and given to Major General Greene, his heirs and assigns, within the bounds of lands reserved for the use of the army to be laid off by the aforesaid commissioners as a mark of the high sense, etc.

After pointing out that in a previous section persons had been appointed to make particular allotments for individuals and quoting the above words of the section granting to General Greene, the Chief Justice asks:

> Given when? The answer is unavoidable, when they shall be allotted. Given how? Not by any future act, for it is not the prac-

(1) 14 Can. S. C. R. 392. (2) 2 Wheat. 196.

tice of legislation to enact that a law shall be passed by some future legislature, but given by force of this Act.

As a fact the Dominion Government seems to have gratuitously assumed the duty of surveying and selecting the swamp lands. No complaint is made either of the terms on which the surveys and selections were made, nor is it alleged that there has been undue delay. It was quite open to Manitoba to have had the surveys made if the province had so determined and to have placed the necessary evidence before the Dominion Government to have satisfied it of the existence and location of swamp lands to which it was entitled under the statute. But nothing of the kind was done. The method and manner of location was left entirely to the Dominion without protest or complaint.

I think the appeal should be dismissed with costs.

NESBITT J. concurred in the judgment dismissing the appeal with costs.

KILLAM J (dissenting).—I am of opinion that this appeal should be allowed.

The learned judge of the Exchequer Court proceeded upon the view that the transfer referred to by the statute was to take place only upon its being shown to the satisfaction of the Dominion Government that the lands were "swamp lands," that in the meantime the lands were to be administered by the officers of the Crown for the Dominion, and that this involved the right of the Dominion to the beneficial enjoyment of the lands in the interval.

I quite agree that a formal conveyance of the lands was not necessary. The lands were vested in the Crown and were to remain so vested. And the province was to have no right to occupy or deal with the

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

KILLAM J.

lands in the interval. Whether the proposed transfer was to be by force of the statute or was to require a formal act seems to me unimportant. At any rate, for its completion, some indication of the Dominion Government being satisfied that the lands were swamp lands would be contemplated.

But it does not appear to me to be a necessary consequence that the absolute right to the beneficial enjoyment was to remain in the Dominion until the Government became so satisfied. In my opinion the statute 48 & 49 Vict. ch. 50, sec. 1, necessarily imposed a limitation upon the right of the Dominion to administer and beneficially enjoy the lands.

By the statute constituting the Province of Manitoba, 33 V. ch. 3, sec. 30 (D.) 1870,

> all ungranted or waste lands in the province shall be * * * vested in the Crown and administered by the Government of Canada for the purposes of the Dominion, subject, &c.

But such administration must, of course, be treated as subject to the control of Parliament, which could dictate the purposes. In this case it did dictate that certain lands were to be applied to a particular purpose. By various other enactments the Parliament of Canada has fettered the executive in the administration of Dominion lands. Certain sections have been allotted to the Hudson Bay Company; others have been set aside for school purposes for the benefit of the Province of Manitoba or the North-West Territories; others have been allotted or agreed to be granted to railway companies; other dispositions have been provided for. The authorities administering the lands must do so subject to these enactments and to the rights arising under them.

It seems to me that, by virtue of the Dominion Act, 48 & 49 Vict. ch. 50, and the acceptance of its terms by the provincial Act, 49 Vict. ch. 38, there arose a legis-

lative contract between the Dominion and the province, under which, in consideration of the release of certain claims of the province, the Dominion was to make certain grants to the province and to do other things of value to the province and its inhabitants. The Dominion Act, then, should be interpreted by analogy to the principles applied to contracts for the sale of land. It was as if a party agreed to sell all portions of an estate which should be ascertained to be woodland, or pasture land, or of some other character. The fact that the Dominion Government, and not an independent party, was to be the judge of the character could not affect the matter.

The logical conclusion from the reasoning of the learned judge of the Exchequer Court would be that the officers of the Crown for the Dominion could continue to dispose of all swamp lands in Manitoba, as before the Act of 1885, and appropriate the proceeds without liability to account therefor. Such a construction would go far to render nugatory the agreed grant of the swamp lands to Manitoba. It does not appear to me that it is any answer to this reasoning to say that the lands were not likely to be sold to any considerable extent or that the province could trust to the sense of right and justice of the Dominion authorities. It must be assumed that the Dominion intended to bind itself to something, that some distinct right was intended to be given to the province. Otherwise the Dominion would do no injustice by disposing of the lands as it saw fit.

In my opinion the Act was intended to operate with reference to all lands which were Crown lands at the time of the enactment and which should thereafter be shewn to the satisfaction of the Dominion Government to be swamp lands.

1904

ATTORNEY GENERAL FOR MANITOBA v. ATTORNEY GENERAL FOR CANADA.

Killam J

It is true that the right to occupy and control and administer the lands was to accrue at a future date. But the agreement and the statutory direction for the transfer would not be fulfilled by transfer of the lands stripped of timber or otherwise rendered of much less intrinsic value.

In the case of an agreement between two private individuals for the sale and purchase of land, executed on the part of the purchaser, the vendor would be enjoined against the destruction of timber or other waste or made to account therefor, and he would be made to account for rents and profits or to allow an occupation rent for lands beneficially occupied.

The words "shewn to the satisfaction of the Dominion Government to be swamp lands" should, in my opinion, be treated as descriptive only of the lands to be transferred. They are not words of condition, except in so far as the ascertainment of the lands imposed a condition upon the completion. But once ascertained, applying the principles applicable to contracts of sale, the right to the benefits and uses should be deemed to have accrued not later than the execution of the consideration on the part of the province.

The provincial statute accepting the grants and payments in settlement of the claims was not enacted for about a year after the Dominion statute; but the claims were old ones existing prior to the Dominion Act. I think that the acceptance should be treated as relating back, so that the consideration should be deemed to have been executed at the passing of the Act of 1885.

It must have been in the contemplation of Parliament that the work of ascertaining the character of the lands would occupy years. No provision was made for the payment of interest or other compensation for the inevitable delay.

About the time of the enactment of the provincial Act an order was made by the Governor-General-in-Council laying down certain rules to guide in settling the character of the lands, and providing for the selection of the swamp lands by two surveyors appointed by the Minister of the Interior, but paid by and conducting their work at the expense of the Province. This was merely a provision for the practical working out of the statute, which must necessarily take a long time, and is, I understand, not yet completed.

The provision is that the lands are to be "transferred to the province and enure *wholly* to its benefits and uses." Taking the prior words as defining the lands to be transferred and of which the uses and benefits are to enure to the province, I think that the proper construction is to treat it as speaking from the time of its enactment and as providing that the uses and benefits were to enure from that time to the province. This construction appears strengthened by the use of the word "wholly" and by the analogy of contracts of sale. It has the advantage, also, of giving some effect to the words "enure wholly to its benefits and uses," which would be absolutely useless with reference to the period following the completed and formal transfer.

Appeal dismissed with costs.

Solicitor for the appellant: *T. Mayne Daly.*

Solicitor for the respondent: *E. L. Newcombe.*

1903
*Dec. 4.
1904
*Feb. 16.

ARTHUR DRYSDALE (DEFENDANT).....APPELLANT

AND

THE DOMINION COAL COMPANY (PLAINTIFFS)..... ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Commissioner of mines—Appeal from decision—Quashing appeal—Final judgment—Estoppel—Mandamus.

Where an appeal from a decision of the Commissioner of Mines for Nova Scotia on an application for a lease of mining land is quashed by the Supreme Court of the province on the ground that it was not a decision from which an appeal could be asserted the judgment of the Supreme Court is final and binding on the applicant and also on the commissioner even if he is not a party to it.

The quashing of the appeal would not, necessarily, be a determination that the decision was not appealable if the grounds stated had not shewn it to be so.

In the present case the quashing of the appeal precluded the commissioner or his successor in office from afterwards claiming that the decision was appealable.

If the commissioner, after such appeal is quashed, refuses to decide upon the application for a lease the applicant may compel him to do so by writ of mandamus.

APPEAL from an order of the Supreme Court of Nova Scotia, dismissing an appeal from the judgment of Mr. Justice Ritchie ordering the issue of a writ of mandamus commanding the Commissioner of Public Works and Mines of the Province to "take into consideration" an application of the respondent company for a lease of certain lands for mining purposes.

In October, 1893, a lease of certain lands for coal mining purposes was granted by the province to one

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

John Murray. In October, 1894, a license to search for minerals was granted to the Dominion Coal Co. over lands in the neighbourhood of those leased to Murray and was alleged by the appellant to include a portion of such leased lands. In July, 1897, the company applied for a lease for coal mining of a portion of the lands covered by its license to search, including the parts said to have been leased to Murray. The contention on the part of the company was that the commissioner had never given any decision upon this application, and that he was bound by law to do so. It was this application which the court in Nova Scotia had commanded the commissioner to "take into consideration."

The proceedings on the application of the respondent company are fully set out in the judgment of Mr. Justice Davies.

W. B. A. Ritchie K C. and *Mackay* for the appellant. The appellant decided that the application had been disposed of and could not be re-opened. Such decision could have been appealed from and such decision as the commissioner should have given obtained. No appeal having been taken, mandamus will not lie. See *Rex* v. *Justices of Midalesex* (1).

Mandamus sets the machinery of the courts in motion but will not direct the performance of any judicial act. High on Extraordinary Legal Remedies, sec. 152. *The Queen* v. *Justices of Middlesex* (2).

The following cases were also cited. *Mott* v. *Lockhart* (3); *Williamson* v. *Bryans* (4); *Meyers* v. *Baker* (5); *Fielding* v. *Mott* (6).

(1) 4 B. & Ald. 298.
(2) 9 A. & E. 540.
(3) 8 App. Cas. 568.
(4) 12 U. C. C. P. 275.
(5) 26 U. C. Q. B. 16.
(6) 18 N. S. Rep. 339; 14 Can. S. C. R. 254.

1903

DRYSDALE v. DOMINION COAL CO.

Lovett for the respondents. Mandamus is the proper remedy. *The Queen* v. *Adamson* (1); *The Queen* v. *Boteler* (2).

The decision of the commissioner must not be uncertain nor doubtful. *The King* v. *Archbishop of Canterbury* (3).

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

SEDGEWICK J.—I concur in the opinion of Mr. Justice Killam.

DAVIES J.—I reluctantly yield to the conclusion that this appeal must be dismissed. I do so reluctantly because, in my opinion, while the decision given by the commissioner in the first instance was defective and uncertain in neglecting to decide expressly upon the application of the respondents for a lease it was rendered certain by the commissioner's second decision of the 21st April, 1900. In this latter decision he affirmed the validity of the lease to Rev. Mr. Murray, and the fact that it was considered by him as the evidence of the contract made by the department with Murray leasing to the latter a piece of land described in the lease. It further decided that the coal company's application could not be granted in its entirely but that the department was

prepared to grant to the Dominion Coal Company a lease of so much or the ground described in said application, dated as above (meaning respondent's application), as is not covered by the lease granted to said John Murray.

This decision seems to me to have covered everything which, on the application before him, the commissioner was called upon to decide. Of course it might have been couched in more formal language

(1) 1 Q. B. D. 201. (2) 4 B. & S. 95.

(3) [1902] 2 K. B. 503.

but in view of the questions of overlapping as between Murray's existing lease and respondents' application for one, which were raised on the investigation hold by the commissioner, and of the definite and emphatic statement made in his evidence by Dr. Gilpin, the deputy-commissioner, that the only objection to granting the application was the one of its overlapping Murray's lease, I think it was quite clear and definite. I am not therefore surprised that with the evidence of this decision of his predecessor standing as part of the records of his department the present commissioner should have declined re-opening a case which as far as his records shewed he was quite justified in considering as closed and settled by his predecessor. I am quite at a loss to understand how this decision came to be set aside by the Supreme Court of Nova Scotia. Of course its validity depends upon the conclusion being reached that the first attempted decision of the commissioner was invalid for uncertainty and a nullity. That being conceded I do not understand the grounds upon which the court acted in setting aside the decision of the 21st April. No reasons were given by the learned judges and the assumption in the formal rule quashing the appeal of the Dominion Coal Company on the ground that the decision

> was signed by the deputy-commissioner and is not a decision of said commissioner from which an appeal can be asserted

was, as I understand, admitted in the argument at Bar to be a mistake as the document in question was signed by the commissioner's own name and by himself. Of course the holding of the Supreme Court of Nova Scotia that the decision of the commissioner of the 21st of April, 1900, "was not one from which an appeal could be asserted," could be supported on the ground that the commissioner

1904

DRYSDALE v. DOMINION COAL CO.

Davies J.

was at the time *functus officio*, having already given his decision. But I do not understand this reason is advanced by either of the litigants or by the court itself and in the absence of any reasons for the judgment we are left in the dark as to the grounds on which it was based. I gather from the judgment of Mr. Justice Townshend in the present appeal that the court looked upon the decision in question merely as an explanation of his first attempted decision and not as a substantive decision. But in view of the fact that the second decision incorporated the first one in its very words and then went on to supply its deficiencies I cannot think that the suggested reason would be held a good one. However the decision setting aside this last decision of the commissioner is final and I feel myself bound by it as did the trial judge in this action. I do not agree with either the trial judge or with Mr. Justice Townshend, who delivered the judgment of the court *in banco*, that the commissioner was to say yes or no to the application simply. From the evidence before the commissioner it appeared that Murray's lease granted some years before the Dominion Coal Company's application was made might overlap the lands applied for in the latter. Whether it would do so or not depended largely upon the construction of the lease and other facts to be determined. Were the posts and specific distances in the description of the lands leased to control and the reference to the original application for a license to search to be treated as *falsa demonstratio*, or was the latter line to control the specific distances? These were legal questions on which the commissioner I think had no right to pass. What lands were legally covered by Murray's lease was a question to be determined afterwards by the court in a proper action. No decision of the commissioner could either contract or expand the legal

boundaries of Murray's lease. But a simple affirmative answer might well land the department in the position of having granted the same lands to different parties and possibly involve it in an expensive litigation. I conceive therefore that the commissioner might well grant the Dominion Coal Company's application subject to and excepting thereout such lands as might be found and determined to be included in the Murray lease; in other words, bounding it by the lands, whatever they were, described in the Murray lease. Such a decision would leave the respective claims of the parties for adjudication by the proper tribunals and such a decision I would have supposed but for the judgment of the Supreme Court of Nova Scotia had been reached and expressed in the document signed by Mr. Commissioner Church of the 21st April, 1900.

I was at first inclined to adopt the appellant's contention that the respondents in applying for a madamus had mistaken their remedy which was by way of writ of *scire facias*. But further consideration has convinced me that this is not so. The questions to be determined between the parties here, as I understand them, depend not so much upon whether Murray's lease should have been granted or not as upon the meaning of the description in the lease. What respondents want is a determination of their application for a lease. That they are entitled to have. We are all of opinion that what is called the first decision of Commissioner Church was void for uncertainty. The Supreme Court of Nova Scotia has held, and its decision on the point is final and binding, that the second decision of the commissioner was "not one from which an appeal would lie" and therefore was not a decision at all. There is no other remedy is it appears to me open to the respondents under the circumstances than the one they have taken, and that being the controlling test as to whether an

1904

DRYSDALE v. DOMINION COAL CO.

Davies J.

action for a mandamus will lie the question must, I think, be decided in favour of the action lying.

NESBITT J.—I agree with Mr. Justice Killam.

KILLAM J.—The principal contention on the part of the commissioner is that his predecessor in office, long ago, considered the company's application and gave his decision with reference thereto, and that another commissioner is not bound to re-open the matter and decide upon it anew.

Three written documents are relied upon as constituting the decision of the former commissioner.

The document of the 7th April, 1899, purported to express a decision upon a dispute between the Dominion Coal Co. and the Rev. John Murray, relative to the overlapping of Murray's lease by the company's application for a lease. The decision was that Murray's lease was not void or uncertain, and that it be and remain the evidence of the contract between Murray and the Crown.

This did not, upon its face, determine anything regarding the company's application. A reference to the notice of investigation and to the full record does not seem to extend its effect in this respect. It is argued that the necessary result of adjudging Murray's lease good was to preclude the commissioner from granting a lease to the company of the common ground. But it does not appear whether the commissioner found that there was any overlapping, or what he considered he ought to do with reference to the company's application.

The second document was a copy of a letter signed by the deputy-commissioner and sent by him to the company's solicitor, purporting to express what the ommissioner considered to be the effect of the prior

decision. The company's appeal from a decision of the commissioner as of the date of that letter was quashed, on Murray's motion, upon the ground, as stated in the rule or order of the court, that

the letter of February 1st, 1900, signed by the deputy-commissioner is not a decision of said commissioner from which an appeal can be asserted.

The third document was also made the subject of an appeal, which, again, was quashed, on Murray's motion, upon the ground, as set out in the rule or order of the court,

that the document of April 21st, 1900, signed by the deputy-commissioner, is not a decision of said commissioner from which an appeal can be asserted.

The appellant, in his factum, states that the reference to the document as signed by the deputy commissioner was an error.

The service upon the commissioner of the statutory notice required for the purpose of initiating the appeal does not appear to me to have the effect of making the commissioner a party to the appeal. It is a notice to the tribunal being appealed from for the purpose of informing it of the appeal and of procuring the transmission of the requisite material. It is a step in carrying the matter from the original tribunal to the appellate court.

But it appears to me that the inferior tribunal must be bound by the judgment of the appellate court in the matter, without being a party thereto.

The quashing of the appeals would not necessarily have determined that there was no appealable decision, were it not for the statement of the grounds. This statement, however, is a binding adjudication which works an estoppel between the parties. See *Alison's Case* (1).

(1) 9 Ch. App. 1.

1904

DRYSDALE v. DOMINION COAL CO.

Killam J.

It was adjudged by the Supreme Court of Nova Scotia, as between the parties to the appeal, that the commissioner had not given an appealable decision in the matter. On this ground the company was precluded from exercising its statutory right to appeal from what the commissioner's successor now says was an appealable decision. In that matter, and as between those parties, he should not be permitted to take that position.

The statute did not, in express terms, command the commissioner to give an appealable decision. But it appears to me to have given to the holder of a license to search a right to acquire a lease of a portion of the area covered by the license, upon duly making his application to the commissioner. The commissioner is given jurisdiction to inquire into and decide upon the application, and his decision is subject to appeal to the highest legal tribunal of the province.

It was imperative upon him to exercise the jurisdiction when called upon to do so by a party interested and having the right to make the application. *Rex* v. *Havering Atte Bower* (1); *Macdougall* v. *Paterson* (2); *Julius* v. *The Lord Bishop of Oxford* (3).

Although the Commissioner is a member of the Executive Council of the Province the Act gave him jurisdiction to decide upon a question of right, and made his decision subject to review by a legal tribunal. It appears to me that, in such a matter, he was not to act as a member of the executive or as the agent of the Crown, but he was given jurisdiction to exercise a judicial function, which a party in the position of the respondent company had a right to call upon him, and the court the power to command him, to exercise.

(1) 5 B. & Ald. 691. (2) 11 C. B., 755; 2 L. M. & P. 681.
(3) 5 App. Cas. 214.

It is true that, when the decision is given, the remedy is by way of appeal. But until there is a decision there can be no appeal.

I express no opinion upon the questions of the correctness of the decisions in the Nova Scotia court that the documents mentioned were not appealable decisions.

By virtue of the conclusions of the court, the company was not allowed to appeal from them and could not now do so if we considered that the conclusions upon this point were erroneous.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. A. Mackay.*

Solicitor for the respondents: *W. B. Ross.*

1903
*Dec. 1, 2.
1904
*Feb. 16.

THE CONFEDERATION LIFE ASSOCIATION (PLAINTIFFS)..... } APPELLANTS;

AND

FREDERICK W. BORDEN AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Order for new trial—Weight of evidence—Discretion—New grounds on appeal.

Where the court whose judgment is appealed from ordered a new trial on the ground that the verdict was against the weight of evidence:

Held, that this was not an exercise of discretion with which the Supreme Court of Canada would refuse to interfere and the verdict at the trial was restored.

The argument of an appeal to the Supreme Court of Canada must be based on the facts and confined to the grounds relied on in the courts below.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) setting aside the verdict for the plaintiff and ordering a new trial.

The following statement of the facts of the case was prepared by Mr. Justice Killam.

This action was brought upon a bond of indemnity given by the defendant Brown, as principal, and the defendants, Borden and Kirk, as sureties, to secure the faithful accounting for and payment over of all moneys received by Brown for the plaintiff association and the performance of Brown's duties and obligations under his agreement of service with the plaintiff as its agent.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ.

(1) 35 N. S. Rep. 94 *sub nom. Conf. Life Assoc.* v. *Brown.*

The statement of claim alleged the receipt by Brown of a large number of sums of money on the plaintiff's account, amounting in the aggregate to $1,262.75, and failure to account for or pay over the same.

Brown did not defend the action, but the sureties did. By their statements of defence, besides generally denying the allegations in the statement of claim, they set up the following defences :—

1. Dishonesty of Brown while employed by the plaintiff prior to the giving of the bond, known to the plaintiff and fraudulently concealed from these defendants when the bond was given ;

2. Large indebtedness of Brown to the plaintiff arising in the course of such prior employment fraudulently concealed from these defendants ;

3. Material change in Brown's remuneration as fixed by his agreement with the plaintiff, made after the giving of the bond without the knowledge or consent of the sureties ;

4. Similar material alteration of the nature of Brown's employment ;

5. Failure of Brown, from the first month of his employment after the bond, to remit moneys monthly as required by his agreement, under which plaintiff had a power of dismissal for such default, and retention of Brown ;

6. Practically a repetition of the 5th, with allegations that it was the plaintiff's duty to notify the sureties of the default and omission to do so ;

7. Systematic failure by Brown to remit, and neglect to notify sureties ;

8. Dishonesty and misconduct of Brown, prior to defaults sued for, entitling plaintiff to dismiss, and retention of Brown, and connivance of plaintiff with him in the continuance of dishonesty ;

1903

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

9. Similar dishonesty and misconduct, and fraudulent concealment from sureties.

The action was tried before Mr. Justice Meagher, with a jury, and upon the answers of the jury to certain questions judgment was directed to be entered for the plaintiff. The sureties moved to set aside the findings of the jury and the order for judgment, and to have judgment in their favour or a new trial.

The Supreme Court of Nova Scotia set aside the findings and the order for judgment and directed a new trial.

The plaintiff association carries on the business of life insurance.

The defendant was employed by the plaintiff from 1891 to September, 1900. One contract of service, made in 1895, terminated at the end of 1897. After some negotiations during the months of January, 1898, a new contract was made, in writing, dated 1st January, 1898, by which Brown was to act as agent of the association for five years from that date at such places as the association should from time to time designate. By the terms of this instrument Brown was to canvass for new insurance; to collect premiums when instructed by the association or its authorized officers; to well and faithfully account to the association for all moneys, securities, &c., which should be received by him as such agent or come into his possession for or on account of the association; to remit to the association all such moneys or securities collected by him at least once in each month, or as often as might be required by the association; "to obey and carry out any lawful order or instructions given to or received by him from the managing director or other constituted authority of the association respecting the operations of the said association, and conform to the rules of the association;" not to neglect the

business of the association or misconduct himself in the conduct therof; "before entering on his duties as such agent to give a bond, with sureties satisfactory to the said association, for the faithful performance by him of the foregoing agreements, stipulations and conditions, for the sum of one thousand dollars."

By the instrument the association agreed to pay to Brown certain remuneration. "Upon the first year's premiums, as collected, under policies issued through his instrumentality," various rates of commission were provided for, according to the system. "Upon all renewal premiums, as collected, under policies secured through his instrumentality, which are now in force or shall hereafter be secured by him a commission of 5 per cent" was to be paid. These commissions were to be subject to deductions of those paid to local agents, the rates of which were limited.

The agreement further provided that the association might terminate and cancel it at any time for breach of any of the conditions, stipulations and agreements on Brown's part, and, also, that it might be terminated by the association at any time upon one month's notice.

The bond sued on bore date the 3rd day of February, 1898. It began with the recital of Brown's appointment as agent under the agreement mentioned, "which agreement forms the basis of this obligation," and that these defendants had "agreed to become sureties for the faithful carrying out of the said agreement." The condition was that Brown should account for and pay over moneys received, and well and truly "perform, observe and discharge all duties and obligations contained in the said agreement and on his part to be performed," and indemnify and save harmless the association from loss and damage by reason of any act,

1903

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

matter or thing done or omitted to be done by him contrary to the agreement.

The plaintiff association was represented in Nova Scotia by Frederick W. Green, general manager for the Maritime Provinces, with headquarters in Halifax. Brown's headquarters and place of residence were at Wolfville, but his field occupied several counties and he had four sub-agents in different places. Brown's instructions were to send monthly returns to the Halifax office. These were to be made by the 10th of each month in respect of the business of the preceding month. His financial reports were made upon forms supplied to him from the Halifax office, partly filled up. He remitted by his own cheque, unaccepted, upon a bank in Wolfville. Remittances received in Halifax were frequently held, undeposited, for some days, pending the checking of returns. On a few occasions Brown requested that particular cheques be held over as long as possible. On the 10th July, 1900, Brown's report for the preceding month was received at the Halifax office, showing a balance of $781.93 to be remitted, and with it a cheque for that amount. After a few days this was deposited in a bank and sent to Wolfville for collection when payment was refused, and on the 18th July the cheque was protested for want of funds. Notice of protest reached the Halifax office on the 20th July in Green's absence and came to his knowledge a few days later.

Under date of 27th July Green wrote Brown asking for a remittance of the amount of the protested cheque and referring to a prior letter on the same subject, not produced. On the 2nd August Brown replied, with a remittance of $450, explaining that he had failed to properly check his bank account and asking for an advance against the balance for a few days. On the 14th Aug. Green notified the defendant Kirk of the

shortage and of Brown's explanation, and on the 21st August he gave formal notice to both sureties that Brown had failed to account for moneys received to the amount of $1,469.18, and that they would be held liable to the amount of the bond. On the 6th September Green dismissed Brown after getting from him a final report showing the shortage to be $1,262.76.

Brown was called as a witness for the defendants, and gave direct evidence of having on several occasions prior to the defaults sued for expressly admitted to Green that he was short of funds to make his remittances.

In 1899 Brown asked for and obtained from the association a loan of $400 upon the security of property belonging to his wife. According to his account he first asked for this loan in March or April. It was finally made in June. It was in interviews with Green about this loan that Brown claimed he made some of the admissions mentioned, and his statement was that the advance was directly applied by Green to cover the shortage in June, 1899.

In the early part of 1900, Green made advances to Brown on account of commissions upon premiums for which the association held notes or acknowledgements, but on which commissions only would be payable when the premiums should have been actually paid. Brown testified to having made similar admissions to Green upon obtaining these.

The defendant Kirk testified to admissions by Green to himself of having long known of Brown being in arrear and to having lent him money to keep him in good standing with the company.

Green directly contradicted both Brown and Kirk upon these points, and both Green and the Halifax cashier expressly denied any knowledge of Brown

1903

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

being in default until after the protest of the cheque of July, 1900.

To account for the requests to hold the cheques, Green stated that Brown sometimes included sums not actually paid to him in money, for some of which he might hold cheques of policy holders or of sub-agents which might turn out worthless. Brown admitted that occasionally he did return as paid small sums which he had not received, and that, in one case, he had done so with reference to a note of the defendant Kirk for over $200.

Brown's returns of July, August and September, 1900, were put in evidence. Upon each was printed the following:—

"NOTE.—All drafts or cheques for remittances (to be on chartered banks) must be payable at par in Toronto, or at some place where the Canadian Bank of Commerce, the Ontario Bank or the Imperial Bank has a branch."

At the close of the portion of each account relating to the credits to Brown was printed "By Draft, Marked Cheque, P. O. Order, to balance."

Upon the June report was a printed form of "Instructions to the Manager or Agent," having at the foot of the printed signature "J. K. Macdonald, Managing Director." These instructions were partly as follows:—

"5. Commissions are to be charged only on the premiums ACTUALLY COLLECTED and remitted to the head office. * * * * *

7. Your remittance for balance due must be made either by chartered bank draft, marked check, post office order, or by express.

8. The payment of premiums not actually received by you is done at your own personal risk, and the association will not, UNDER ANY CIRCUMSTANCE, be

responsible to return the same upon the non-receipt by you."

Under Brown's engagements with the association before 1898, considerable advances had been made to him for travelling and other expenses. In his former agreement there was some provision for these being secured upon, or repayable by the application of, commissions on renewal premiums.

Green stated in evidence, "at the time agreement of '98 was made we had an understanding with Brown that his old commissions would go in reduction of old account, and his new commissions would be paid him in cash. He received his commissions on new premiums until discharged. Some paid in cash and some through his returns by treating them as equal to cash. * * About spring of 1898 or may be later the old arrangement with Brown was varied by allowing him the commision in cash on old business which he was collecting himself in place of using it to reduce old account. The old understanding was that advances should cease, and that the commission on old business should be applied to reduce the balance in his commission account prior to 1898. Don't allow him any commission at all since discharged. Commissions on business secured since 1898 by him would be about $40 to $60 a year, depending on the continuance of the business."

The learned judge before whom the cause was tried instructed the jury that "it was the duty of the plaintiff company to disclose as promptly as possible to the sureties any notice or knowledge they received or had of any breach of duty, misconduct or dishonest act on the part of Brown"; that the knowledge of Green or notice to him in these respects would be the knowledge of or notice to the association; and that the burden was upon the defendants to prove, to the rea-

1903

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

sonable satisfaction of the jury, that the association had such notice or knowledge some considerable time before its communication to the defendants.

The learned judge pointed out the conflict between Green's evidence and Brown's upon this question of notice, and left it to them to determine as to the weight to be given to Brown's. He told the jury that it was for them to give such effect to Green's story,—regarded in the light of the protested cheque, and the notice thereof to Green, and the effect these ought reasonably to have had upon his mind in the matter of notice—as they thought it was under the circumstances reasonably entitled to.

He also adverted to three contentions made, as he stated, by the defendants' counsel:

"1. That the mortgage loan of itself conveyed notice to the defendants that Brown was in default to them;

2. That his reports in themselves necessarily conveyed notice of his default to them; and

3. That his request to hold over his cheques, and Green's compliance therewith, was in itself a confession of default, especially when regarded in the light of the report which preceded or accompanied such cheque."

He left to the jury four questions, which, he stated, had been prepared and agreed upon by counsel.

These questions and the answers of the jury were as follows:

"1. Had the plaintiff company during the negotiations for the loan on mortgage, or at the time the mortgage was given, knowledge that Brown had received moneys on account of the company which he used for his own purposes? No.

2. Had the plaintiff company knowledge that Brown had received moneys on account of the plaintiff and which he had not paid over as required by his agree-

ment, when Brown's cheques were held over and not deposited in the regular course of business by the plaintiff? No.

3. On July 20th, 1900, had the plaintiff company knowledge that Brown had received moneys on plaintiff's account and which he had failed to pay over as required in the regular course of his employment? No.

4. Did Green at Dorchester admit to Kirk that he had had knowledge of defaults by Brown at several times prior to July 1st, 1900, and that he, Green, had been helping him from time to time to keep him in good odour with the company? No."

The majority of the Supreme Court of Nova Scotia were of opinion that the answers to the second and third questions were against the weight of evidence.

Mr. Justice Townshend based his opinion upon the disobedience, on Brown's part, of the printed instructions as to the methods of remitting moneys, considering that compliance with such instructions was so material a part of the agreement forming the basis of the sureties' obligation that the association should have dismissed Brown therefor.

The court therefore ordered a new trial on the ground that the verdict was against the weight of evidence. The plaintiffs appealed.

W. B. A. Ritchie K.C. for the appellants. Permitting the agent to depart from the terms of the instructions given him will not discharge the sureties; *Mayor of Durham* v. *Fowler* (1); but there must be conduct amounting to fraud. *Dawson* v. *Lawes* (2); *Caxton* v. *Dew* (3); *Hamilton* v. *Watson* (4); *Town of Meaford* v. *Lang* (5); *Exchange Bank* v. *Springer* (6); *Niagara Dist. Fruit Growers Stock Co.* v. *Walker* (7).

(1) 22 Q. B. D. 394.
(2) Kay 280.
(3) 68 L. J. Q. B. 380.
(4) 12 Cl. & F. 109.
(5) 20 O. R. 42, 541.
(6) 13 Ont. App. R. 390; 14 Can. S. C. R. 716.
(7) 26 Can. S. C. R. 629.

1903

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

The findings of the jury should not have been disturbed. *Metropolitan Railway Co.* v. *Wright* (1); *Fraser* v. *Drew* (2); *Commissioner for Railways* v. *Brown* (3). An order for a new trial may be reversed on appeal. *Solomon* v. *Bitton* (4); *Webster* v. *Friedeberg* (5).

Newcombe K.C. for the respondents. The court below ordered a new trial on the ground that the verdict was against the weight of evidence, which exercise of discretion will not be interfered with on appeal. *Eureka Woolen Mills Co.* v. *Moss* (6).

The retention of Brown in the company's employ after he had made default in remitting monies as instructed discharged the sureties. *Phillips* v. *Foxall* (7); *Sanderson* v. *Aston* (8); *Holme* v. *Brunskill* (9); *Pidcock* v. *Bishop* (10).

Ritchie K.C. in reply. As to interference with discretion of the court below see *London Street Railway Co.* v. *Brown* (11); *Pidcock* v. *Bishop* (10) was distinguished in *Mackreth* v. *Walmesley* (12).

THE CHIEF JUSTICE.—Upon the authority of *Black* v. *The Ottoman Bank* (13), in the Privy Council, and of *The Niagara District Fruit Growers Co.* v. *Walker* (14), in this court, I would allow this appeal.

The attempt by the respondents to raise here questions of fact which they did not raise at the trial must fail; *Lyall* v. *Jardine* (15). I agree with Mr. Justice Killam on all the points.

(1) 11 App. Cas. 152.
(2) 30 Can. S. C. R. 241.
(3) 13 App. Cas. 133.
(4) 8 Q. B. D. 176.
(5) 17 Q. B. D. 736.
(6) 11 Can. S. C. R. 91.
(7) L. R. 7 Q. B. 666.
(8) L. R. 8 Ex. 73.
(9) 3 Q. B. D. 495 at p. 505.
(10) 3 B. & C. 605.
(11) 31 Can. S. C. R. 642.
(12) 51 L. T. 19.
(13) 15 Moo. P. C. 472.
(14) 26 Can. S. C. R. 629.
(15) L. R. 3 P. C. 318.

1904

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

Girouard J.

SEDGEWICK J. dissented from the judgment of the court for the reasons stated by His Lordship Mr. Justice Girouard.

GIROUARD J. (dissenting.)—This is an appeal from a judgment of the Supreme Court of Nova Scotia granting a new trial. The action is upon a fidelity bond signed by the respondents in favour of the appellant for $1000. Four questions were submitted to the jury by consent and answered in favour of the company. Thereupon the trial judge (Meagher J.) directed judgment to be entered upon said findings and referred the determination of the amount of the defalcations to a special referee who fixed it at $909, for which amount judgment was entered with interest and costs. The respondents appealed to the full court which set aside the verdict and ordered a new trial. The learned judges did not agree as to the reasons of judgment. Townshend J. held that the agreement of engagement of Brown had been violated by the company in many essential particulars and that the sureties were thereby discharged. Weatherbee and Graham JJ. considered the verdict as being contrary to the weight of the evidence. All came to the conclusion to order a new trial.

I do not see that the course taken by the court *in banco* can cause any real injustice to the appellant, if the action is well founded; it is not dismissed, it is merely submitted to a new test. A new trial may however relieve the respondents from liability, especially if the questions to the jury are framed so as to exhibit before the trial judge and the jury the true position of the parties, as disclosed by the evidence of Green, the general manager of the company in the Maritime Provinces, and other witnesses. It is partly set forth in paragraphs 7 and 8 of the statement of defence; but it

1904

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

Girouard J.

may be necessary for the defendants to amend the pleadings so as to agree with the facts proved. They should fully lay before the jury the breaches of contract on the part of the company pointed out by Mr. Justice Townshend, and also the past defalcations of Brown (not merely his indebtedness to the company) as local agent of the company, and the secret agreement made by Green with him with regard to the same, which were concealed from the sureties when they signed or delivered the bond, and according to the best authorities were sufficient to void their obligation.

In *Railton* v. *Mathews* (1) decided by the House of Lords, one George Hickes was re-appointed the agent in Glasgow of a Bristol firm, Mathews & Leonard, drysalters, he finding security for his fidelity. He offered his brother and one Railton; they were accepted by the Bristol merchants, who caused a proper bond to be prepared and transmitted to the agent in Glasgow where it was signed by him and his two sureties without having any communication with either of them, and without making any arrangement with Hickes as to the payment of the balance standing against him as agent during the two previous years. Hickes being denounced as a defaulter to the sureties, they made inquiry and discovered that in the course of his previous employment the Bristol firm knew that he had appropriated the funds of the firm, and that at the time the bond was demanded he was a defaulter. Lord Cottenham said:

I find several facts appearing as having passed between the party who was the subject of the suretyship and those by whom he had been previously employed; and I find the matter stated in these terms: That the parties totally failed to communicate the said circumstances, or either of them, or the existence of any balance on the agency accounts then standing against the said George Hickes, to the pursuer or to the said Henry William Hickes; and, on the con-

(1) 10 Cl. & F. 934.

trary, while they accepted and took possession of the said bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of the said George Hickes, &c.

It has not been contended, and it is impossible to contend, after what Lord Eldon lays down in the case of *Smith* v. *The Bank of Scotland* (1) that a case may not exist in which a mere non-communication would invalidate a bond of suretyship. Lord Eldon states various cases in which a party about to become surety would have a right to have communicated to him circumstances within the knowledge of the party requiring the bond; and he states that it is the duty of the party acquiring the bond to communicate those circumstances, and that the non-communication, or, as he uses the expression, the concealment of those facts would invalidate the obligation and release the surety from the obligation into which he had entered.

Lord Campbell, page 942:

The question really is: What is the issue which the court directed in this case? Whether the pursuer, Edward Railton, was induced to subscribe the said bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them? The material words are, "undue concealment on the part of the defenders." What is the meaning of those words? I apprehend the meaning of those words is, whether Railton was induced to subscribe the bond by the defenders having omitted to divulge facts within their knowledge which they were bound in point of law to divulge. If there were facts within their knowledge which they were bound in point of law to divulge, and which they did not divulge, the surety is not bound by the bond; there are plenty of decisions to that effect, both in the law of Scotland and the law of England. If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety; and whether they concealed those facts from one motive or another, I apprehend is wholly immaterial.

And as the trial judge had misdirected the jury to the effect that a concealment to be undue must be wilful and intentional, a new trial was ordered.

I take it for granted that this decision is binding upon us notwithstanding what has been said or held to the contrary by other courts.

(1) 1 Dow 272, p. 292, *et seq.*; 7 Ct. Sess. (1 Ser.) 244, 248.

1904

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

Girouard J.

It has been contended that *Railton* v. *Mathews* (1) cannot be reconciled with another decision rendered a year or two after by the same tribunal in *Hamilton* v. *Watson* (2). But *Hamilton* v. *Watson* (2) was a very different case, for it applied only to a suretyship to a banker for a cash advance.

There is a great difference between the credit of a man and his character, his solvency and his honesty. The suretyship does not stand upon the same basis in both cases. The credit surety had a right to expect that the cash advance would be made, and in fact it was made, in that case, by the banker according to the usages of banking business. The principal debtor or borrower or his sureties have nothing else to expect from the banker.

In the case of a fidelity bond, the surety has a just and legal expectation that the creditor will not trust his money or his property to a man known to him to be dishonest and that the commissions earned by the agent during the existence of the bond would help him at least to discharge his liabilites incurred in the course of his agency. I think therefore there is a vast difference between the two cases. If this distinction did not exist, Lord Campbell who pronounced the judgment in both cases would have placed himself in a contradictory position, within a very short time, without any expression on his part of intending to do so. This cannot reasonably be presumed. The difference between a fidelity contract and a credit guarantee is pointed out in *Lee* v. *Jones*, (3)

Shee J. said:

> There is a wide difference as respects what might naturally be expected to be the actual state of the account of one man with another, between the case of a suretyship for a man requiring and applying for a cash-credit to bankers with whom he had had previous deal-

(1) 10 Cl. & F. 934.
(2) 12 C. & F. 109.
(3) 14 C. B. N. S. 386; 17 C. B. N. S. 482, at p. 501.

ings, and whose business is to lend capital to penniless persons on the security of sureties, and the case of a suretyship for a surety for others.

Hamilton v. *Watson* (1) is not therefore inconsistent with *Railton* v. *Mathews* (2). It is moreover a strong authority for the contention of the respondents that an agreement, such as is admitted by Green, is fatal to their suretyship. The argument on the part of the surety was that the circumstances of the case showed the "probable existence" of a secret agreement that the fresh credit was to be applied to the payment of an old debt. Lord Campbell said:

> Now, in this case, assuming that there had been the contract contended for, and that had been concealed, that would have vitiated the suretyship. There is no proof nor is there any allegation that there was any such contract. There is, therefore, neither allegation nor proof, and what then does the case rest upon? It rests merely upon this, that at most there was a concealment by the bankers of the former debt, and of their expectation, that if this new surety was given, it was probable that the debt would be paid off. It rests merely upon non-disclosure or concealment of a probable expectation. And if you were to say that such a concealment would vitiate the suretyship given on that account, your lordships would utterly destroy that most beneficial mode of dealing with accounts in Scotland.

And the Lord Chancellor concluded:

> If there was a stipulation that it was to be so applied, and these were the conditions upon which the money was advanced, it might have effected the transaction. But, in order to raise that question there should have been an averment upon the record that such an agreement had been entered into.

The principles laid down in the above cases have been applied in many cases, more particularly in *Stone* v. *Compton* (3); *Lee* v. *Jones* (4); *Phillips* v. *Foxall* (5); *Sanderson* v. *Aston* (6). *See* also *Davies* v. *London & Provincial Marine Insurance Co.* (7)

(1) 12 Cl. F. 109.
(2) 10 Cl. & F. 334.
(3) 5 Bing. N. C. 142.
(4) 17 C. B. N. S. 482.
(5) L. R. 7 Q. B. 666 at p. 672.
(6) L. R. 8. Ex. 75.
(7) 8 Ch. Div. 469.

1904

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

Girouard J.

In this case the plaintiff is charged with fraudulent concealment of past dishonesty on the part of the agent; the secret agreement is not alleged; probably it was unknown to the defendants till it was admitted by Green at the trial but it was proved beyond any question.

Black v. *The Ottoman Bank* (1) does not conflict with the above decisions; it was a very different case; it was not one of continued employment and of anterior defalcations; there was no secret agreement injurious to the interests of the surety; in fact it refers to a state of affairs happening after the bond had been entered into. *Niagara Fruit Growers Stock Co.* v. *Walker* (2), is clearly distinguishable, for in that case there was no secret agreement as to the payment of old accounts; none was necessary, as the agent, Walker, had in each previous year settled with his own means and in a manner satisfactory to the principals, the balance due from him in respect of his agency for every preceding season. In the present case no such settlement had been effected; only advances had been made by Green acting for the Company to cover up the deficiencies, and at the time of his re-engagement, on the 1st January 1898, he stood in default for a large sum of money, about $2,000, and likewise when the bond of the respondents was subsequently obtained in February following. He should not have been re-engaged by Green, but if re-engaged at all, it should have been at the risk of the company, as was done previously, and not of the sureties unless informed of the fact. The exacting of a fidelity bond after the agent had acted for years without any, satisfies me that it was a scheme on the part of Green to throw the loss upon some outsiders. The sureties cannot lawfully be used

(1) 15 Moo. P. C. 472. (2) 26 Can. S. R. C. 629.

to make good past deficiencies, unless willing to do so. Can it be supposed that they would have signed the bond if they had been acquainted with his previous dealings with the Company? Green says in his evidence:

> At the time agreement of '98 was made we had an understanding with Brown that his old commissions would go in reduction of old account, and his new commissions would be paid him in cash. * * The old understanding was that advances should cease, and that the commission on old business should be applied to reduce the balance in his commission account prior to 1898.

This is a plain admission by the appellant of past defalcations and of a secret arrangement to satisfy the same out of current earnings of Brown, a material fact which was undisclosed to the sureties and amounted to a fraud in law and in fact.

This evidence would perhaps be sufficient to dismiss the action but it was not passed upon by the jury. The defendants did not move for the dismissal of the action. They only applied for a new trial which was granted to them by the full court, which is the best judge of its own procedure. The evidence of Green may possibly be explained or supplemented; and to avoid any surprise, it is reasonable to submit it to the appreciation of the trial judge and jury with the other circumstances of the case. The point of the secret agreement was taken in the Court below, as appears from the report of the case (1). If standing alone it would probably not be sufficient to allow a new trial, as it was not pleaded, but this new trial has been ordered for other reasons which I approve in a certain measure and I think it is in the interest of justice that the whole case should be re-opened. I quite agree with the majority of the judges that the verdict is contrary to the weight of evidence.

(1) 35 N. S. Rep. 94, 96.

1904

THE CONFEDERATION LIFE ASSOCIATION v. BORDEN.

Girouard J.

I am not prepared to say that the reasons of judgment advanced by Mr. Justice Townshend are unfounded. The proper time to decide the nice points of law the learned judge elaborately discusses will be when the case will come back for adjudication after all the facts have been passed upon by the jury.

The appeal should be dismissed with costs.

DAVIES J. concurred in the judgment allowing the appeal for the reasons stated by Killam J.

KILLAM J.—I am of opinion that this appeal should be allowed, and the judgment for the plaintiff restored.

The questions submitted to the jury were directed solely to the acquisition by the plaintiff association of knowledge of Brown's defaults. The answers to the first and fourth depended upon the relative credibility of Brown's and Kirk's evidence respectively, on the one side, and Green's, on the other. The jury might well have discredited Brown, and they probably considered that Kirk misunderstood Green. No serious objection is made to the propriety of the answers to these two questions.

It being fairly open to the jury to disbelieve Brown's evidence of his express admissions to Green, the objections to the answers to the remaining questions must be confined, as they were by the majority of the court below, to the inferences which should be drawn from the clearly ascertained facts. Those inferences again were for the jury to draw, and their findings upon them should not be disturbed unless they were such as, reasonably viewing the whole of the evidence, the jury could not properly reach. *Commissioner of Railways* v. *Brown* (1); *Council of the Municipality of Brisbane* v. *Martin* (3); *Australian Newspaper Co.* v. *Bennett* (3).

(1) 13 App. Cas. 133. (2) [1894] A. C. 249.
(3) [1894] A. C. 284.

Green testified to circumstances which show that the including in Brown's monthly statements of moneys as being received did not conclusively establish their actual receipt by him. Green's evidence received some corroboration from Brown's own. In a letter of 8th July, 1899, Brown wrote Green:

Have remitted some which have not received money for as yet; so do not send cheque till you have to.

The printed instructions from the head office recognized it as not improbable that agents would make such remittances. A man in Green's position would have a knowledge of the practice in these respects which might well make him hesitate to conclusively adopt the view that a request for delay in forwarding a cheque was necessarily attributable to misappropriation of funds. The questions put to the jury were as to the plaintiff's *knowledge* of Brown's receipt of moneys not paid over. They were not as to knowledge merely of facts calculated to lead to inquiry, not as to negligence in failing to ascertain what the apparent facts were calculated to suggest. It appears to me that the answer to the second question was not merely such as could reasonably be given, but probably also the correct one.

The third question was, apparently, directed to the knowledge to be imputed through receipt of the notice of protest of the cheque. Green states that he was out of town then. It does not appear when the notice was first seen by any person conversant with the circumstances. So far as dishonour of the cheque is concerned, the association was bound by the bare receipt of notice; but its receipt in the office did not of itself constitute knowledge that Brown had received moneys on the plaintiff's account which he had failed to pay over as required in the regular course of his

1904

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

Killam J.

employment. For this purpose an inference from circumstances was required.

The notice of dishonour is not put in evidence. If in the form given by "The Bills of Exchange Act, 1890," it merely stated that the cheque had been presented and protested for non-payment. Its contents and the fact of dishonour might well be consistent with a case of a slight insufficiency of funds, which might be due to Brown's not having received some of the moneys covered by the cheque or to some unintentional error which could be satisfactorily rectified and explained. Still the presumption would be that a large part of the moneys had been actually received by Brown, and to any one in Green's position there would be conveyed the information that Brown had received some moneys on the plaintiff's account which he had in fact failed to pay over within the time required by the regular course of business. But if, in strictness, this is the knowledge contemplated by the question, still it cannot be said that the jury erred in finding that the company had not that knowledge on the 20th July. The onus was upon the defendants to show knowledge in some person empowered for that purpose to represent the company. In my opinion, the jury were fully justified in finding that this onus had not been discharged as regards the particular date to which they were confined by the question.

The case was very much stronger for finding that Green had positive knowledge that Brown was a defaulter when he received the latter's letter of 31st July, or when he wrote on the 27th July notifying him that further collections would not be sent to him, or even on the preceding Wednesday—the 25th—when they had the conversation to which that letter refers. But the latter is the earliest date at which, in my opinion, there can properly be imputed to the company

1904

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

Killam J.

such knowledge as cast upon it any duty to terminate the risk or obtain the sureties' consent to its continuance.

But whatever the exact date in July at which the knowledge was acquired, it would affect the quantum of liability only. Unless otherwise discharged, the sureties were responsible for the prior shortage. It has been argued before us that they were entirely relieved from liability on three grounds :—(1) Concealment by the plaintiff, when the bond was given, of an agreement or arrangement for the application of a portion of the commissions upon the previous advances to Brown; (2) Disobedience by Brown of instructions as to the times and methods of remitting moneys, and his retention in the plaintiff's employ thereafter without the knowledge or consent of the sureties; (3) Variation of the terms of the contract of service by advances on account of commissions before they were strictly due, without the knowledge or consent of the sureties.

No questions relating to any of these points were left to the jury; none of the facts affecting them have been found by the jury; none of them were set up in the pleadings.

The statements of defence did allege prior indebtedness of Brown to the association and fraudulent concealment of this, but nothing as to any agreement for the application of commissions. They alleged a duty to remit at least once in each month and continuous defaults; but nothing as to instructions or their disobedience, nothing as to the methods or precise dates prescribed. They alleged a material change in Brown's remuneration, but nothing about the times of payment.

The decisions in *Hamilton* v. *Watson* (1) and *The Niagara District etc., Co.* v. *Walker* (2), shew that the mere

(1) 12 C. & F. 109. (2) 26 Can. S. C. R. 629.

1904

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

Killam J.

existence of prior indebtedness is not a fact which must necessarily be communicated, though under some circumstances its concealment might be fraudulent as against the surety. In *Hamilton* v. *Watson* (1) it appeared that advances made upon the security in question had been used to discharge a former liability to the lender. Lord Lyndhurst L. C. there said:

> The mere circumstance of the parties supposing that the money was to be applied to a particular purpose, and the fact that it was intended to be so applied, do not appear to me to vitiate the transaction at all. If there was a stipulation that it was to be so applied, and these were the conditions upon which the money was advanced, it might have affected the transaction. But in order to raise that question, there should have been an averment upon the record that such an agreement had been entered into.

In the present case, it came out incidentally, during Green's cross-examination, that there was some "arrangement" or "understanding" with Brown for the application of commissions on renewal premiums under former insurance policies upon the previous advances. If an agreement to that effect had been alleged, this language might have afforded such evidence of it as to warrant the inference of an agreement; but under the circumstances, it does not seem to me proper to take hold of these expressions, where no inquiry was made or called for respecting the real terms and nature of the "arrangement" or "understanding", and act upon them as shewing a definite agreement. There may have been a suggestion to that effect by Green, an expression of intention, hope or expectation by Brown. If indebtedness need not be disclosed, the debtor's expressions of his hopes and intentions respecting its liquidation must stand in the same category. The fact of the subsequent application amounts to no more than appeared in *Hamilton* v. *Watson* (1).

(1) 12 Cl. & F. 109.

No specific dates or methods of accounting and remitting were provided for by the contract of employment or the bond of indemnity. By the former Brown was to remit at least once in each month, or as often as might be required by the association, and he was to obey and carry out lawful orders and instructions. The bond was conditional upon Brown's performance of all his obligations under the agreement. No specific instructions were referred to or embodied in either. Whether any, or, if so, what instructions on these points were in force when the agreement or bond was entered into, we are not informed. The instructions to which reference is specially made are those which were printed upon the back of Brown's report for June, 1900. Mr. Justice Meagher says that these were presumably in use when the agreement and bond were given. Mr. Justice Townshend proceeds upon this inference and treats the instructions as practically embodied in the agreement. With all respect, I conceive the inference to be wholly unwarranted. No case of the kind being set up in the pleadings, it would be unsafe to make any inference whatever from the appearance of this printed matter on the back of this report. They may not have been issued as instructions. There may have been others which varied them. The forms may have been old ones in use at some time, whether under Brown's former employment or under that in question, but long before disregarded by mutual consent even if not by express direction. There being no issue upon the question we cannot assume any state of facts. As the association was not bound to give any particular directions in these matters, it was free to cancel or alter any that were given.

As laid down by the Judicial Committee of the Privy Council in *Black* v. *The Ottoman Bank* (1).

(1) 15 Moo. P. C. 472.

1904

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

Killam J.

The surety guarantees the honesty of the person employed, and is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty.

There was no change of remuneration, but payments were made in advance of the times when they were strictly due. The association held notes and other securities which might not be realized. Brown had performed the services necessary to entitle him to commission upon them if they should be paid. There was no express stipulation against paying the commissions in advance. The association had guarded itself against being obliged to pay commissions on premiums which might never be received. It chose subsequently to take the risk that a portion at least would eventually be paid, and gave Brown commissions which they could safely assume that he had earned.

No authority is cited for the proposition that such a course produces a change of position which discharges the surety. In my opinion it does not.

On all of these points, if raised by the pleadings, there would naturally have been issues for the consideration of the jury. There is no evidence of any concealment from the sureties of anything whatever. For all that appears they may have been fully informed of the prior debt, of the alleged arrangement for its discharge, of the variations in the methods of remitting and of the advances on account of non-matured commissions. These matters were not in issue and we can make no assumption of concealment from the want of evidence upon them. Concealment of the prior indebtness not being of itself fraudulent, the plaintiff was not called upon to give proof of knowledge or of circumstances relating thereto. ' Neither in their pleadings, nor by evidence, nor otherwise, have the defendants asserted any concealment or want of knowledge or consent on the points now sought to be raised.

1904

CONFEDERATION LIFE v. ASSOCIATION

Killam J.

At the trial no question was raised as to the execution of the bond or the existence of defaults within its terms. *Primâ facie* the liability of the defendants was established. The onus was thrown upon the defence. The questions to be submitted to the jury were settled by counsel. They were directed to points on which the defendants relied to negative liability. If other facts were relied on for the purpose, they should have been put forward then.

When the case came up on motion for judgment, the only course open was to give judgment for the plaintiff. There being still a question of amount raised, this was left to a referee. The defendant's counsel had picked on certain particular times as those on which knowledge of defaults was acquired and, having succeeded as to none, no limitation as to time was made in the reference. It is to be noticed, however, that the amounts charged as received after the 25th July constituted a comparatively small portion of the alleged shortage, and as against these should be placed all the credits given Brown for August. The amount for which judgment went against the defendants falls short of the claim by more than the difference.

It appears to me that, under such circumstances, the judgment could not properly be disturbed. The answers of the jury were, in my opinion, amply warranted by the evidence. The judgment directed by the trial judge was the only one he could direct under the circumstances. There was no error on the part of judge or jury. Every defence sought to be raised was tried and disposed of. To allow a new trial for the purpose of inquiring whether there are other defences would be against all precedent.

In *Browne* v. *Dunn* (1), Lord Halsbury said :

(1) 6 The Reports, 67.

1904

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

Killam J.

My Lords, I cannot but think that this case, although the amount involved is small, raises very important questions indeed. Amongst other questions I think it raises a question as to the conduct of the trial itself and the position in which the people are placed when, apart altogether from the actual issues raised by the written pleadings, the conduct of the parties has been such as to leave one or more questions to the jury, and those questions being determined they come afterwards and strive to raise totally different questions because upon the evidence it might have been open to the parties to raise those other questions. My Lords, it is one of the most familiar principles in the conduct of causes at *nisi prius*, that if you take one thing as the question to be determined by the jury and apply yourself to that one thing, no court would afterwards permit you to raise any other question. It would be intolerable and it would lead to incessant litigation if the rule were otherwise. I think Dr. Blake Odgers has with great candour produced the authority of *Martin* v. *Great Northern Railway* (1) which lays down what appears to me a very wholesome and sensible rule, namely, that you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you on the evidence if you have deliberately elected to fight another question and have fought it, and have been beaten upon it.

See, also, *Martin* v. *Great Northern Railway Co.* (1); *Clough* v. *London & Northwestern Rway. Co.* (2); *The Tasmania* (3); *Connecticut Fire Ins. Co.* v. *Kavanagh* (4); *Nevill* v. *Fine Art & Gen. Ins. Co.* (5); *Karunaratne* v. *Ferdinandus* (6); *Star Kidney Pad Co.* v. *Greenwood* (7).

These cases shew that the same principle prevails under the present practice as at common law. It was acted on by the Supreme Court of Nova Scotia in *Davis* v. *The Commercial Bank of Windsor* (8).

Under the Act 54 & 55 Vict. c. 25. s. 2, an appeal now lies to this court "from the judgment upon any motion for a new trial." The decision of the *Eureka Woollen Mills Co.* v. *Moss* (9), was before that enactment.

(1) 16 C. B. 179.
(2) L. R. 7 Ex. 26, 38.
(3) 15 App. Cas. 223.
(4) [1892] A. C. 473.
(5) [1897] A. C. 68.
(6) [1902] A. C. 405.
(7) 5 O. R. 28, 35.
(8) 32 N. S. Rep. 366.
(9) 11 Can. S. C. R. 91.

1904

CONFEDERATION LIFE ASSOCIATION v. BORDEN.

Killam J.

The majority of the court below proceeded upon the view that the findings of the jury were against the weight of evidence. In *Commissioner of Railways* v. *Brown* (1); *Council of Brisbane* v. *Martin* (2), and *Australian Newspaper Co.* v. *Bennett* (3), the Judicial Committee of the Privy Council reversed the orders of Australian courts granting new trials on this very ground. In the case of *The Metropolitan R. Co* v. *Wright* (4), the House of Lords affirmed the order of the Court of Appeal reversing a similar order of a Divisional Court. These cases show that a grant of a new trial on this ground is not an exercise of discretion with which an appellate court will refuse to interfere. In my opinion there was no ground whatever for interfering with the original judgment and it should be restored.

Appeal allowed with costs.

Solicitor for the appellants; *H. C. Borden.*

Solicitor for the respondent, F. H. Borden; *W. H. Fulton.*

Solicitor for the respondent, J. A. Kirk; *A. MacGillivray.*

(1) 13 App. Cas. 133.
(2) [1894] A. C. 249.
(3) [1894] A. C. 284.
(4) 11 App. Cas. 152.

1903
*Dec. 7.
1904
*Feb. 16.

THE DARTMOUTH FERRY COMMISSION (DEFENDANTS)..... } APPELLANTS;

AND

JANE MARKS, EXECUTRIX OF JOHN H. MARKS, DECEASED (PLAINTIFF). } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Master and servant—Contract of service—Termination by notice—Incapacity of servant—Permanent disability—Findings of fury—Weight o evidence.

Where a contract for service provided that it could be terminated by either party giving the other a month's notice therefor or by the employer paying or the employee forfeiting a month's wages:

Held, reversing the judgment appealed from (36 N. S. Rep. 158) that illness of the employee by which he is permanently incapacitated from performing his service would itself terminate the contract.

Held, also, Killam J. dissenting, that an illness terminating in the employee's death and during the whole period of which he is incapacitated for service is a permanent illness though both the employee and his physician believed that it was only temporary.

By a rule of the employer an employee was only to be paid for time he was actually on duty. One of the employees had accepted and signed a receipt for a month's wages from which the pay for two days on which he was absent from duty was deducted and his conversations with other employees shewed that he was aware of the rule, but no formal notice of the same was ever given him. Having died after a long illness his executrix brought an action for his wages during such period and the jury found on the trial that he did not continue in the employ after notice of the rule and acquiescence in his employment under the terms thereof.

Held, that such finding was against evidence and must be set aside.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

1903

DARTMOUTH FERRY COMMISSION v. MARKS.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) maintaining the verdict at the trial in favour of the plaintiff.

This action was brought by the plaintiff, a widow, as executrix of the last will and testament of her husband, the late John H. Marks, deceased. The defendant is a body corporate and maintains and operates a line of ferry steamers across the Harbor of Halifax, between the Town of Darmouth and the City of Halifax. The said John H. Marks in his lifetime was in the employ of the defendant as captain of one of the defendant's ferry steamers. The agreement under which he was employed was in writing and is as follows :—

" No. 7 Memorandum of Agreement between the Darmouth Ferry Commission of the one part and John H. Marks of Darmouth in the Countyof Halifax of the other part.

" The said John H. Marks agrees to serve the Dartmouth Ferry Commission in the capacity of captain at the monthly wages of sixty dollars per month. Such service to commence on the first day of March, A. D. 1899, the wages for each calendar month to be paid on the 10th day of the following month, and such service to be terminated by one calendar month's notice on either side, to be given at any time. Should either party wish to terminate the service without such notice the Commission to be entitled to do so by paying one month's pay, and the said John H. Marks by forfeiting to the Commission one month's pay. Any period of service prior to the commencement of a calender month to be paid *pro ratâ* on the 10th day of such calendar month. Nothing in these presents to effect the right of either party to terminate the relation hereby created for lawful causes.

(1) 36 N. S. Rep. 158.

1903

DARTMOUTH FERRY COMMISSION v. MARKS.

"In witness whereof, the party of the first part has hereunto subscribed his name, and the parties of the second part have hereto affixed their corporate seal.

Witness
H. WATT.

JOHN H. MARKS.
A. C. JOHNSON,
Chairman
WALTER CREIGHTON,
[SEAL] *Act. Secretary.*

Under this agreement Marks began serving the defendant as captain on the first day of March 1899. A resolution was passed at the meeting of the commission held on 8th January, 1900, as follows, namely "Resolved. That after this date no employee will be paid for any time he or she be absent from duty." There is no evidence of any formal notice to Marks of the contents of this resolution but he submitted to a deduction of wages under it and admitted knowledge of it to other employees. Marks became ill on the 15th December, 1900, and from that time until the date of his death was not able to perform his duties as captain of the defendants' steamer. He was confined to the house for three or four months. In May, June and July, he was able to be out of doors and apparently was recovering. Dr. Cunningham, who attended him, thought that he might be able to get back to work in the summer and told him so. Dr. Stewart, a consulting physician who was called in consultation with Dr. Cunningham, also considered the illness a temporary one. However, early in July, 1901, Marks became much worse and called Dr. Smith in attendance upon him who diagnosed the case as cancer of the stomach in an advanced stage. He died on 16th July, 1901.

The plaintiff, as executrix, brought this action to recover $416.00 wages from 15th December, 1900,

until 16th July, 1901, at $60 per month under the said agreement.

The action came on for trial before the Chief Justice of Nova Scotia with a jury, at Halifax, during the April term of the Supreme Court, 1902. Questions were submitted to the jury whose answers were as follows:

"1. Was the resolution of January 8th, 1900, communicated to John H. Marks shortly after its adoption by the defendant Commission? A. No."

"2. Did the said John H. Marks continue in the employ of the defendant Commission after notice of this resolution and acquiese in said employment under the terms of said resolution? A. No."

"3. Did the said John H. Marks remain in the active discharge of his duties in the employment of the defendant Commission until his death? A. In the employ but not active."

"4. Was the illness of said John H Marks and of which he died of temporary or permanent character? A. Temporary."

"5. Was John H. Marks after the 16th day of December, 1900, prevented by a permanent illness from performing any service under his contract with the defendant? A. No."

On these findings the learned Judge directed judgment to be entered for the plaintiff for $416.00, the amount of her claim.

From that judgment the defendant appealed to the Supreme Court of Nova Scotia *in banco* and moved to set aside the findings of the jury and for judgment in favour of the defendant.

The said appeal and motion came on for argument before the Supreme Court of Nova Scotia in *banco*, the following Judges being present, viz., Weatherbe J., Townshend J., Graham E. J., and Meagher J. The

1903

DARTMOUTH FERRY COMMISSION v. MARKS.

court were evenly divided in opinion, Mr. Justice Weatherbe and Mr. Justice Graham being of opinion that the appeal and application for new trial should be dismissed and that the plaintiff should have judgment, while Mr. Justice Townshend and Mr. Justice Meagher were of the opinion that judgment should be entered for the defendant. In accordance with the practice of the Supreme Court of Nova Scotia an order was granted dismissing the said appeal and application without costs. From this judgment the present appeal has been asserted by the defendants.

Russell K. C. and *McInnis* for the appellants. In a contract for service it is an implied condition that the servant will continue to be in a state of health which will enable him to perform his services. *Johnson* v. *Walker* (1); *Robinson* v. *Davison* (2); *Boast* v. *Firth* (3).

Respondent's deceased husband was aware that he would not be paid for the time he was absent and acquiesced in that condition of his service.

Judgment can be entered for appellant notwithstanding the findings of the jury. *Nixon* v. *Queen Ins. Co.* (4); *McDowell* v. *Great Western Railway Co.* (5).

W. B. A. Ritchie K. C., for the respondent. There was a yearly hiring of respondent which could not be divided. *Cuckson* v. *Stones* (6); followed in *K——* v. *Raschen* (7).

There was no acquiescence in the resolution, *De Busche* v. *Alt* (8); and no estoppel; *Proctor* v. *Bennis* (9).

The CHIEF JUSTICE and SEDGEWICK and NESBITT JJ. concurred in the opinion of Mr. Justice Davies.

(1) 155 Mass. 253.
(2) L. R. 6 Ex. 269.
(3) L. R. 4 C. P. 1
(4) 23 Can. S. C. R. 26.
(5) [1903] 2 K. B. 331.
(6) 1 E. & E. 248.
(7) 38 L. T. 38.
(8) 8 Ch. D. 286.
(9) 36 Ch. D. 740.

1904

DARTMOUTH FERRY COMMISSION v. MARKS.

Davies J.

DAVIES J.—The late Captain John Marks, on or about the 1st of March, A.D. 1899, entered into a written agreement with the Dartmouth Ferry Commission, as follows:

No. 7. Memorandum of agreement between the Dartmouth Ferry Commission of the one part and John H. Marks of Dartmouth, in the county of Halifax, of the other part.

The said John H. Marks agrees to serve the Dartmouth Ferry Commission in the capacity of captain at the monthly wages of sixty dollars per month. Such service to commence on the first day of March, A.D. 1899, the wages for each calendar month to be paid on the tenth day of the following month, and such service to be terminated by one calendar month's notice on either side, to be given at any time. Should either party wish to terminate the service without such notice, the commission to be entitled to do so by paying one month's pay, and the said John H. Marks by forfeiting to the commission one month's pay. Any period or service prior to the commencement of a calendar month to be paid *pro ratâ* on the tenth day of such calendar month. Nothing in these presents to affect the right of either party to terminate the relation hereby created for lawful cause.

Captain Marks continued in the service of the Commission until the 15th of December, 1900, when he became ill and unable to work. He never was able to resume his work after that date, and on the 16th July, 1901, he died. The commission paid him his wages up to the 15th of December, 1900, that being the last day he worked for them, and he signed the December wage or pay list acknowledging receipt of the amount paid to him. There is no evidence whatever as to what took place at the time Captain Marks received this payment and signed the pay list. Some time previously, on 8th January, 1900, the commission had passed a resolution

that, after this date, no employee will be paid for any time he or she be absent from duty,

but there was no evidence that this resolution had been communicated to Marks. There was abundant evidence, however, that he knew of the resolution having been passed, and complained or grumbled to

1904

DARTMOUTH FERRY COMMISSION v. MARKS.

Davies J.

some of his fellow employees about it. Evidence was also given that in the month of April, 1900, four months after the resolution was passed, Marks was docked in the pay sheet for the month for one day he had been absent, and that he signed the pay sheet receiving $58 for his month's pay; also that he signed the December pay sheet in which he was docked for all the working days of the month after the fifteenth when he was taken ill and gave up work.

After Captain Marks's death, his executrix brought this action for seven months' wages up to the day of his death, contending, first, that the commission could not by resolution change or import a new term into the written contract with deceased, and that the evidence did not show any such acquiescence or consent on his part to the resolution as bound him, nor any conduct on his part inconsistent with his rights under the agreement. She contended, further, that illness on the part of Captain Marks incapacitating him during all the seven months sued for from discharging any of his duties under his agreement with the commission and terminating with his death, while it might have justified the commission in putting an end to the agreement by notice as therein provided, did not, in the absence of any such determination of the contract, prevent him or his executrix, after his death, from recovering his wages.

The case was tried before the Chief Justice, with a jury, and the questions put to the latter and the answers given by them are as follows:

1. Was the resolution of January 8th, 1900, communicated to John H. Marks shortly after its adoption by the defendant Commission?—No.

2. Did the said John H. Marks continue in the employ of the defendant Commission after notice of this resolution and acquiesce in said employment under the terms of said resolution?—No.

3. Did the said John H. Marks remain in the active discharge of his duty in the employment of the defendant Commission until his death?—In the employ, but not active.

4. Was the illness of the said John H. Marks, and of which he died, of temporary or permanent character?—Temporary.

(Added at the instance of Mr. Ritchie.)

5. Was John H. Marks, after the 16th day of December, 1900, prevented by a permanent illness from performing any services under his contract with the defendant?—No.

Under these findings, the Chief Justice directed judgment to be entered for the plaintiff for the full amount of the claim and, on the case coming before the full court of Nova Scotia on a motion to set aside these findings, the court being equally divided, the motion was dismissed.

From this judgment the Dartmouth Ferry Commission appealed to this court.

In the view I take of the law, it is not necessary for me to say anything on that branch of the appeal which relates to the "no work no pay" resolution, so-called.

I agree with Mr. Justice Townshend on the substantial question of the liability of the defendants to pay Captain Marks wages for the seven months during which he never worked or was able to work. From the day when he first gave up his work, 15th December, until the day of his death, Captain Marks was a sick man, utterly unable to discharge his duties and made no pretence of being able to do so. He was from that date, beyond any doubt, permanently disabled by sickness from attending to his work. Some argument was attempted to be advanced that when he was first taken ill, he himself hoped and his medical adviser also hoped and believed his illness was only temporary. But in the face of the facts which subsequently developed that he was suffering from an incurable malady, which soon afterwards caused his death, it does not appear to me possible seriously to argue that

1904

DARTMOUTH FERRY COMMISSION v. MARKS.

Davies J.

the deceased's illness was only temporary. The findings of the jury on this point are clearly contrary to the evidence and the facts and must be set aside. It is quite true that the deceased and his medical adviser both hoped and believed, at first, that his illness was only temporary, but their belief or hope cannot alter the truth subsequently disclosed. That truth is now admitted and is beyond controversy that on and after the 15th of December, when Captain Marks ceased working, he was permanently disabled from doing his work he had contracted to do. In law, this disablement is termed the act of God. It not only, in my opinion, justified the Commission in formally determining the contract, if they had chosen to take that course, but by rendering it impossible that he could ever afterwards discharge his duties under his contract, the permanent disablement determined and ended the contract. The consideration which moved the Commission to promise wages was gone. The mutuality necessary for longer continance of the contract ceased. Captain Marks could not be sued by the Commission for non-performance by him of his promise to serve them in the capacity of captain of one of their steamers. He could plead to any such action, disablement or incapacity by the act of God. The same result would have followed if he had become insane or had lost the physical use of his limbs. The fact of the disablement arising from occult internal troubles cannot make any difference. There is no analogy between such permanent disablement and temporary sickness. The law permits the latter on the ground of common humanity to be offered as an excuse for not discharging duty temporarily and suffers the disabled party to recover wages for the time he is temporarily away from his work. But while releasing the permanently disabled workman from damages for the non-performance of his

contract, it does not permit him to recover wages without doing work. No case can be found so deciding. We are asked to create a precedent. This permanent disability goes to the very root of the consideration for the promise on the part of the Commission to pay wages. The covenant on the part of the employee to serve as master was not one independent of the employer's covenant to pay wages. They were interdependent and the promise to pay was dependent upon the performance of the work covenanted to be done. The belief of the employee or his medical adviser that the former's disability was only temporary cannot affect the question in the light of the subsequent knowledge which revealed its permanency. The excuse for not working for a short time, which a temporary illness would justify, cannot apply to absence from work caused by permanent disability. The reasoning on which the cases were decided of *Boast* v. *Frith* (1); *Robinson* v. *Davison* (2); *Poussard* v. *Spiers* (3); and also the case of *Johnson* v. *Walker* (4); fully sustain these propositions.

The action, therefore, must fail, but, while setting aside the findings of the jury on the fourth and fifth questions, as being contrary to the evidence, we are not able, under the Judicature Rules of Nova Scotia, as interpreted by this court in the recent case of *Green* v. *Miller* (5), to direct judgment to be entered for the defendant as such a judgment would be inconsistent with the findings of the jury.

The appeal should be allowed with costs in this court and in the court appealed from and a new trial ordered, the costs of the trial to abide the event.

(1) L. R. 4 C. P. 1.
(2) L. R. 6 Ex. 269.
(3) 1 Q. B. D. 410.
(4) 155 Mass. 253.
(5) 33 Can. S. C. R. 193.

1904

DARTMOUTH FERRY COMMISSION v. MARKS.

Killam J.

KILLAM J.—This is an appeal from a decision of the Supreme Court of Nova Scotia in an action brought by the executrix of the will of the late John H. Marks, a former employee of the appellant commission, to recover wages for a period during which the deceased was wholly incapacitated by illness from performing any service. The cause was tried by a jury, and upon their answers to certain specific questions judgment was entered for the plaintiff for the full amount claimed. A motion was made to set aside the findings as being against the weight of evidence and to have the action dismissed. Upon an equal division the court refused the motion.

There is a singular dearth of clear authority respecting the effect of the disability of an employee arising from illness upon the right to wages and in determining or giving the right to determine the contract of service.

In *Chandler* v. *Grieves* (1), it was held that a seaman was entitled to wages for a period during which he was wholly disabled through an injury received in the course of his duty. The court said that

> clearly the law marine ought to be followed in the construction of the contract, and they directed an inquiry to be made in the Court of Admiralty whether, according to the usage there adopted, a disabled seaman, in similar circumstances, would be entitled to wages for the whole voyage, or only up to the time he was so disabled.

After inquiry, it was stated

> that in every case there to be found, a seaman disabled in the course of his duty was holden to be entitled to wages for the whole voyage, though he had not performed the whole.

In Abbott on Shipping, (7 ed.) p. 619, it is laid down that

> as a seaman is exposed to the hazard of losing the reward of his faithful service during a considerable period in certain cases so, on the other hand, the law gives him whole wages, even where he has been

(1) 2 H. Bl. 606n.

unable to render his service, if his inability has proceeded from any hurt received in the performance of his duty or from natural sickness happening to him in the course of the voyage.

In *Beale* v. *Thompson* (1), after referring to *Chandler* v. *Grieves* (2), Chambré J. said:

In every contract of service, the contract goes on though the servant be disabled by sickness. A servant is never conceived to enter into an engagement that he will continue in health; it is no part of the contract that he will do so.

Heath J. said;

The hiring of mariners for a voyage is an executory contract, the service must be performed before the wages become due. There are many things which will dispense with the actual service, such as sickness and any accidental infirmity that happens after the mariner has entered on his services; but then the mariner is usually on the ship and the ship is earning freight, so that there is a fund out of which the wages may be paid.

And Lord Alvanley C. J. said:

On these articles the contract must be considered as entire, and as long as that contract subsists there can be no such thing as an interruption; it is either entirely at an end or entirely subsists.

The case usually cited as the leading authority is *Cuckson* v. *Stones* (3). In reality, however, the decision was founded upon the special nature of the contract in question, as Lord Campbell C. J. distinctly indicated.

The plaintiff was employed as an expert brewer for ten years. The defendants were to pay him a lump sum in advance and weekly wages and to furnish him with a house and with coals for the whole term. About a year from the end of the term, the plaintiff became ill and continued so for about seven months, during which time he was unable to personally attend to the business, but gave advice to the defendants who consulted him from time to time. The defendants paid the wages for some months of the period of illness and, upon the plaintiff's recovery, he went on with his

(1) 3 B. & P. 405. (2) 2 H. Bl. 606*n*.

(3) 1 E. & E. 248.

1904

DARTMOUTH FERRY COMMISSION v. MARKS.

Killam J.

work and was paid as before. It was admitted that the contract continued. As declared and as proved, the promise to pay was clearly an independent promise, the consideration for which was the plaintiff's executory promise to serve; and the agreement to pay wages was only a part of the consideration for the plaintiff's promise. There was but one entire contract. Upon general principles, the performance of the service was not a condition precedent to the obligation to pay. Disability arising from natural illness was an absolute excuse for non-performance. There was no default on the part of the plaintiff. The decision affords very little assistance in determining whether, under a contract such as that now in question, actual service is an absolute condition precedent to the right of payment. It is important, however, for an expression of opinion by Lord Campbell regarding the effect of illness upon the relation of the parties. He said:

> We concur in the observation of Willes J. in *Harmer* v. *Cornelius* (1), and if the plaintiff from unskilfuness had been wholly incompetent to brew, or by the visitation of God he had become, from paralysis or any other bodily illness, permanently incompetent to act in the capacity of brewer for the defendant, we think the defendant might have determined the contract. He could not be considered incompetent by illness of a temporary nature; but if he had been struck with disease so that he could never be expected to return to his work, we think the defendant ought to have dismissed him and employed another in his stead. Instead of being dismissed, he returned to the service of the defendant when his health was restored and the defendant employed him and paid him as before. At the trial the defendant's counsel admitted that the contract was not rescinded. The contract being in force, we think that there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work. It is allowed that under this contract, there could be no deduction from the weekly sum in respect of his having been disabled by illness from working for one day of the week; and while the contract remained in force, we see no difference between his being so disabled for a day or for a week or for a month.

(1) 5 C. B. N. S. 236.

These views were pronounced as indicating the considered opinion of the court. They do not seem to have been since questioned by any court. They should, I think, be accepted as governing the rights of the parties under contracts of a similar nature.

In *K* —— v. *Raschen* (1), the plaintiff had been employed at a yearly salary subject to dismissal on one month's notice. The service began on the 2nd of July, and continued until the 30th of July, when the plaintiff was given leave of absence until the 6th of August, on account of illness. He remained unable to work until the 2nd of September, when he returned and tendered his services, which were refused. On the 20th of August he was given notice that he was dismissed. He was held entitled to recover his wages for the whole period of illness. So far as the report shews the only serious position raised was upon the defendant's contention that there was no liability because, it was claimed, the illness was due to the plaintiff's own misconduct. It appeared, however, that the misconduct occurred before the engagement, and there was nothing to indicate that the plaintiff knew, when he contracted, that he was afflicted with an infirmity likely to disable him. The court considered that illness was to be taken as *primâ facie* due to the act of God, and that the plaintiff should not be deemed to have warranted his permanent capacity for work.

In *Elliott* v. *Liggens* (2), the plaintiff was employed at weekly wages, subject to dismissal on a week's notice He was partially incapacitated by accident but continued to work as well as his condition allowed for several months, when he was dismissed upon the agreed notice. He claimed and was awarded, by agreement, half his weekly wages by way of compen-

(1) 38 L. T. 38. (2) [1902] 2 K. B. 84.

1904

DARTMOUTH FERRY COMMISSION v. MARKS.

Killam J.

sation under the "Workmen's Compensation Act, 1897." After his discharge, he sued in a County Court for the remainder of the weekly wages and recovered judgment. The King's Bench Division reversed the decision on the ground that, by claiming and receiving the compensation, he lost any right which he might otherwise have had to his ordinary wages. The opinion of the court upon the right, if this had not been done, was not indicated.

It seems clearly settled that under a contract to furnish the personal services of a particular person, there is an implied qualification that it is subject to such person being in health to perform the services when the time for their performance comes, and that the party so contracting is excused by the disability, without his fault, of the person who is to render the services. *Boast* v. *Frith* (1); *Robinson* v. *Davison* (2); *Poussard* v. *Spiers* (3); *Spalding* v. *Rosa* (4); *Dickey* v. *Linscott* (5).

In *Poussard* v. *Spiers* (3), the employer was held excused for refusing to accept the services where the performer was disabled when the time came for entering upon them and the time was deemed so material as to be of the essence of the contract.

The contract in question in the present case was in writing and was set out and admitted in the pleadings. It was as follows:

No. 7.—MEMORANDUM OF AGREEMENT between The Dartmouth Ferry Commission, of the one part, and John H. Marks, of Dartmouth, in the County of Halifax, of the other part.

The said John H. Marks agrees to serve The Dartmouth Ferry Commission in the capacity of captain at the monthly wages of sixty dollars per month. Such services to commence on the first day of March, A.D. 1899, the wages for each calendar month to be paid on the tenth day of the following month, and such service to be termi-

(1) L. R. 4 C. P. 1.
(2) L. R. 6 Ex. 269.
(3) 1 Q. B. D. 410.
(4) 71 N. Y. 40.
(5) 20 Me. 453.

nated by one calendar month's notice on either side, to be given at any time. Should either party wish to terminate the service without such notice, the commission to be entitled to do so by paying one month's pay, and the said John H. Marks, by forfeiting to the commission one month's pay. Any period of service prior to the commencement of a calendar month to be paid *pro ratâ* on the tenth day of each calendar month. Nothing in these presents to affect the right of either party to terminate the relation hereby created for lawful cause.

In witness whereof, the party of the first part has hereunto subscribed his name and the parties of the second part have hereunto affixed their corporate seal.

Witness,

(Signed) H. WATT.

(Signed) JOHN H. MARKS.

(Signed) A. C. JOHNSTON,
Chairman.

(Signed) WALTER CHREIGHTON,
(SEAL.) *Act Secretary.*

Marks served the commission in the capacity of master of a ferry boat from the 1st of March, 1899, to the 15th of December, 1900. From the latter date until the 16th of July, 1901, when he died, he was wholly incapacitated by illness from performing any services and performed none. This is distinctly established by the evidence of the plaintiff herself.

If then, upon a proper construction of this contract, the actual performance of service during each month was an absolute condition precedent to the right to payment of the wages for the month, the action should have been dismissed.

Although the deceased was employed in the work of navigation, it does not appear to me that it is to be presumed that the parties contracted with reference to the custom found in *Chandler* v. *Grieves* (1) to prevail in the employment of mariners on sea-going ships. There is no evidence of any custom which the parties can be assumed to have had in view.

(1) 2 H. Bl. 606 n.

1904

DARTMOUTH FERRY COMMISSION v. MARKS.

Killam J.

In *Lampleigh* v. *Braithwaite* (1), it is said;

> But, if it be executory, as in consideration that you will serve me a year I will give you ten pounds, here you cannot bring your action till the service performed. But if it were a promise, on either side, executory, it needs not to aver preformance; for it is the counter-promise and not the performance that makes the consideration.

And in *Thorp* v. *Thorp* (2), Holt C. J. said:

> If A. covenant with B. to serve him for a year and B. covenant with A. to pay him ten pounds, there, A. shall maintain an action for ten pounds before any service; but if B. had covenanted to pay ten pounds for the said service, there A. could not maintain an action for the money before the service performed. And there is a great reason for this diversity; for when one promises, agrees or covenants to do one thing for another, there is no reason he should be obliged to do it till the thing for which he promised to do it is done; and the word "for" is a condition precedent in such a case. See also Y. B. 15 H. VII., 10 pl. 17.

The modern principle is to endeavour to ascertain from an examination of the whole contract what was the real intention of the parties; but if it appears that it was the performance and not the promise that was to constitute the consideration for the counter-promise, this still gives rise to the presumption that performance was intended to be a condition precedent.

Here the only specific promise is that of Marks to serve in a certain capacity at certain wages. The counter-promise to pay must be inferred from the words "to be paid". The monthly wages were to be paid after the month's service was to be rendered. Upon these circumstances alone, the natural presumption would appear to be that the performance of each month's service was to be a condition precedent to the right to the month's wages. But, if so, complete performance would be necessary. Failure of performance for one day would, unless some qualification is to be implied from the nature and subject

(1) Hob. K. B. 105. (1) 12 Mod. 455.

1904

DARTMOUTH FERRY COMMISSION v. MARKS.

Killam J.

matter of the contract, involve the same result as a failure for all but one day. It is a well established principle that, under such a contract, failure to serve for a portion of a month, when attributable to the fault of the employee, disentitles him to the wages for the whole month. For each month the contract is entire. I do not think that, in the absence of an express stipulation, an intention would be implied that, upon partial failure of performance due to illness, the monthly wages were to be apportioned. In the case of a domestic servant this would certainly not be done. I see no greater reason for implying it in the case of a clerk employed in an office or shop, or of one in the occupation of the deceased.

In the contract before us are the words,

> any period of service prior to the commencement of a calendar month to be paid *pro ratâ* on the tenth day of such calendar month.

These follow immediately the provisions for termination of the contract at any time, not necessarily at the end of a month, and were probably directed particularly to that contingency. I cannot infer from their use an intention that a deduction should be made for time lost through illness if this should not be inferred from the previous language.

The real qualification to be implied is, I think, the one recognized in the cases to which I have referred. As the employee does not warrant the continuance of his physical ability to work, he does not contract absolutely and at all events to do so. Disability due to illness excuses him. And since his promise is so qualified, strict and full performance of service is not a condition precedent to the right to wages. The wages are payable for such service as he can reasonably be called upon to give and for such only.

These appear to me to be the principles justifying the decison in K————v *Raschen* (1) and the judicial

(1) 38 L. T. 38.

1904

DARTMOUTH FERRY COMMISSION v. MARKS.

Killam J.

opinions expressed in *Beale* v. *Thompson* (1) And there seems to be no ground for distinguishing between different periods of illness, so long as the contract subsists. Disability due to this cause and lasting for months would not seem to have a different effect from such disability lasting for nine-tenths of a month or for one day only. There is no precise point at which a line can be drawn. I cannot concur in the opinion which I understand to be held by the other members of this court, that the illness of Marks, *ipso facto*, put an end to the contract. Both the question as to whether the illness of which Marks died was of a temporary or permanent character and the answer appear, at first sight, anomalous. But they were evidently dictated by the peculiar nature of the case. Apparently, Mark's illness was not considered to be permanent until a few days before his death. He appeared to be recovering, but he then had a relapse which resulted fatally. And it was fully open to the jury to find, upon the medical evidence, that the malady which incapacitated him for nearly the whole of the seven months was independent of that which brought about the death and that the existence of the latter was unsuspected until the relapse occurred.

The jury have found that Marks remained in the employ of the commission until his death; that is, they found that the contract remained undetermined. The evidence appears to me to have justified the finding. There was no date, prior to the end of June, when the parties deemed the contract as determined. Month by month, as I interpret the original contract, the wages would accrue. And once accrued, the right to them could not be taken away by what subsequently occurred or became apparent.

(1) 3 B. & P. 405.

1904

DARTMOUTH FERRY COMMISSION v. MARKS.

Killam J.

In the words of Lord Alvanley in *Beale* v. *Thompson*, (1)

> as long as that contract subsists there can be no such thing as an interruption; it is either entirely at an end or entirely subsists.

Lord Campbell, in *Cuckson* v. *Stones*, (2) put incapacity arising from illness on the basis of incompetency, as giving a right to determine the contract. But it would be clearly in the power of the master to waive a right to discharge for the incompetency of the servant; and so, I think, the right to discharge for incapacity arising from illness would be waived and lost by conduct shewing a continuance of the employment.

I am, however, of opinion that the answer to the second question was against the weight of evidence. It was a double question:

> Did the said John H. Marks continue in the employ of the defendant commission after notice of this resolution and acquiesce in said employment under the terms of said resolution?

The resolution referred to was adopted by the commission on the 8th January, 1900, and was as follows:

> That after this date no employee will be paid for any time he or she be absent from duty.

Marks did remain in the employment of the commission after the passing of the resolution. There is no question about that. In accordance with the resolution, deductions were made from his wages for time lost. He accepted the payments and receipted for them. He is dead and the secretary whose duty it would be to give him formal notice of the resolution is dead. The proper inference from the circumstances is that Marks had notice of the resolution. Witnesses testified orally to conversations with Marks which, if believed, shewed that he both knew of and had assented, though unwillingly, to the modification of his contract proposed by the resolution. No evidence

(1) 3 B. & P. 405. (2) 1 E. & E. 248.

1904

DARTMOUTH FERRY COMMISSION v. MARKS.

Killam J.

was given of any refusal by him to accept the terms of the commission or of any claim by him to the wages deducted or to wages for any period of his illness. There was no contradictory testimony.

The evidence appears to me overwhelmingly in favour of the view that Marks, by his conduct, if not in words, expressed to the commission his assent to the modification proposed, and that the commission was thereby induced to continue him in its service. If he had not led them to believe in his assent, they would, no doubt, have long ago discharged him.

I cannot help thinking that the jury failed to fully comprehend the question. They may have thought that formal notice was intended, or that the acquiescence must be willing and with approbation.

It does not appear to me that the corporate seal raises any difficulty. The commission did not agree to retain Marks in its service or to pay him for a definite period. The contract was determinable on either side by the giving of a month's notice, or by payment or loss of a month's wages. It was quite competent for the parties to take notice of the resolution as a notice of intention to discharge from the former contract and to agree upon a continuance of the service only upon special terms. It was quite competent for Marks to waive formal or more definite notice or to accept employment on the new terms in lieu of the monthly wages.

Upon the ground that the answer to the second question was against the weight of evidence, I assent to the allowance of the appeal and the granting of a new trial.

Appeal allowed with costs.

Solicitors for the appellants: *F. W. Russell.*

Solicitors for the respondent: *R. E. Finn.*

THE DOMINION IRON AND STEEL COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

JAMES DAY (PLAINTIFF).....RESPONDENT.

1903
*Dec. 9, 10.

1904
*Feb. 16.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence — Employers Liability Act — Injury to servant — Proximate cause—R. S. N. S. (1900) *c.* 79.

D. was engaged in moving cars at a quarry of the company. The cars were loaded at a chute under a crusher and had to be taken past an unused chute about 200 feet away supported by a post placed 7½ inches from the track. D. having loaded a car found that it failed to move as usual after unbraking and he had to come down to the foot-board and shove back the foot-rod connected with the brake. The car then started and he climbed up the steps at the side to get to the brake on top but was crushed between the car and the post. He could have got on the rear of the car instead of using the steps or jumped down and walked along after the car until it had passed the post. The manager at the quarry had been warned of the danger from the post but had done nothing to obviate it.

Held, reversing the judgment appealed from (36 N. S. Rep. 113) Davies and Killam JJ. dissenting, that D.'s own negligence was the cause of his injury and the company were not liable.

Held per Davies and Killam JJ. that the position of the post was a defect in the company's works under the Employers Liability Act which was evidence of negligence.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the verdict at the trial in favour of the plaintiff

The facts of the case are set out in the judgment of Mr. Justice Weatherbe, at the trial, as follows:

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

(1) 36 N. S. Rep. 113.

1903

DOMINION IRON AND STEEL CO. v. DAY.

"Plaintiff was injured by being squeezed between a car on which he was brakesman and a post, alleged to be too near the track by reason of negligent construction.

"It was plaintiff's duty to move the car from the chute when it was filled, and when in motion to jump quickly on the rear end of the car and walk along to put down the brake, and while doing so he was struck by a post supporting an unused chute of the company.

"Plaintiff had climbed up and took the brake off, and, owing to some defect, the car would not start. Then he shook the car, which still could not be moved. He then came down to the foot-board and shoved back the rod connected with the brake. On going up the car started and, being unable to jump clear, he was crushed between the post and the side of the car.

"On warning the foreman of this post he said 'we will not bring any cars that way,' but owing to neglect in shunting cars on another track the mischief occurred.

"Plaintiff's entire body was squeezed in a 7½ inch space, and was injured, he says, 'right across the system.' The injury, he says, is so great that he may never get over it. He was unable to walk for 13 days after the injury. After, he was obliged to get an easier job. For 10 weeks he could only average four days a week. After a month and a half's rest he commenced to work again, but does not seem to be much better. He was going to meet two doctors for consultation when called to attend the court.

"He averaged a dollar and a half a day as wages when well, sometimes he got $1.75 a day.

"He applied to the official in charge of the quarry for damages, and two letters of Mr. Jennison are in evidence, in one of which he says the matter has been

1903

DOMINION IRON AND STEEL CO. v. DAY.

referred to the head office at Sydney, where no doubt the matter will be considered.

"The defence pleaded, denying any negligence whatever on defendant's part and setting up contributory negligence. Defendants denied that plaintiff was injured and put him to the proof of everything;—though plaintiff had been for some time employed by the company, he had been but a short time at the work at which he was injured.

"Plaintiff called the 'walking boss' Stamper. He admits that the post was too close to the car and if he had built the chute, he would have given three feet of room instead of 7 or 8 inches.

"George Lawrence, under whom plaintiff worked, was called by the defence and I regard his evidence as corroborative of the manner in which the accident occurred. He also corroborated plaintiff as to his inability to do his usual work.

"Another brakesman was called Jesso who, on cross-examination, admitted that the steps on the side of the car which plaintiff used were generally used for the same purpose and are placed there to get up and down.

"Jennison, who was in charge of the quarry for defendant company, was also called for the defence. He started the construction of the plant but did not complete it. He says very suggestively that 'this particular part I did not construct, fortunately.' He does not know the width of the cars and whether they are wider than ordinary cars."

On the facts so found the learned judge gave judgment for the plaintiff and assessed the damages at $850 with costs. The company appealed to the court *in banco* which affirmed the judgment of the trial judge but reduced the damages to $600. From this judg-

1903

DOMINION IRON AND STEEL CO. v. DAY.

ment a further appeal was taken by the company to the Supreme Court of Canada.

Lovett for the appellants.

Harris K.C. for the respondents.

THE CHIEF JUSTICE.—I would allow this appeal and dismiss the respondent's action on the ground that, even if the company were negligent in allowing the post to remain so close to the track, yet the respondent by reasonable care and ordinary prudence could have avoided this accident.

As I read the evidence, if he had stepped off to the ground immediately on the car starting, he would not have been hurt. He is not merely guilty of contributory negligence but is the victim of his own carelessness. It is a case where it was perfectly in the power of the servant, by keeping his eyes open, to guard himself against a possible danger of which he was fully aware. If, by not doing so, he suffers injuries he must take the consequences of his own neglect. Without the respondent's negligence or stupidity this accident would never have happened.

The appeal is allowed with costs in this court and in the court *in banco*, and the action is dismissed with costs.

SEDGEWICK J. concurred with the Chief Justice.

DAVIES J. (dissenting).—For the reasons given by Mr. Justice Graham in delivering the unanimous judgment of the Supreme Court of Nova Scotia, to which I have not much to add, I am of the opinion that this appeal should be dismissed. The action was brought under The Employers Liability Act of Nova Scotia which is similar to that of Ontario. In his able

presentation of the case for the appellants, Mr. Lovett contended that there was no evidence of any negligence on the part of the defendants (appellants) "arising out of any defect in the condition or arrangement of the ways, works, machinery, buildings or premises connected with, intended for or used in the business of the employer." His argument was that the statutory negligence must be negligence *per se* in the condition or arrangement of the ways, etc. But I think the decided cases clearly show that the defects to which the statute refers are defects having regard to the use to which the ways or premises are to be applied or the mode or manner in which they are to be used. The use of the railway with the presence of the post complained of where it was might not be negligence under some circumstances and might be under others. *Walsh* v. *Whitely* (1); *Heske* v. *Samuelson* (2), the head note of which says:

The Employer's Liability Act, 1880—which gives a workman a right of action against his employer for personal injury by reason of a defect in the condition of the machinery used in the business of the employer—applies to the case where a machine, though not defective in its construction, was, *under the circumstances in which it was used, calculated to cause injury to those using it.*

As Lord Coleridge C.J. says:

If it was not in a proper condition for the purposes for which it was applied there was a defect in its condition within the meaning of the Act.

This decision was affirmed and followed by the Court of Appeal in *Cripps* v. *Judge* (3), and also in *Walsh* v. *Whiteley*, cited above, and has not so far as I have found been questioned. I am of opinion that in the circumstances of this case the user of the railway to load the cars with stone from the crusher with the post complained of and which caused the injury to

(1) 21 Q. B. D. 371. (2) 12 Q. B. D. 30.
(3) 13 Q. B. D. 583.

1904

DOMINION IRON AND STEEL CO. v. DAY.

Davies J.

the plaintiff, fixed where it was, brings the case within the meaning of the section.

The appellant further contended that the maxim *volenti non fit injuria* applied and that its application ousted the plaintiff's claim. But I think the evidence given as to the complaint made by the plaintiff to the manager or superintendent of the danger which the continued maintenance of the post in question would probably cause, and the assurances given to the plaintiff respecting it, constitute, apart from other considerations, a complete answer to that contention.

Mr. Beven in his work on Negligence, vol. 1, page 383, lays down the following as one of the three propositions which may be accepted as the result of the decided cases so far as they relate to the application of this maxim:

> When the master is under a statutory liability to take precautions in any particular work the presumption of law is, that as between the master and the workman the fact of the workman working in the absence of the statutory safeguards does not discharge the master from his liability to compensate the workman for injuries sustained through the master's neglect to provide the statutory safeguards; and this presumption can only be rebutted by clear proof of an undertaking of the employment by the workman with a knowledge of the risk involved and of the master's duty in respect thereof.

Adopting this as I do as a fair though possibly not exhaustive definition of the liability of the master under the conditions assumed, I fail to see where the evidence of any such understanding on the part of the plaintiff can be found.

The statutory safeguard in this case is of course the proper condition of the ways and premises of the defendants' railway for the purposes and under the circumstances in which they were being used at the time the plaintiff sustained his injuries. As I have already held this was defective, and the defect had

been brought expressly to the knowledge of the defendants and assurances given that it would be remedied.

The only other contention advanced by the defendants was that the plaintiff contributed by his own negligence to the injury he received. The case of *Ryan* v. *The Canada Southern Railway C.* (1) was cited in support of this contention. But that case was decided on the ground that the injury could not have happened if the deceased had not placed himself in the position to be injured by the switch stand and that he had not satisfactorily explained why he was there. The facts of the case are stated on page 746 of the report as follows:

> His position as brakesman should have been on top of the car, but for some reason or other, *of which there is no evidence*, he was on the side of the car holding on to the steps of the ladder, etc.

In the case at Bar there was, in my opinion, ample evidence giving satisfactory reasons why the plaintiff was on the side of the car when injured and the case relied upon has not, therefore, in my opinion, any relevance.

NESBITT J. concurred with the Chief Justice.

KILLAM J. (dissenting), agreed with Davies J.

Appeal allowed with costs.

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

Solicitor for the respondent: *John A. Macdonald.*

(1) 10 O. R. 745.

1903
*Dec. 10,11.
1904
*Feb. 16.

THE DOMINION IRON AND STEEL COMPANY (DEFENDANTS)..... } APPELLANTS.

AND

DUNCAN McLENNAN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Expropriation of land—Statutory authority—Manufacturing site—Survey—Location—Trespass.

The Town of Sydney was empowered by statute to expropriate as much land as would be necessary to furnish a location for the works of the Dominion Iron Steel Co., a plan showing such location to be filed in the office for registry of deeds and on the same being filed the title to said lands to vest in the town. Engineers of the company were employed by the town to survey the lands required for the site and to make a plan which was filed as required by the statute. M., two years later, after the company had excavated a considerable part of the land, brought an action for trespass claiming that it included five chains belonging to him and, at the trial of such action, the main contention was as to the boundary of his holding. He obtained a verdict which was affirmed by the full court.

Held, reversing the judgment appealed from (36 N. S. Rep. 28) that the only question to be decided was whether or not the land claimed by M. was a part of that indicated on the plan filed; that the sole duty of the engineers was to lay out the land which the town intended to expropriate; and whether it was M's land or not was immaterial as the town could take it without regard to boundaries.

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

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*PRESENT:—Sir Elzéar Taschereau C.J, and Sedgewick, Davies, Nesbitt and Killam JJ.

(1) 36 N. S. Rep. 28.

The facts of the case sufficiently appear from the above head-note and the judgment of the court on this appeal.

Lavett for the appellants.

Newcombe K. C. and *McInnis* for the respondent.

The judgment of the court was delivered by:

SEDGEWICK J.—This is an action brought against the appellant company for trespass on a lot of land at Sydney, in the County of Cape Breton, Nova Scotia.

The trial judge found in favour of the plaintiff, which judgment was confirmed by the Supreme Court *in banco*, and an appeal was taken to this court.

The appellant company was incorporated for the purpose of manufacturing iron and steel, and the town of Sydney desiring that the works of the company should be located within its limits, obtained from the legislature an Act authorising it to give a site for their works. The Act is chapter 84 of the statutes of 1899, and provides in effect as follows:—

The Town of Sydney is hereby empowered to expropriate, acquire, purchase, take over and hold so much land within the limits of the town as may be necessary to furnish a location for the works of the company, a plan showing the site or location of such lands and lands covered with water, easements, privileges and other rights shall be filed in the office of the Registrar of Deeds of the County of Cape Breton by the town clerk of the said Town of Sydney immediately after the town council of the said Town of Sydney shall by resolution provide for such acquisition or expropriation, and on the filing of the said plan all the right, title and interest in said land and lands covered with water, easements, priviledges and other rights, shall forthwith absolutely vest in the Town of Sydney.

1904

DOMINION IRON AND STEEL CO. v. MCLENNAN.

Sedgewick J.

Under this statute the town employed engineers of the appellant company to survey the lands required for the site of the steel works and to make a plan; this they did, and it was duly filed in the office of the Registrar of Deeds after the town council had passed the resolution required by the statute.

The sole question to be decided in order to determine this appeal is whether or not the locus upon which it is alleged the appellant company committed trespass was included in the plan or was outside of it.

The site chosen and selected consisted of a considerable tract of land bounded on the north and north-west by the waters of Sydney Harbour; on the south-east by the line of the Sydney and Louisburg Railway; on the south-west by a line staked by the surveyors on the ground, and subsequently marked by iron posts, extending from the railway mentioned to the Reserve Mine Railway and thence along the line of Reserve Mine Railway to the harbour waters.

The whole point in dispute is as to the location of the north-eastern corner of the property, the respondent contending that this corner is five chains nearer the harbour than the company says it is—these five chains being the land in dispute. In surveying the grounds the engineers commenced from a certain well known and defined point in the waters of Sydney Harbour: they proceeded along the line of the Sydney and Louisburg Railway until they came to a point which, in their opinion, would be sufficiently landward to afford adequate ground for the company's works. At this particular point they placed a stake. There was here no indication of any kind that it was a boundary line but they were told as a matter of fact it was the end of a boundary line between John McDonald and one Alexander McLennan. From that point across to the Reserve Railway they

staked a line the stakes indicating that the line was a line between John McDonald and Alexander McLennan, and for these stakes there were shortly afterwards substituted iron posts, also indicating the supposed boundary line.

1904

DOMINION IRON AND STEEL CO. v. MCLENNAN.

Sedgewick J.

Afterwards the company erected their works upon the site chosen, with a railway or siding on the locus. Now it happened that five chains harbourward from the point mentioned on the Sydney and Louisburg Railway there was another point which was intended to indicate the corner of a lot of which one John McDonald had given an option of sale to the plaintiff Duncan McLennan. The sale had not been completed at the time of the filing of the plan, but it subsequently was, and the plaintiff brings his action holding that that conveyance gave him title as against the town of Sydney and the defendant company.

The plan filed purports to be a plan of lands and lands covered with water in the Town of Sydney, C.B., required for proposed blast furnaces to be erected by Henry M. Whitney—scale 400 feet to one inch,—and the description upon the plan refers to the corner in dispute as the division line between the lands of John McDonald and the lands of Alexander McLennan. Which point is the true corner? I am of opinion that the point marked upon the ground by the surveyors governs. It is true that at that point there was no division line between John McDonald and Alexander McLennan, but that was the point intended to be the corner of lands to be expropriated, the lands which the town of Sydney intended to pay for and transfer to the company, and the lands which the company expected to receive.

The plan it was proved was a substantially accurate picture or representation of the lands intended to be expropriated, and one could by scaling, having regard

1904

DOMINION IRON AND STEEL CO. v. MCLENNAN.

Sedgewick J.

to the railways, roads and other objects marked upon the plan, ascertain from the plan, within a few feet, the proposed boundary, irrespectively of the stakes or posts upon the ground. The plaintiff's position, however, is that because there was a division line between himself, Duncan McLennan, and one John McDonald, it must be presumed that that division line was the one intended and not the alleged division line which the surveyors were informed existed between John McDonald and Alexander McLennan. This, in my view, is absolutely fallacious. The marking upon the plan of the boundary in question with John McDonald on one side and Alexander McLennan on the other, the latter being a fictitious person, made it, for the purposes of the expropriation, a boundary line identifying that boundary as the one mentioned in the description, and there is, in my judgment, no ground which would compel the company to accept any other boundary than that one. The surveyors making the plan may have called the corner point in question by any name they chose. The fact that they designated that point in the way they did whether accurately or inaccurately affords no justification for the plaintiff's claim. If they had called it Black Acre and marked it on the ground as Black Acre the plaintiff unquestionably would be out of court. I am unable to conceive why the plaintiff can make the company stop in their landward claim at his boundary; that boundary might have been a few feet from Sydney Harbour or miles distant from it. They were entitled to the lands included within the plan and were limited by the boundaries indicated upon the plan irrespective altogether of any actual boundary line whether within or without the lands surveyed. I need not discuss the authorities but the following cases and references support the propositions which have enabled me to

come to the conclusion I have; *Lyle* v. *Richards* (1); *Nene Valley Drainage Commissioners* v. *Dunkley* (2); *Llewellyn* v. *Earl of Jersey* (3); Devlin on Deeds, section 1022, etc.; *Penry* v. *Richards* (4); *O'Farrell* v. *Harney* (5).

DOMINION IRON AND STEEL CO. v. MCLENNAN.

Sedgewick J.

For these reasons I am of opinion that the appeal should be allowed with costs in all the courts.

Appeal allowed with costs.

Solicitors for the appellants; *Pearson, Lovett & Covert.*

Solicitors for the respondent: *Ross & Ross.*

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(1) L. R. 1 H. L. 222.
(2) 4 Ch. D. 1.
(3) 11 M. & W. 183.
(4) 52 Cal. 496.
(5) 51 Cal. 125.

1903
*Dec. 11.
1904
*Feb. 16.

W. W. PAYSON (DEFENDANT).....APPELLANT;

AND

ANNABELLA HUBERT (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Constitutional law—Legislative Assembly—Powers of Speaker—Precincts of House—Expulsion.

The public have access to the Legislative Chamber and precincts of the House of Assembly as a matter of privilege only, under license either tacit or express which can be revoked whenever necessary in the interest of order and decorum.

The power of the Speaker and officers of the House to preserve order may be exercised during the intervals of adjournment between sittings as well as when the House is in session.

A staircase leading from the street entrance up to the corridor of the House is a part of the precincts of the House and a member of the public who conducts himself thereon so as to interfere with the discharge by members of their public duties may lawfully be removed.

Judgment of the Supreme Court of Nova Scotia (36 N. S. Rep. 211) reversed and a new trial ordered.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) maintaining, by an equal division of the judges, the verdict for the plaintiff at the trial.

The following statement of facts is taken from the judgment of the Chief Justice of the Supreme Court of Nova Scotia:

"This is an action to recover damages for alleged assault and battery on the plaintiff. The defendant was, during the session of 1902, the chief messenger of the House of Assembly of the province. The plaintiff

*PRESENT:—Sir Elzéar Taschereau C. J. and Sedgewick, Davies, Nesbitt and Killam JJ.

(1) 36 N. S. Rep. 211.

during that session frequented the House and its corridors in the promotion of a petition which she had presented to the House, in the previous session of 1901, and which had not been dealt with or disposed of by the House or the Government. For reasons which appear from the evidence, the defendant in the alleged discharge of his duty as an officer of the House, and by the direction of the Speaker, requested the plaintiff to retire from the House and its corridors. This direction the plaintiff refused to obey and defendant thereupon removed her with no more force than was necessary. The House was not, at the time of plaintiff's removal, in session, but had been adjourned in the usual course from the previous sitting. The defendant's eighth plea appears to embrace his grounds of defence. It is as follows:

" '8. The defendant says he is the chief messenger of the House of Assembly, and that one of his duties is to preserve order and decorum in the House of Assembly, and about the precincts and corridors thereof, and that the plaintiff at the times alleged in the statement of claim was creating a disturbance in the House of Assembly, in the committee rooms thereof, and in the corridors of the said House, and that the defendant, after he had requested the plaintiff to cease making such disturbance and to leave the said house, committee room and corridors, and after the plaintiff had refused to leave the said house, committee rooms or corridors, or desist from creating a disturbance in said house, committee rooms or corridors, gently laid hands upon the plaintiff and removed her from said house, committee rooms and corridors thereof, using no more force than was necessary, and this is the assault complained of in the statement of claim herein.' The question then appears to be, assuming as the defendant alleges that at

1903

PAYSON v. HUBERT.

the times alleged in the statement of claim the plaintiff was creating a disturbance in the House of Assembly, in the committee rooms, and in the corridors of the said House, whether or not the defendant could, after requesting her to retire, legally remove her from the precincts of the House, although the House was not in formal session with the Speaker in the chair. Was the conduct of the plaintiff, before and at the time she was requested to retire from the corridors of the House, such as to justify the language of the plea that "the plaintiff was creating a disturbance in the House of Assembly, in the committee rooms thereof, and in the corridors of the House?

"The evidence of the plaintiff relates first to the occurrences during the session of 1901 which, for the reasons stated by the learned trial judge, have no relation to the question to be decided in this appeal. As to the occurrences during the session of 1902, when the alleged assault was committed, the plaintiff says:

"'I attended again at the session of 1902, 28th February. I was in the hall near the glass door. I met some of the members. Defendant there assaulted me. He took me by the shoulders and violently shook me and pushed me. He pushed me and tried to throw me down stairs. He had been drinking. I could smell liquor on his breath. I said to him—'If you will leave me alone I will go out.' He did not leave me alone. I was afraid of him and when he went to open the door on Granville Street I ran out the other way to get rid of him. I was so much afraid of his treatment that I never went there again.'

"Cross-examined by *Mr. Drysdale*.—'It is true that formerly, on another occasion, I had called the Attorney General a thief. I had a quarrel with him. (Here the witness got much excited.) Before I was assaulted

the last time, one of the members from Cumberland told me to wait and I could then see the members. Defendant said I could not speak to the members. On all occasions of my visits to the House I was there about my property and my petition. I had formerly been told by the Speaker that I must have justice done me.'

"It was with difficulty that the statements of the plaintiff in cross-examination could be understood on account of her rapid utterance. She volunteered many statements not touching the issue with respect to her petition, and the subject of that petition, which I was obliged to prevent.

"During the cross-examination I learned that the first assault of which the plaintiff had given evidence without objection was barred by the statute which was pleaded.

"This was the evidence for the plaintiff.

"The defendant was then called and testified as follows:

"'In 1901 plaintiff met the Attorney General and called him a rogue, thief and liar. Mr. Longley then ordered me to put her out. She refused to go and I took her by the arm and led her down stairs and she went out. I did not use more force than was necessary. I did not shake her, as she says. She frequently came to the corridors twice a day, and every day sometimes. This was at both sessions. She intercepted the members and talked very loud sometimes. She screamed and on different occasions I had to stop it. The Speaker sent a message to me in the smoking room. The House was not in session at the time I put her out After the message I got from the Speaker from his room, in the smoking room—(All evidence of messages from the Speaker, or directions from the Speaker or members is objected to.)—I asked her to go

1903

PAYSON v. HUBERT.

out and she went outside in the hall. The Speaker then sent for me to his room and then I undertook to use force. The Speaker had said 'Go and put her out!' She came back the next day after the second assault. She had talked quite loudly and at first when I had orders from the Speaker refused to go, but afterwards went. She was in the hall when I first took hold of her.'

"Cross-examined.—'This is not the first person I had heard talking loudly. I had heard members talk loudly while the House was not in session. I had the orders, in 1902, of the Speaker's messenger from the Speaker's private room to remove plaintiff when I first touched her, and then after that she broke away from me. The Speaker sent for me. I was eight or ten feet away from her when plaintiff talked loudly. Could not say whether Speaker heard her. I was acting on the Speaker's instructions in 1902. She struggled a little. I put the same lady out in 1900 and 1901. Persons having business with members went where she had gone. The House was not sitting, nor was there any committee sitting when I put plaintiff out in 1902, and the Speaker was in his own room away from the place where the plaintiff was.'

"The Hon. Mr. Longley, the Attorney General of the province, and a member of the House of Assembly, testified as follows:

"'I am Chairman of Committee on Law Amendments and was at the time of the affair in 1901. I was in my own office and going to my desk to get papers to take to committee room. Sitting at the desk plaintiff called out,—'thief, scoundrel, rogue.' I paid no attention to this on this day, and plaintiff was not molested. On the next day when I went to my desk I paid no attention at first to the plaintiff, but on my way to the committee room she followed me and kept

shouting and I told the messenger he must preserve order. He just quietly removed her. There seemed to be no difficulty—(Objected to as the statute is pleaded to above.)—In 1902 session I was not present at plaintiff's removal, but she frequented the committee in the same way. She was obviously crazy. Became necessary to have plaintiff permanently removed. She was in the corridor and around the House of Assembly continuously and became an intolerable nuisance. Talked wildly and loudly and in an excited state. This continued till the time of the last removal.'

"Cross-examined.—'I am a member of the Government of Nova Scotia. The plaintiff's petition referred to in the resolution in the journals in 1901 was before the Government and we took no action on it.'

"Clifford Marriot, sworn:

"'I am the Speaker's messenger. During the last four sessions. I was present in 1902 at the place where the affair occurred between plaintiff and defendant. Plaintiff was in the smoking room before I saw her or defendant went to her. The Speaker had been in the smoking room when plaintiff was present and several members also. The House was not in session. After a while the Speaker went out of that room and went to his own room. He beckoned to me to follow him to his room. The Speaker gave me a message.—(All evidence of what Speaker said objected to.)—The Speaker said: 'Tell Payson that woman must go out. I can't have her bothering the members.' I went and told Payson and he spoke to her. She was in the corridor. He said 'the Speaker says you must go out.' She said 'how dare you order me out?' Payson put his hand on her arm and she went quietly until she reached the hall. She then resisted and Payson let go immediately. When Speaker was

1903

PAYSON v. HUBERT.

in the smoking room plaintiff was talking loudly. This was previously. After Payson let go and came into the corridor I went to the Speaker and he said 'is that woman out?' I said 'she is in the hall.' He said 'why is she not out?' I said 'she would not go.' He told me to tell Payson to come to him. He said 'I want to see him.'

"Cross-examined.—'I can't say that the first order was more than that she must go out. Plaintiff had documents in her hands when in the smoking room.'

"Frank Greenough sworn:

"'I was present when defendant put plaintiff out. I saw them go down the first stone steps. The Speaker's messenger said—(objected)—then to Payson that the Speaker had given orders to put her out. He said 'I got orders from the Speaker to have you put out.' She had been between the two doors. He took her by the arm. One hand on her arm the other on her shoulder, and they went down together. I did not see Payson shake the plaintiff.'

"Cross-examined.—'I did not see Payson attempt to put her out on two occasions. I did not see the occasion when she broke away. I did not see her go down the steps.'

"Mr. O'Connor objects (as the Attorney General had given evidence) that he should address the jury. I thought it was a question for the Attorney General himself.

"The Attorney General addresses the jury in closing for defendant. Mr. O'Connor closed for plaintiff.

"All this evidence appears to lead to the inevitable conclusion that the language used by the Attorney General to describe the conduct of the plaintiff while frequenting the precincts of the House is not in any degree exaggerated. According to the contention of counsel for the plaintiff there is no remedy for this

kind of thing unless the House be in session and the Speaker in the chair, and until the House be thus clothed with formal authority, anyone so disposed may invade the House and its committee rooms with impunity, till a formal resolution can be passed to commit the offender for contempt.

" Chapter 20 of the Revised Statutes, (N.S.) sec. 18, subsection *b*. enacts:

" 'That the House and committees and members thereof respectively shall hold, enjoy and exercise such and the like privileges, immunities and powers as are from time to time held, enjoyed and exercised by the House of Commons of Canada, and by the committees and members thereof respectively, and such privileges and immunities shall be a part of the general public law of Nova Scotia and taken notice of judicially.'

" And section 25, sub-section 5, makes assaults upon or interference with officers while in the execution of their duty a violation of the Act and punishable accordingly."

At the trial a verdict was entered for the plaintiff and the damages assessed at $500. On appeal to the full court, the Chief Justice was of opinion that the verdict should be set aside and judgment entered for the defendant while Mr. Justice Graham was in favour of ordering a new trial. The other two judges, Townshend and Meagher JJ. agreed with the trial judge, and there being an equal division of opinion, the verdict for the plaintiff stood.

Newcombe K.C. and *McInnis* for the appellant referred to May on Parliamentary Practice (10 ed.) pp. 63, 69, 187 and 332 *n*; Comyn's Dig. (5 ed.) vol. 5 p. 275; *Bradlaugh* v. *Gossett* (1)

(1) 12 Q. B. D. 271.

1904

PAYSON v. HUBERT.

Lovett and *Glyn Osler* for the respondent, cited Bourinot on Parliamentary Procedure and Practice p. 157; *Landers* v. *Woodworth* (2).

THE CHIEF JUSTICE and SEDGEWICK J. were of opinion that the appeal should be allowed and a new trial granted.

DAVIES J.—This action was one brought to recover damages for an assault alleged to have been committed by the defendant the chief messenger of the Legislative Assembly of the Province of Nova Scotia in removing, pursuant to the order of the Speaker, the plaintiff from the smoking room and corridor of the House, and from the stair-case leading up to the corridor. At the time the plaintiff was so removed the House was not in actual session, having adjourned for a short interval, and the fact seems to have had much influence in leading the learned trial judge and at least one of the judges sitting in banc to the conclusions they reached. It is much to be regretted that the report of the trial and of the judge's charge to the jury are so meagre. Sufficient facts however appear to enable a conclusion to be reached as to the legal rights of the respective parties.

The plaintiff appears to be an an excitable and rather erratic person who, in the years 1900 and 1901 prior to the year 1902 when the alleged assault tried in this action was committed, had been forcibly removed from the precincts of the House of Assembly in the interest of order and decorum. In 1901 she had violently and apparently without provocation attacked the Attorney General while he was engaged as Chairman of Committee on Law Amendments, calling him a "thief, scoundrel, rogue" and the defendant, the

(2) 2 Can. S. C. R. 158.

chief messenger, had, at the Attorney General's request, removed her from the building. In giving his evidence in the present action the Attorney General, after referring to this incident, stated that

> she was obviously crazy. Became necessary to have plaintiff permanently removed. She was in the corridor and around the House continuously and became an intolerable nuisance. Talked wildly and loudly and in excited state. This continued till the time of the last removal.

There was no cross-examination of the Attorney General on these points and no evidence was offered by the plaintiff calling in question the learned gentleman's statement. They stand uncontradicted and the opinion as to the mental condition of the plaintiff which they are calculated to make on the reader is confirmed by the learned trial judge who in a note to the plaintiff's cross-examination reported:

> It was with difficulty that the statements of the plaintiff in cross-examination could be understood on account of her rapid utterances. She volunteered many statements not touching the issue with respect to her petition and the subject of that petition which I was obliged to prevent.

The statement of claim in the action, which was obviously prepared by herself and so stated in argument, goes still further to confirm the impression to be gathered from the evidence and the judge's notes that she was, to say the very least, an extremely erratic and excitable personnage possessed with the impression that she was the victim of some cruel wrong done to her in respect of an estate which she claimed and supposed she had been deprived of in the Island of Cape Breton by, as she alleged, the robbery of the Attorney General and others. On appeal to the Supreme Court of Nova Scotia from the judgment entered by the trial judge for the plaintiff on the verdict of $500 given by the jury, the court was equally divided, the Chief

1904

PAYSON v. HUBERT.

Davies J.

Justice and Mr. Justice Graham being in favour of judgment being entered for the defendant or a new trial being granted, while Mr. Justice Townshend and Mr. Justice Meagher were in favour of maintaining the judgment. Under these circumstances the judgment of Weatherbe J. stood confirmed.

The legal questions in dispute are complicated by being mixed with questions of fact, and as the jury were not asked any questions but gave a general verdict merely, it is somewhat difficult to determine precisely some facts with reference to the House of Assembly rooms, corridors and precincts, which it is desirable if not absolutely necessary to know.

From the statement of counsel at the Bar and from the record, however, it is plain that the House of Assembly occupies the first floor to the eastward of the staircase leading from the ground floor of the Provincial Building, while the Legislative Council occupies the western end of the same flat. A long corridor runs from one chamber to the other and the legislative library runs between both chambers and their rooms and is common to both. I should not have supposed it open to reasonable doubt that the corridor and all the rooms adjoining used and occupied by the members of the House as committee rooms and offices as well as the Chamber itself were part of the precincts of the House and equally so that the staircase leading up to this corridor and up and down which members and the public generally had to go to reach or leave the House and the committee rooms, was a part of such precincts. I cannot think that any one or number of people could gather either in this corridor or on this staircase and so conduct themselves as to hinder if not prevent the carrying on of public business and justify themselves on the ground that they were not within the precincts of the House. I gather from the judg-

ment of Mr. Justice Townshend that it was largely if not altogether founded upon the ground that the plaintiff at the time she was forcibly removed by the defendant was in "the general hall of the Provincial Building" and not "within the actual precincts of the House" The learned judge goes on to say:

> The alleged assault having taken place outside of that portion of the provincial building exclusively assigned to and occupied during the sessions by the members of the House of Assembly, it would seem quite clear that neither the Speaker nor chairman of any committees nor yet any member of the House had any authority as such to interfere with plaintiff in entering or remaining in the halls leading to the Assembly Chamber.

So far as "the halls" which lead to and from the public offices of the province and places other than the Assembly room are concerned, this may well be so, but it cannot be so and is not, in my opinion, so, as regards the staircase leading from the entrance on Granville street up to the corridor of the House. If a person was of such eccentric violent habits and conduct as made her presence an "intolerable nuisance" which ought to be removed from the Assembly Room or the working or Committee Rooms and their corridors, can it be for a moment contended that she could safely take her position at the head of the staircase up and down which members must pass on going to or from their Legislative Chamber or Committee Rooms and so placed set alike the House and its officers at defiance? As the necessary if not the sole immediate access to the House of Assembly quarters I am of the opinion that this staircase is a part of the precincts of the House and just as much so as the corridor to which it leads and from which and upon which the Assembly Chamber and Committee Rooms open.

The learned judge appears entirely to ignore the forcible removal of the plaintiff from the smoking room which was charged as part of the assault and

1904

PAYSON v. HUBERT.

Davies J.

which was left to the jury without any specific instructions as to its being part of the precincts of the House or as to the control which the Speaker could rightly exercise there as against mere strangers. I am unable to gather from the judge's charge to the jury whether they were instructed on either of these points. The question would appear to have been left entirely at large.

Mr. Justice Meagher, who concurred in supporting the judgment entered upon the verdict, seems to base his judgment upon the *right* of the public as distinct from the privilege or liberty of access to the Legislative Chamber and the Committee Rooms, which right was not, in his opinion, to be

> subject to the arbitrary whim or caprice of the Speaker or messenger of the House, and so long as the public did not unduly interfere with the freedom of public duties of Members or Committee.

But the defendant, while admitting that the public have such access as a matter of license or privilege, contends that it is a license or privilege merely conceded by the House expressly or tacitly and capable of being withdrawn or refused as occasion requires. It is not contended by him that such right or privilege of access is to be "exercised subject to the arbitrary whim or caprice of the Speaker or messenger of the House." Nor was it argued at the Bar that in ordering the removal of the plaintiff the Speaker acted from any arbitrary whim or caprice. On the contrary it seemed to be admitted that whether he acted legally or otherwise his orders were given *bonâ fide* and after he had personally seen and heard the plaintiff in the smoking room and in the exercise of what he honestly believed to be alike his right and his duty. The true rule which must guide the Speaker and the officers of the House in the exercise of their duty of preserving order and decorum is, in my judgment, correctly stated

by Mr. Justice Graham in his able and clear judgment. His reasoning and the authorities he cites in support of it are conclusive as shewing that the public have access to the Legislative Chamber and to the precincts of the House as a matter of privilege only, and under either express or tacit license, which can at any time be withdrawn or revoked when in the interest of order and decorum it is judged to be necessary. That withdrawal of license can either be general as regards the whole public or special with respect to individuals who make themselves so offensive as to prejudice the proper conduct of public affairs committed to the Assembly or its Committees. It can *ex necessitate* be exercised by the Speaker or officers of the House in proper cases as against individuals offending against the rules of order and decorum or interfering with the proper discharge of their duties by members in the intervals of the adjournments of the House between its sessions, as well as by the House when actually sitting. Any other rule would leave the Assembly rooms, the meetings of committees or the work of the members carried on during the adjournment at the mercy of any individual or body of men who might obtrude themselves into the Chamber or its Committee Rooms and prevent the public business being carried on. Of course I do not refer to any arbitrary or capricious or malicious action on the part of the Speaker or his officers, but one which was a *bonâ fide* exercise of what I consider to be a necessary power. In this case, as I before said, Mr. Speaker's order was not alleged to be malicious, and in my judgment cannot be said to be either arbitrary or capricious. The evidence as to its having been well founded is to me overwhelming. The plaintiff who had been several times previously ejected from the precincts of the House obtruded herself into the smoking room where

1904

PAYSON v. HUBERT.

Davies J.

the Speaker and other members were (see the evidence of Marriott, the Speaker's messenger) and the Speaker gave orders that she should be removed. The defendant, the chief messenger, in giving his evidence says:

> She (the plaintiff) frequently came to the corridors twice a day, and every day sometimes. This was at both sessions. She intercepted the members and talked very loud sometimes. *She screamed and on different occasions I had to stop it.* The Speaker sent a message to me in the smoking room. The House was not in session at the time I put her out. After the message I got from the Speaker from his room, in the smoking-room. * * * (All evidence of messages from the Speaker, or directions from the Speaker or members, are objected to.) I asked her to go out, and she went outside in the hall. The Speaker then sent for me to his room and then I undertook to use force. The Speaker had said: "Go and put her out." She came back the next day after the second assault. She had talked quite loudly and at first when I had orders from the Speaker refused to go, but afterwards went. She was in the hall when I first took hold of her.

The jury should have been told that if they believed the facts to be as related by the Attorney General and the officers of the House and the other witnesses for the defence the action of the Speaker and of the chief messenger was justifiable. The plaintiff had no right to remain in the smoking-room or the corridors when ordered to leave, nor, in my opinion, had she any right to remain against orders at the head of the staircase and so obstruct and interfere with and annoy members while going to and from the Chamber or the rooms. I think also the trial judge was wrong in refusing to instruct the jury when asked by counsel for defendant to do so

> that if the plaintiff was creating a disturbance in the smoking-room the Speaker or any other member then there had a right to order her removal.

At present and under the charge given to the jury it cannot be ascertained for what the damages were awarded, whether for expulsion from the smoking-

room and the corridor, which were beyond any doubt within the precincts of the House, or merely for expulsion from the head of the stairway. I do not think the learned trial judge was right in putting the arbitrary limitation he did upon the powers and duties of the chief messenger so far as they related to the preservation of order and decorum in the House and its precincts as pleaded in the 11th paragraph of the defence. "This" he said

> refers to a disturbance while the House and Committees were in session which was not the case as to the last assault and therefore not applicable.

There is no law or reason justifying any such limitation. The powers and duties of the officers of the House with respect to the preservation of order and decorum within its precincts are as applicable to the intervals of time of adjournments between the sessions as to the sessions themselves. Since the decision of the Judicial Committee in the case of *Fielding* v. *Thomas* (1), affirming the constitutionalty of the Provincial Legislation affecting the powers and privileges of the Legislature of the Province of Nova Scotia contained in ch. 3 of the R. S. N. S., 5th series, many judicial doubts upon these points formerly held have been removed. The 20th section so far as it relates to the assembly of the Province is as follows:

> In all matters and cases not specially provided for by this chapter or by any other statute of the Province the House of Assembly and the Committees and members thereof respectively shall at any time hold, enjoy and exercise such and the like privileges, immunities and powers as shall for the time being be held, enjoyed and exercised by the House of Commons of Canada and by the respective Committees and members thereof, and such privileges, immunities and powers shall be deemed to be and shall be part of the general and public law of Nova Scotia and * * * be taken notice of judicially.

(1) [1896] A. C. 600.

1904

PAYSON v. HUBERT.

Davies J.

Now the powers, privileges and immunities of the House of Commons in Canada are practically the same as those of the House of Commons in Great Britain, although the distribution of the different powers of maintaining order and decorum may be relegated to different officials from those in England. Mr. May in the Parliamentary Practice, 10th ed. 199, while defining the duties of the Sergeant-at-Arms, says they are *inter alia* the maintenance "of order in the lobby and passages of the House," and at page 190

> upon information that a man had assaulted a member in the lobby, the Speaker directed the sergeant to take the offender into custody.

In the note to page 332 he says:

> The area within the walls of the Palace of Westminster compose the Parliamentary precincts.

Applying these general principles and rules to the case before us I cannot have any doubt that it was the duty of the trial judge to have charged the jury that the Speaker was within his rights when, after having had an opportunity of forming a judgment upon the manner in which the plaintiff conducted herself on the occasion of the alleged assault in the smoking-room of the House in 1902, and with his knowledge of her previous history in offending against the order and decorum of the Assembly, over which he presides, he ordered the officials to remove her beyond the precincts of the House. That it did not matter whether the person to whom he instructed the carrying out of his orders was the Sergeant-at-Arms, the chief messenger or an ordinary messenger or doorkeeper. That the question whether the Speaker acted maliciously or capriciously in giving his order might perhaps in some cases be raised, but that in this case there was no evidence on which they could find either malice or caprice. That the precincts of the House embraced as well the smoking-room and the corridor and staircase leading

to it and the Assembly Room as the latter room itself, and that the powers of the officials of the House could be exercised as well for the preservation of order in the adjournments between the sessions as during the sessions, in all cases of course the question of *bona fides* being pre-supposed but being open to adjudication, and, lastly, that the question whether the officer had been guilty of excess in discharging his orders was one peculiarly for them to decide.

I do not think that if the jury had been properly charged upon these points they could under the evidence have found for the plaintiff. I have not deemed it necessary to call attention again to the several authorities collected and reviewed by Mr. Justice Graham in his judgment. I think they fully sustain the position he took that the liberty of access which the public has to attend the proceedings of the House of Assembly and its Committees and to visit the precincts and rooms of the House is not a *right* but a *license* or *privilege* capable of being revoked, and when properly revoked as to any one leaving him or her a trespasser and liable to expulsion as such. I fully agree alike with his reasoning and his conclusion but being of opinion that directing a judgment to be entered for the defendant would be inconsistent with what must have been the necessary findings of the jury in reaching their general verdict I think the appeal should be allowed with costs in this court and in the court appealed from and a new trial granted, the costs of the first trial to abide the event.

NESBITT J. concurred in the judgment allowing the appeal and ordering a new trial.

KILLAM J.—In my opinion this appeal should be allowed and a new trial granted.

1904

PAYSON v. HUBERT.

Killam J.

I concur in the reasoning of Mr. Justice Graham as to the plaintiff having no legal right to enter and remain with the precincts of the Legislature. *Primâ facie* she would be there by license only. The evidence establishes clearly that the place in which the alleged assault took place was within those precincts and that the acts complained of were done in removing the plaintiff therefrom.

While not prepared to say that in no case would a member or messenger of the House of Assembly have authority, *mero motu*, to remove an intruder behaving in a disorderly manner or so as to endanger the peace or safety of the members or officers of the Assembly, I prefer to base my conclusion, in this instance, upon the ground taken by the learned Chief Justice of Nova Scotia. I think that the speaker, though not in the chair, had the implied authority to direct the removal of any person not having an absolute right to insist on being within the precincts, whose conduct appeared to him to be a disturbance of the peace, order or comfort of those having such a right. And I think that this authority was sufficiently pleaded.

As, however, there was some evidence of unnecessary violence, there was a case to go to a jury under proper direction, and the action could not properly have been dismissed.

Appeal allowed with costs.

The appellant in person.

Solicitor for the respondent: *F. B. Scott.*

CATHERINE TRAVERS AND BOYLE TRAVERS (PLAINTIFFS) } APPELLANTS ;

AND

THE RIGHT REVEREND TIMOTHY CASEY; AND VERY REVEREND MONSIGNOR THOMAS CONNOLLY, EXECUTORS OF THE LAST WILL OF THE RIGHT REVEREND JOHN SWEENEY, DECEASED, THE ROMAN CATHOLIC BISHOP OF SAINT JOHN AND THE SAID VERY REVEREND MONSIGNOR THOMAS CONNOLLY (DEFENDANTS) ..... } RESPONDENTS.

1904

*Feb. 19, 22, 23.

*March 10.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Corporation sole—Roman Catholic Bishop—Devise of personal and ecclesiastical property—Construction of will.

The will of the Roman Catholic Bishop of St. John, N.B., a corporation sole, contained the following devise of his property :—"Although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education and charity, in trust according to the intentions and purposes for which they were acquired and established, yet to meet any want or mistake I give and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of St. John, New Brunswick, in trust for the purposes and intentions for which they are used and established."

Held, affirming the judgment appealed from (36 N. B. Rep. 229) that the private property of the testator as well as the ecclesiastical property vested in him as Bishop was devised by this clause and the fact that there were specific devises of personal property for other purposes did not alter its construction.

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*PRESENT :—Sir Elzéar Taschereau C.J., and Sedgewick Davies Nesbitt and Killam JJ.

1904

TRAVERS v. CASEY.

APPEAL from a decision of the Supreme Court of New Brunswick (1) affirming the decree of the Judge in Equity in favour of the defendants.

The only question to be decided in this case was the construction of the clause set out in the head-note of the will of the late Right Reverend Bishop Sweeny, of St. John, N.B. The plaintiffs filed a bill in Equity for a decree that the Bishop died intestate as to the real and personal property which he owned in his private capacity, the plaintiff, Catherine Travers, claiming the same as his next of kin. The Judge in Equity decided that there was no intestacy and his judgment was affirmed by the full court. The plaintiffs then took an appeal to this court.

Pugsley K.C. and *Quigley K.C.* for the appellants. This will was prepared by the testator himself but the construction must be the same as if it had been written by a lawyer. *Thellusson* v. *Rendlesham* (2).

The surrounding circumstances must be taken into consideration in construing it. *Webber* v. *Stanley* (3).

(The learned counsel then referred to the evidence and admissions of the respondent shewing that the testator was possessed in his private capacity of family property and of real estate that was conveyed to him for ecclesiastical purposes.)

These admissions and the evidence referred to shew that the title to property intended for church purposes was vested in the testator as an individual and it was such property he had in mind when he wrote the clause containing the general devise. He says in that clause that all church property should be vested in the Bishop in trust for church purposes and he bequeaths all his property to the church in trust for such purposes. He thus identifies the property conveyed to

(1) 36 N. B. Rep. 229. (2) 7 H. L. Cas. 429 at p. 519.
(3) 16 C. B. N. S. 698.

the individual but which should have been conveyed to the ecclesiastical corporation. See the rule of interpretation laid down by Lord Westbury in *Parker* v. *Tootal* (1), and Lord Selborne's rule in *Hardwick* v. *Hardwick* (2).

The fact that the testator may have died intestate as to the portion of his property claimed by the appellants cannot be invoked against the construction called for by the language of the will and surrounding circumstances. *Webber* v. *Stanley* (3) approved in *Smith* v. *Ridgway* (4); *Pedley* v. *Dodds* (5); *Slingsby* v. *Grainger* (6).

The heir at law cannot be disinherited except by clear and unambiguous language. *Ferguson* v. *Ferguson* (7); *Hall* v. *Warren* (8).

Stockton K.C. and *Barry K.C.* for the respondents. The disputes between the Bishop and his sister were disposed of by the reciprocal deeds of partition, the payment of $2,000 to Mrs. Travers, the appellant, and the releases from the appellants to Bishop Sweeny in 1894. The release is to the Bishop as an individual; as administrator of his father's estate; as a trustee of that estate, if such relationship existed, and also as Bishop of Saint John. These transactions took place in 1894. The appellant, Mrs. Travers, had her share of her father's estate and the Bishop had his. Each could do with her or his share as it seemed to them best. The property then ceased to be property belonging to any estate. Shortly after that, in April, 1895, the Bishop made the will in controversy in this suit. Is it reasonable to suppose he meant not his own estate, his individual property, but property belonging to the church?

(1) 11 H. L. Cas. 143.
(2) L. R. 16 Eq. 168.
(3) 16 C. B. N. S. 698.
(4) L. R. 1 Ex. 46.
(5) L. R. 2 Eq. 819.
(6) 7 H. L. Cas. 273.
(7) 2 Can. S. C. R. 497.
(8) 9 H. L. Cas. 420.

1904

TRAVERS v. CASEY.

He was not making a will as Bishop of Saint John; he could not will church property if he had so desired. All such property by operation of law was continued to his successor in the office of Bishop.

The court must avoid, if possible, giving any effect to the argument that the Bishop intended to die intestate, as to his individual property, and that the true construction of the clause quoted must be confined to church property, because he happened at the time of his death to hold two or three unimportant pieces of church property in his individual name. We must construe the will and ascertain its meaning and intent from the language used. The proper interpretation of the language will give his intention.

The rule of construction, applicable to all wills, is well settled and must dispose of this appeal as laid down by Lord Wensleydale in *Grey* v. *Pearson* (1). The ordinary sense of the words is to be adhered to, unless that would lead to absurdity, repugnance or inconsistency. A long list of cases from that time to the present have followed that rule, the latest of which is *Inderwick* v. *Tatchell* (2). Practically the same rule is laid down in *Roddy* v. *Fitzgerald* (3); and *Abbott* v. *Middleton* (4). The courts, if possible, should so construe wills as to avoid an intestacy: *Edgeworth* v. *Edgeworth* (5), per Lord Hatherly, at p. 40; *In re Redfern*, *Redfern* v. *Bryning* (6); *In re Harrison* (7), per Esher M.R.

The reason assigned by the testator for giving all his property to his successor, even if incorrect, cannot control a bequest actually made or power given. *Cole* v. *Wade* (8); *Holliday* v. *Overton* (9); *Williams* v.

(1) 6 H. L. Cas. 61 at p. 106.
(2) [1903] A. C. 120.
(3) 6 H. L. Cas. 823.
(4) 7 H. L. Cas. 68.
(5) L. R. 4 H. L. 35.
(6) 6 Ch. D. 133.
(7) 30 Ch. D. 390.
(8) 16 Ves. 27.
(9) 14 Beav. 467.

Pinckney (1); Jarman's 12th rule, vol. 2, (5 ed.) 841; *Ex parte Dawes* (2), per Esher M.R.

As to the doctrine of *ejusdem generis*, limiting the operative words of the will by the preceding words, the will can only apply to the testator's individual property, he could not will property not his own, and the courts will disregard the doctrine when the effect of regarding it would be to cause a partial intestacy. See Underhill and Strahan on Interpretation of Wills, p. 21; *Parker* v. *Marchant* (3); *Anderson* v. *Anderson* (4), per Esher M.R. If he intended his individual property to go to his heirs-at-law, why did he not, by apt and plain words, say so? In this case the ordinary grammatical meaning of the words used is large enough and sufficiently explicit to devise and transfer all the testator's estate to his successor in office. Any other construction would be straining the language from its ordinary meaning and cause an intestacy, which the courts, if possible, must avoid. The following cases also support the contentions of the respondents, viz.: *Hodgson* v. *Jex* (5); *Shore* v. *Wilson* (6); *Scalé* v. *Rawlins* (7); *Thellusson* v. *Rendlesham* (8); *Lowther* v. *Bentinck* (9); *Leader* v. *Duffey* (10); *Jones* v. *Curry* (11).

The respondents also adopt the authorities and reasons given in the judgments in the courts below, and from these authorities and reasons, and the authorities cited herein, contend that the judgment of the Supreme Court of New Brunswick should be affirmed, and the appeal dismissed, and with costs.

(1) 77 L. T. 700.
(2) 17 Q. B. D. 275.
(3) 1 Y. & C. C. 290.
(4) [1895] 1 Q. B. 749.
(5) 2 Ch. D. 122.
(6) 9 Cl. & F. 355 at p. 525.
(7) [1892] A. C. 342.
(8) 7 H. L. Cas. 429.
(9) L. R. 19 Eq. 166.
(10) 13 App. Cas. 294.
(11) 1 Swanst. 66, 72.

1904

TRAVERS v. CASEY.

The Chief Justice.

THE CHIEF JUSTICE.—I have had communication of my brother Davies's opinion and I agree in his reasoning and conclusion I shared at one time in his doubts, and I cannot say that I am yet thoroughly satisfied that the testator intended to bequeath his private property to the Church. But though the case on the part of the appellant was as forcibly and ably argued by Dr. Quigley as it could possibly have been, yet he failed to convince me that the judgment appealed from is clearly wrong. The testator would have given nothing to the Church if his will is to be construed as bequeathing only what really belonged to it, and the devise of all *his* estate real and personal would be a devise of none of *his* estate at all.

SEDGEWICK J.—I am of opinion that the appeal should be dismissed with costs.

DAVIES J.—The question for determination in this case is the true construction of the general devise or bequest in the will of the Right Reverend John Sweeney, late Roman Catholic Bishop of St. John, N.B. The clause reads as follows :

> Although all the church and ecclesiastical and charitable properties in the Diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education, and charity, in trust, according to the intentions and purposes for which they were acquired and established, yet to meet any want or mistake, I give and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of Saint John, New Brunswick, in trust for the purposes and intentions for which they are used and established.

The will was written by the Right Reverend gentleman himself, and it was admitted in the answer to the bill filed praying for a declaration as to the meaning of the will that, at the time it was written and also when the testator died, several parcels of real estate which should

have been vested in the Bishop in his corporate name in trust for the Roman Catholic Church for the benefit of religion, education and charity

stood on the records in the name of Bishop Sweeney personally.

I concur in the conclusion reached by the Equity judge, Mr. Justice Barker, who heard the cause, that there has been no intestacy and that everything the Bishop owned or possessed at his death, and which was not otherwise specifically devised in his will, passed under this clause to the Roman Catholic Bishop of St. John. I agree in general with the reasons for his judgment given by that learned judge, but as I entertained for a time grave doubts arising out of the ambiguous language used at the close of the clause quoted above, I thing it desirable to add a few words. The judgment of the Equity Court was confirmed on appeal by the Supreme Court of New Brunswick and this appeal is taken from the latter judgment.

In the able and exhaustive argument addressed to us by Dr. Quigley, for the appellant, much stress was laid upon the opening words of the disputed devise

although all the church and ecclesiastical and charitable properties etc. etc., yet to meet any want or mistake.

It was said that these words had reference to two subject matters only ; 1st, to the real estate, admittedly standing in the Bishop's personal name and which should have stood in his corporate name ; and, secondly, to certain personal property and effects used by the Bishop in and about the services of his cathedral but admittedly not his private property ; and it was argued that the words were intended to rectify the "want or mistake" referred to in the clause and afforded a key to and controlled the meaning of the general words which followed. I cannot accede to this argument. The utmost that can be said for the language used is

1904

TRAVERS v. CASEY.

Davies J.

that it expressed, in a more or less ambiguous way, reasons or motives which influenced the testator in making the general disposition of his property which followed. Standing alone however the words could not be fairly construed as limiting to church properties only the generality of the succeeding devise. My difficulties and doubts arose not out of the introductory words of the devise but of those at its close, namely,

in trust for the purposes and intentions for which they are used and established.

Were these descriptive of the property devised or only a limitation upon the user of that property? What did "they" refer to? The word could not, says the appellant, refer to his own private estate whether real or personal, for the language is quite inapplicable to such properties, and being inapplicable the conclusion must be that he was dealing only with the church properties standing in his name or used by him in the services of the church and to which the words were applicable. But reflection has convinced me that however inapt the language of the sentence may be the meaning is sufficiently plain and that the words are not descriptive of the property intended to be devised but are simply a limitation upon the user of that property, or, in other words, a trust. The word "they" in my judgment, refers to the "church, ecclesiastical and charitable properties in the diocese" which in the beginning of the sentence he had declared are and should be vested in the Roman Catholic Bishop of St. John, N.B., for the benefit of religion, education and charity. He desired to devise as well the church properties standing in his personal name as also his own private properties to his successor and intended to impress upon them all the trusts for religion, education and charity, upon which as he

had declared in the opening part of the sentence, the Bishop should hold all the church and ecclesiastical and charitable properties. Difficulties may possibly arise in determining to which of the particular trusts the private property of the Bishop embraced in the general devising words should be subject, whether for the benefit of religion or education or charity, and in what proportion for each. But that his intention was to devise and bequeath all he owned or possessed at his death to his successor in the Bishopric, and to and for the benefit of the Roman Catholic religion, education and charity within the diocese, I am satisfied. I think that intention sufficiently well expressed and if the language does not leave a legal discretion sufficiently broad to the devisee, then, any difficulties arising out of the trusts must be disposed of as and when they arise on a proper application to the courts. No such difficulties are before us for determination now and once it is held that the words are not words descriptive of the property devised and bequeathed but are simply expressive of a trust we need go no further.

It was argued that the specific bequests of the coupon bonds held by the testator to the Roman Catholic Bishop of St. John, for the special purposes mentioned in the will, shewed that the general words of the disputed clause did not include all of his personal estate and that the further bequests of $500 to have masses

said for the benefit of his soul and the souls of his departed relatives

and $100 to one of his executors

in token of good will and on account of trouble he may have in the execution of the will

confirmed that view. The argument is a legitimate one to advance. But the fact that the bequests of the coupon bonds was made for certain special trusts and purposes set out in the will, shows that the testator's

1904

TRAVERS v. CASEY.

Davies J.

intention was that these special bonds whatever their amount (about which there was much dispute but no evidence) should be applied only for the particular objects specified by him and not generally

> for the benefit of religion, education and charity in connection with the Roman Catholic Church in his diocese.

He "earmarked" them accordingly. There is more weight in the argument arising out of the other two small bequests but looking at the purposes for which they were made and the trivial amount of the bequests I do not think they should be considered as in any way altering the construction which otherwise should be given to the words of the general devise.

Much learning and ingenuity were expended by counsel in suggestions as to what, having regard to the evidence, the deceased Bishop may or must have intended. In the view, however, I take as to the meaning of the disputed clause, all such speculations are of no assistance. The distinguished prelate must be taken to have meant what he said in his will, and that meaning is the one, in my opinion, decreed by the Court of Equity and confirmed by the Supreme Court of New Brunswick.

I think the doubts and difficulties necessarily arising from the use of language somewhat doubtful and ambiguous in the will, and the great gain which must follow from an authoritative decision of the highest Court of Appeal in Canada as to the meaning of these words, fully justified the appeal being taken and that the costs should be paid out of the estate.

NESBITT and KILLAM JJ. concurred in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitor for the appellant: *William Pugsley.*

Solicitor for the respondents: *John L. Carleton.*

THE PEOPLES BANK OF HALIFAX (PLAINTIFF) ..... } APPELLANT;

1904
*Feb. 26,27.
*March 10.

AND

RICHARD A. ESTEY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Sale of goods—Owner not in possession—Authority to sell—Secret agreement—Estoppel.

The owner of logs, by contract in writing, agreed to sell and deliver them to McK. the title not to pass until they were paid for. The logs being in custody of a boom company, orders were given to deliver them as agreed. E., a dealer in lumber, telephoned the owner asking if he had them for sale and was answered "No, I have sold them to McK." E. then purchased a portion of them from McK. who did not pay the owner therefor and he brought an action of trover against E.

Held, affirming the judgment under appeal (36 N. B. Rep. 169) Nesbitt and Killam JJ. dissenting, that the owner having induced E. to believe that he could safely purchase from McK. could not afterwards deny the authority of the latter to sell.

Held per Nesbitt and Killam JJ. that as there was no evidence that the owner knew the indentity of the person making the inquiry by telephone, and nothing was said by the latter to indicate that he would not make further inquiry as to McK.'s authority to sell there was no estoppel.

Held per Taschereau C.J. that as the owner had given McK. an apparent authority to sell, and knew that he had agreed to buy for that purpose a sale by him to a *bonâ fide* purchaser was valid.

APPEAL from a decision of the Supreme Court of New Brunswick (1) reversing the judgment at the trial in favour of the plaintiffs.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

(1) 36 N. B. Rep. 169.

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

The facts of the case are stated by Mr. Justice Barker in his judgment on the motion before the Supreme Court of New Brunswick as follows:

"This case was tried before Mr. Justice Landry without a jury and a verdict entered in favour of the plaintiff, for $2766.63. This is an action of trover brought to recover the value of a quantity of logs sold and delivered by one McKendrick to the defendant, and of which the plaintiff claimed to be the owner. It appears that, in the autumn of 1899, the bank made certain advances to one George W. Upham to enable him to carry on his lumbering operations during the following winter. Upham got out a quantity of logs which in pursuance of an agreement made by Upham with the bank, when obtaining the advances, were hypothecated to the bank under section 74 of the Bank Act. This hypothecating is dated April 20th, 1900, and it assigns to the bank as a security for their advances, which amounted in all to some $18,000, upwards of three millions of spruce logs free of all lien except stumpage which logs were to be driven by Upham to the Fredericton Boom in that spring. There were some further advances made later on but that fact is not important in this case. By a memo on the hypothecation agreement, Upham authorized the bank to sell the logs to any corporation, person or persons, either at private sale or public auction as to the bank might seem meet. The logs were driven into the boom as agreed and the bank, acting under the authority of the Bank Act and Upham's consent, on the sixteenth day of July, 1900, entered into an agreement of sale of all these logs with McKendrick, who was a lumber manufacturer residing at Fredericton and is so described in the agreement. By the terms of this sale the bank agreed to sell and deliver all these Upham logs to McKendrick for the sum of $8.60 per M. sup. feet,

delivered through the boom and at the boom scale. McKendrick, on his part, agreed to purchase at this price and to pay for the logs as they were delivered. The property in the logs was to remain in the bank until the same were paid for, and the contract only extended to and covered such of the logs as might pass through the Fredericton Boom.

"On the 18th day of July, 1900, the bank sent to the boom company a written order as follows: 'Please deliver to C. F. McKendrick all the George W. Upham logs passing through your boom during the season of 1901.' A similar notice was given by the bank to Sewell, who has charge of the delivery of logs after they have been rafted in the boom, to the various owners. Acting under these instructions the boom company and Sewell delivered these Upham logs to McKendrick. For many years previous to this time McKendrick had been in the business of buying, selling and manufacturing lumber and, when this sale was made, he was operating two mills in the vicinity of Fredericton, all of which the bank seemed to be fully aware of. All of these logs were disposed of by McKendrick but, out of the proceeds, he only paid to the bank $10,000. The logs in question in this suit are a portion of the Upham logs which the defendant bought from McKendrick, and paid for. The purchase was made in August, 1900, but, before making it, the defendant communicated with Mr. White, the bank's manager at Woodstock, who had the entire management of this whole matter, both with Upham and McKendrick. The defendant says that some three months before he purchased, he, by telephone, asked Mr. White if he had the Upham logs for sale and he replied 'No, he had sold them to McKendrick.' The defendant says that having received this answer from Mr. White he purchased from Mr. McKendrick. Mr.

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

White does not deny this conversation though he says he does not recollect it. The defendant had been engaged in the lumber business all his life and was thoroughly conversant with the method of getting lumber to the booms, its rafting there and its delivery to the owners afterwards. He heard nothing of the bank having any claim on this lumber until some eighteen months after he had purchased, when they made a demand upon him for it."

The action was tried by Mr. Justice Landry without a jury and resulted in judgment for the plaintiffs for the value of the logs purchased by defendant from McKendrick. A motion to the full court to have the judgment set aside and judgment entered for defendant or a new trial granted was successful and a judgment was entered for defendant.

Connell K.C. and *Carvell* for the appellants. No property passed to McKendrick until the logs were paid for. *Ex parte Crawcour* (1); *Farquharson Bros. & Co.* v. *King* (2); *Forristal* v. *McDonald* (3); 6 Am. & Eng. Ency. of Law 2 Ed. pp. 440-1, 453

White did not wilfully mislead defendant even assuming, of which there is no evidence, that he knew it was defendant who made the inquiry by telephone; there can, therefore, be no estoppel. *Pickard* v. *Sears* (4); *Freeman* v. *Cooke* (5); *Bell* v. *Marsh* (6); *Carr* v. *London & North Western Railway Co.* (7); *Andrews* v. *Lyons* (8); 11 Am. & Eng. Ency. of Law 2 Ed. p. 431.

Pugsley K. C. and *Gregory K. C.* for the respondent. The bank having delivered the logs to McKendrick without exacting payment in advance must be held to have waived their right especially as they subse-

(1) 9 Ch. D. 419.
(2) [1902] A. C. 325.
(3) 9 Can. S. R. C. 12.
(4) 6 A. & E. 469.
(5) 2 Ex. 654.
(6) [1903] 1 Ch. 528.
(7) L. R. 10 C. P. 307.
(8) 11 Allen (Mass.) 349.

quently shewed a willingness to accept payment from time to time as sales were made. *Cole* v. *North Western Bank* (1) ; *Pickering* v. *Busk* (2) ; 6 Am. & Eng. Ency. of Law 2 Ed. pp. 275–6.

The bank are estopped by their representation to defendant. *West* v. *O'Leary* (3) ; *Spooner* v. *Cummings* (4).

THE CHIEF JUSTICE.—The facts of this case appear at full length in the opinions delivered by the learned judges of the court *a quo*, now reported at page 169, volume 36, New Brunswick Reports.

Either upon the ground taken by the Chief Justice of New Brunswick, that McKendrick had full authority to sell under the circumstances of the case, or, if he had not, upon the ground taken by the other judges that the bank is estopped from now invoking his want of authority, the bank's action must, in my opinion, fail, and this appeal be dismissed. The dealings by the bank were such as to clothe McKendrick with an apparent authority to sell and convey a good title to a *bonâ fide* purchaser, subject to the condition that the purchaser, or McKendrick himself, should pay to the bank whatever amount of the price of sale was sufficient to satisfy its advances, the bank relying upon McKendrick for the fulfilment of that condition. They knew that he bought to resell. And White's answer that he had not the logs for sale, because he had sold them to McKendrick, or in other words, because McKendrick had bought them, completes the evidence that McKendrick had full authority to sell. When the bank put McKendrick in possession for the very purpose that he should resell, surely they cannot say that he had no power to sell to Estey.

(1) L. R. 10 C. P. 354.
(2) 15 East 37.
(3) 32 N. B. Rep. 286.
(4) 151 Mass. 313.

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

The Chief Justice.

But, assuming that McKendrick had not that power, the bank is estopped from now availing itself of it. The bank would now claim the benefit of a *suppressio veri* by its manager, White, that would have misled any reasonable man, as it misled Estey. McKendrick, the bank's debtor, is insolvent and, if the bank could recover against Estey, it would be only because he was not justified in believing that when White said that he had sold to McKendrick, he, White, gave him to understand that McKendrick had bought the whole interest.

Now, in common parlance, for any one to say that he has sold his property, without adding a word more, means that he has parted with all his interest in it. The unfairness of mental reservations in the transactions of ordinary business is so apparent that the courts do not view them with favour.

This case is one, I might say, of *res ipsa loquitur*. Estey was undoubtedly, in fact, misled by White. There is no room for questioning his good faith in purchasing from and paying McKendrick. It is by wilfully not telling him the whole truth that White induced him to buy from McKendrick. White, it is true, was not obliged to speak at all, but, when he did speak, he had no right to mislead Estey by telling him what would reasonably induce any intending purchaser to believe that if he wanted to buy he had to go to McKendrick. The question put by Estey to White was one that he, White, must necessarily, under the circumstances, as a fair inference of fact, have known to be from an intending purchaser, whoever he was. The maxim *memo plus juris transferre potest quam se ipse habet*, has no application where the owner of goods has so lent himself to accredit the title to another person.

In fact, I am strongly inclined to think that White, in answering Estey as he did, was prompted by his

desire to get, in the interest of the bank, a purchaser for these logs, expecting the bank's advances to be repaid out of the price of sale and trusting McKendrick for it. Now that McKendrick has abused the confidence White reposed in him, the bank would have their loss fall upon Estey and make him pay a second time the large amount he, *bonâ fide*, paid to McKendrick. Their contention, to my mind, is untenable.

GIROUARD J. concurred in the judgment dismissing the appeal with costs.

DAVIES J.—This was an action brought by the plaintiff bank against Estey to recover from him the value of a quantity of lumber or logs purchased by the latter from one McKendrick some two years before the action was brought. Judgment had been entered by the trial judge in plaintiff's favour for $2,766.63, being the value of the logs, and this judgment, on appeal to the Supreme Court of New Brunswick, was reversed and judgment entered for the defendant. From the latter judgment the plaintiff bank appeals to this court.

On some of the important questions involved in the case the evidence is regrettably meagre, the parties at the trial having assumed much which does not distinctly appear upon the record. The facts however which, in my opinion, are sufficiently proved, and, if proved, determine the issues in defendant's favour, are as follows:

The bank, which was carrying on business in New Brunswick and had an agency at Woodstock managed by Mr. George White, became through its business operations the owner of a quantity of logs known as the Upham logs, on the St. John river. The defendant Estey was and had been for a great many years a lum-

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

Davies J.

berman carrying on business on the said river buying and selling logs and sawing the same into deals and boards, etc. One McKendrick to whom the bank sold the logs (conditionally) was also a lumberman on the St. John River, residing at Fredericton, and engaged before and at the time he bought the logs from the bank in dealing and trading in lumber and logs, and known to the bank manager to be engaged, as stated by him in his evidence, "in buying and selling lumber" and had a very short time before leased a small saw mill from the bank, on the bank of the river. At the time of the sale by the bank to McKendrick, nothing was said one way or the other as to the use he should put the logs to, whether saw them up or sell them. A day or two after the sale of the logs, White, the bank manager, sent the boom company, in whose custody the logs were, a written order to deliver to McKendrick

> all the Upham logs passing through your boom during the season of 1900

and also sent a similar order to one Sewell, who had charge of the delivery of the logs to their various owners after they had been rafted in the boom. One of the conditions contained in the contract of sale between the bank and McKendrick was as follows:

> The property in the said logs to remain in the Peoples Bank of Halifax until the same be paid for.

Shortly after the sale to McKendrick was made, Estey, who resided at Fredericton, on the St. John river, telephoned to White, the bank manager at Woodstock, with respect to these logs. The evidence with respect to this vital conversation is exceedingly meagre. White has no recollection of it at all and Estey's version of it is as follows:

> Q. Before purchasing from Mr. McKendrick did you have any communication with Mr. White in respect of these logs?—A. I did.

Q. Will you state what the nature of that communication was ?—A. It was over the telephone. I asked Mr. White if he had the Upham logs for sale, and he said, No, he had sold them to Mr. McKendrick.

Q. That is Mr. White, the Manager of the People's Bank at Woodstock ?—A. Yes.

Q. That was before you bought from Mr. McKendrick ?—A. Oh yes, sometime before.

Q. Approximately how long before ?—A. I would think no less than three weeks before.

Q. Having received this answer from Mr. White did you then purchase the logs from Mr. McKendrick ?—A. I did.

A question was incidentally raised during the argument on the absence of any direct and positive evidence that it was White who was at the other end of the telephone when Estey asked the question. But I think, as no such doubt was raised at the trial when it could have been at once either confirmed or removed, or in the court below, and as all the arguments had treated the conversation as having taken place between the real parties, White and Estey, who were known to each other, that weight should not now be attached to the question raised. I think the only fair and legitimate inference to be drawn from the evidence of Estey, above quoted, and from his cross-examination on the conversation, is that both parties knew to whom they were speaking.

At the time Estey purchased the logs in question from McKendrick, he gave him his acceptance for the purchase money, $3,000, which on maturity was duly paid. He was an innocent purchaser for value and did not learn until long after payment that the bank had any claim to the logs. The bank had given its orders to the boom master, and Sewell, the tug master, to deliver possession of the logs to McKendrick who was able to satisfy his purchaser, Estey, on that point. It seems to me therefore that the legal question is reduced to the construction which, under the circumstances of the case, and bearing

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

Davies J.

in mind the nature and character of the business carried on by the several parties concerned, and the relations in which they respectively stood to each other, ought to be put upon the telephone conversation. When Estey asked White, the bank manager, the question whether he had the Upham logs for sale the latter knew he was being asked it by a man who was and had been for years engaged in the lumber business in buying and selling logs and other lumber on the St. John River. It was not therefore to be assumed to be a question asked from mere idle curiosity but a business question asked by a business man for business purposes; and it seems to have been answered in the same spirit by Mr. White, who not only gave a categorical answer that he had not the logs for sale but went further and volunteered the information that he had sold them to McKendrick. Now here is a bank dealing with two lumber merchants, both buyers and sellers of logs and other lumber, and known to its Manager as such. The latter tells one of these merchants, who asks whether he has certain logs for sale, that he has not, that he has already sold them to the other merchant. He was not asked to whom he had sold them. He volunteered that information. What reasonable conclusion ought Estey to have reached on receiving that answer? Certainly, in my opinion, the one that McKendrick was the real as well as the apparent vendee possessing the ordinary power of sale which attaches to an ordinary purchaser. It seems to me that having volunteered to give Estey, a probable purchaser, the information he did, White was bound if he intended to act upon his strict rights to have warned Estey of the secret reservation of property in the bank. When he told him he had sold to McKendrick he only told part of the truth He must be taken to have known what construction a reasonable business man, trading

in lumber, would put upon such an answer, and impliedly at the very least to have held out McKendrick as a purchaser with power to resell. If the latter had not been a buyer and seller of lumber; if he was merely a mill-owner engaged in sawing logs into deals and boards, such an implication would not necessarily perhaps arise. But considering McKendrick's known business I cannot doubt that such an answer, followed by the orders to the boom master to give him possession of the logs, amply justified the implication by Estey that McKendrick had the property in as well as the possession of the logs.

I do not think any difference of opinion exists as to the law governing the case although there are differences as to its application to the admitted facts and the legal inferences to be drawn from them.

In *The London Joint Stock Bank* v. *Simmons* (1), Lord Herschell says:

> The general rule of the law is that where a person has obtained the property of another, from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given and the property be taken in the belief that an unquestionable title thereto is being obtained, *unless the person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shewn a good title is acquired by personal estoppel against the true owner.*

This is after all only an elaboration of the doctrine laid down by Ashhurst J. in the well known case of *Lickbarrow* v. *Mason* (2), where he says:

> We may lay it down as a broad general principle that wherever one of two innocent persons must suffer by the acts of a third he who enables such third person to occasion the loss must sustain it.

And see 6 Am. & Eng. Enc., p. 482. In *Henderson & Co.* v. *Williams* (3), the present Lord Chancellor,

(1) [1892] A. C. 201 at p. 215 (2) 2 T. R. 63.
(3) [1895] 1 Q. B. 521.

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

Davies J.

Halsbury, adopts the language of Savage C. J. in *Root* v. *French* (1), who in speaking of a *bonâ fide* purchaser who has purchased property from a fraudulent vendee and given value for it, says :

He is protected in doing so upon the principle just stated that when one of two innocent persons must suffer from the fraud of a third he shall suffer who by his indiscretion has enabled such third person to commit the fraud. A contrary principle would endanger the security of commercial transactions and destroy that confidence upon which what is called the usual course of trade materially rests.

In the later case of *Farquharson Bros. & Co.* v. *King & Co.* (2), the same learned chancellor reaffirms his adherence to the proposition of law as formulated above by Chief Justice Savage, and remarks on page 332, in reply to those who challenge the accuracy of the language used :

These words "who by his indiscretion" appear not to have made much impression upon those who were commenting upon this matter ;

and later on

of course it depends on the sense in which you are to understand the word "enabled,"

and then he goes on to illustrate the difference between the conduct and language of one who acts and speaks towards those to whom he owes a duty and towards others to whom he owes none.

With the greatest possible deference to those of my brethren who take a contrary view from that which I have stated, I have gone over the evidence most carefully and have reached the conclusion tersely expressed by Mr. Justice Barker in his judgment in the court below

that it would be little less than a fraud to permit the plaintiff to set up a title to the property purchased superior to that of the defendant.

The appeal should be dismissed with costs.

Since writing the foregoing, I have had the advantage of reading the judgment prepared by my Brother

(1) 13 Wend. 570. (2) [1902] A. C. 325.

Nesbitt and I am glad to find that we agree as to the law and differ only as to our appreciation of the facts, and the legal inferences which should be drawn from the evidence.

NESBITT J. (dissenting).—The plaintiffs had made advances to one Upham and obtained security under section 74 of the Bank Act on a quantity of logs stored in a boom at Fredericton, N.B.

Subsequently Upham released all his interest in the logs to the bank and it became known that the bank had for sale the Upham logs. One McKendrick, on the 16th July, 1900, became the purchaser of these logs under an agreement in the following language:

MEMORANDUM OF CONTRACT made this 16th day of July, A.D. 1900, between the People's Bank of Halifax, of the one part, and Cyrus F. McKendrick, of the City of Fredericton, Lumber Manufacturer, of the other part.

The said People's Bank of Halifax, having the right to sell hereby contracts and agrees with the said Cyrus F. McKendrick to sell and deliver to him in the Fredericton Boom, all the logs cut, gotten or purchased by George W. Upham, during the logging season of 1899-1900, which logs are now chiefly in the limits of the Fredericton Boom and the balance are in the course of transit and bear the several marks following:—XUX, MXU, GGU, 'U'; this sale to include all of the said George W. Upham's logs whatever marks the same may bear, and all logs marked with any of the marks rendered, entered or recorded with the said Fredericton Boom Co. by the said George W. Upham for the season of A.D. 1900, at and for the sum of eight dollars and sixty cents per thousand superficial feet, delivered through the boom, boomage paid, regardless of size of logs, boom scale to be accepted. And the said Cyrus F. McKendrick hereby purchases from the said People's Bank of Halifax all the said logs hereinbefore mentioned to be delivered at the said Fredericton Boom at the price aforesaid of eight dollars and sixty cents per thousand superficial feet, and agrees to pay therefor as the same may be delivered.

The property in the said logs to remain in the People's Bank of Halifax until the same be paid for, and this contract only to extend to

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

Nesbitt J.

and cover such of the said Upham logs as may pass through the said boom.

(Signed,) PEOPLE'S BANK OF HALIFAX,
By G. A. WHITE, Manager,
Woodstock, N.B.

(Signed,) C. F. MCKENDRICK.

McKendrick at the same time leased from the bank a mill which Upham had been using intending apparently to manufacture the logs into sawn lumber. McKendrick also had another mill where he was manufacturing lumber. On the 18th July, 1900, the manager of the bank at Woodstock gave an order to the Fredericton Boom Co. as follows:

WOODSTOCK AGENCY, July 18th, 1900.

THE FREDERICTON BOOM CO., Fredericton.

Please deliver to C. F. McKendrick all of the Geo. W. Upham logs passing through your booms during the season of 1900.

(Signed,) PEOPLE'S BANK OF HALIFAX,
By G. A. WHITE, Manager,
Woodstock.

And on the 13th of August McKendrick gave the bank a cheque for $10,000 and the bank gave him a release of 1,162,790 feet in the words and figures following:

WOODSTOCK, N.B., August 13th, 1900.

Received from C. F. McKendrick the sum of ten thousand dollars ($10,000) in full payment for one million one hundred and sixty-two thousand seven hundred and ninety superficial feet of logs delivered to him under the contract of sale of the Geo. W. Upham logs to him by the People's Bank of Halifax, which said number of feet of unsawed logs are hereby released to him and become his property, the first one million one hundred and sixty-two thousand seven hundred and ninety superficial feet of unsawed logs sawn by the said McKendrick to be considered as the logs hereby released.

(Signed,) PEOPLE'S BANK OF HALIFAX,
G. A. WHITE, Manager.

Mr. McKendrick was asked:

Q. You admitted and recognized to Mr. White that you could not sell these logs without his release, didn't you?—A. Well, I asked for a release, yes.

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

Nesbitt J.

On the 9th August, Mr. Estey, defendant, purchased from McKendrick 321,702 feet of logs and apparently about the time that the Upham logs were for sale by the bank Mr. Estey says:

Q. Before purchasing from Mr. McKendrick did you have any communication with Mr. White in respect of these logs?—A. I did.

Q. Will you state what the nature of that communication was?—A. It was over the telephone. I asked Mr. White if he had the Upham logs for sale, and he said no, he had sold them to Mr. McKendrick.

Q. That is Mr. White, Manager of the People's Bank at Woodstock?—A. Yes.

Q. That was before you bought from McKendrick?—A. Oh yes, sometime before.

Q. Approximately how long before?- A. I would think not less than three weeks before.

Q. Having received this answer from Mr. White did you then purchase the logs from Mr. McKendrick?—A. I did.

And Mr. White in his examination says:

Q. Did you also inform Mr. Estey by telephone to the same effect that the logs were sold to McKendrick?—A. I don't remember.

Q. You have no recollection one way or the other upon the subject?—A. My impression is that I did not, because I don't remember him telephoning me about it.

Q. What you say is that your mind is a blank upon the subject of his telephoning you at all?—A. Yes; I have no recollection.

Q. Therefore if we are able to prove that he did telephone you what you say is you do not remember?—A. If you prove he did, it must be so; but I have no recollection of it.

Q. But if it so your memory might be at fault?—A. Yes.

The respondent referred particularly to a letter of the 22nd September, 1900.

WOODSTOCK, N.B., Sept. 22nd, 1900.

C. F. MCKENDRICK, ESQ.,
Fredericton.

DEAR SIR—Yours of 21st received, and contents noted.

It would appear from your letter that you consider the matter of payment to us of very secondary importance. I do not view it in that light. If you have not disposed of more deals than we released we may see our way clear not to demand payment before the 30th inst.

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

Nesbitt J.

Please let me know by return mail the quantity sold and also the amount you will agree to pay to us on September 30th.

Yours truly,
(Signed,) G. A. WHITE,
Manager.

And a further letter of September 29th:

WOODSTOCK, N.B., Sept. 29th, 1900.

C. F. MCKENDRICK, ESQ.,
Fredericton.

DEAR SIR,—You have again failed to make payment on Upham logs as agreed. You must make payment not later than the 3rd. I regret exceedingly having sold the logs to you. It seems very strange that you would buy that quantity of logs and agree to pay cash as delivered without having any idea where the money was coming from to pay with.

As I have to go out of town on the 4th or 5th for several days I must have payment made before that time.

Yours truly,
(Signed,) G. A. WHITE,
Manager.

And on November 16th:

WOODSTOCK, N.B., November 16th, 1900.

C. F. MCKENDRICK, ESQ.,
Fredericton.

DEAR SIR,—After seeing Mr. Richey of the B. of M. yesterday afternoon, I did not have time to see you before taking the train.

As you have doubtless been informed we decided to let matters stand until such time as you are able to get around and prepare a full statement of your affairs, and that in the meantime if the deals, boards and scantlings can be loaded and sent to St. John and there held, to have that done.

What few logs are left, if you cannot get them sawed I hope you will be able to place them where they will not be lost in the spring. I forgot to get from you the name of owner of woodboat that took deals to St. John, who deals were intended for, and where they likely are at the present time. Please let me know.

I trust that you are continuing to improve and that when you get around matters will be so arranged that you will be able to continue your business. I am informed that Dibbles cannot do anything until the 4th December, and as I understand it the B. of M. have no right to dispose of the mill at the present time.

Yours truly,
(Signed,) G. A. WHITE,
Manager.

And on November 20th:

WOODSTOCK, N.B., November 20th, 1900.

C. F. MCKENDRICK, ESQ.,
Fredericton.

DEAR SIR,—I am in receipt of yours of the 19th inst., and note contents. I trust you may continue to improve.

I have just received a telegram from Ruddick which reads as follows: "Cushing stole from wharf scow J. S. G. 4 States Bank of Montreal owns deals. McKean replevins deals for advances made on same to McKendrick October 9th." You will understand the deals replevined by McKeans are not the same as referred to in *re* Cushing.

I may go to St. John to-night and if so will be at the Victoria to-morrow. In reference to the deals claimed by McKean I would like if possible to get the name of scows, date of shipment, etc., and when these deals were sawed.

You will understand that if these scows wers loaded out of the first 1,162 M. that you sawed out of the Upham logs we cannot hold them. If they were not we can.

Will you try and be ready to give me the information to-morrow in case I should ask you for it to-morrow from St. John. If I do not please write me to-morrow afternoon, so that I will get it next day. If I go to St. John will send you a p. c. If I do not and you have any important information write me at Victoria.

Yours truly,
(Signed,) G. A. WHITE,
Manager.

Mr. White in examination of these letters says:

Q. You were willing to wait until he did dispose of the deals so as to pay you?—A. I thought when the deals were there we were comparatively safe and good for the money and a short delay wouldn't make much difference.

Q. Mr. McKendrick had two mills had he not?—A. I believe he was running two mills that summer.

Q. One was called the Upham mill and a mill across the river called the Robinson mill?—A. I believe so.

Q. And these logs he was sawing at both mills?—A. Yes I discovered afterwards. I didn't know it at the time. I didn't know it along in the summer.

Q. Can you tell me about what time in October you were there?—A. It would be late in October.

Q. And you say that then the logs were substantially all disposed of?—A. Yes, I say they were most all gone, and the deals were there he said were gone too.

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

Nesbitt J.

And again he says:

I took it that he was disposing of what we had released, and he distinctly told me—

Witness: I was not aware that he was disposing of any except what we had released. * * * I was afraid that possibly he was. He repeatedly told me previous to that that it was not being shipped.

The case was tried before Mr. Justice Landry and apparently was adjourned for argument, and practically all the cases which were submitted to this court were discussed before the trial judge whose judgment is as follows:

After the attention and care I have given this case, and I feel I have given it all the attention and care I can reasonably give it, I have had some time to look at the evidence, which has been on my mind since I heard it. I have arrived at the conclusion that I will have to find for the plaintiff on both counts of the declaration and assess the damages for the value of the lumber that was received by the defendant, Mr. Estey, from the boom-master, or whoever represented the boom-master, by the order of McKendrick, which would be $2,766.63.

I do not announce that decision, however, without expressing some regret that an innocent person like Mr. Estey should be made to suffer; but still I find that the law of our country is such with circumstances and facts existing as I find them to exist in this case, I have to give the verdict against him. In point of fact if my decision had been the other way I would have said the same thing in reference to the bank—regret the bank suffering, which would also be an innocent party, the damages; but under the law as I find it the plaintiffs protected themselves better than Mr. Estey did, and therefore the damages fall on him after he has already paid for the logs. I find the law to be that and I find the facts such that I will direct the clerk to enter a verdict on both counts for $2,766.63 for the plaintiff.

An appeal was taken to the Supreme Court of New Brunswick and subsequently four propositions were argued:

1. That the appellant bank by the statement of its agent, Mr. White, to the defendant that he had sold the Upham logs to McKendrick, and by its conduct, is estopped from denying McKendrick's right to dispose of the logs and for claiming property in the logs on the bank.

2. The appellant bank waived its right to be paid for the logs on delivery.

3. The appellant bank knew the logs were purchased by McKendrick for the purpose of re-sale, and having delivered the logs to McKendrick and clothed him with the possession and ostensible right to sell, any secret reservation of title or property in the bank would be fraudulent and void as against an innocent purchaser for value.

4. That the logs sold by McKendrick to the respondent were included in or were part of the logs released by the bank upon payment of the $10,000.

Judgment was delivered by the court composed of Tuck C.J., Hanington, Barker, McLeod, Gregory and Landry JJ. All were in favour of the defendants with the exception of Mr. Justice Landry.

I have stated the facts at some length because the case seems to me to be one of considerable importance. I have examined all the authorities cited and many others, and it seems to me that the court below has erred in its application of the decisions.

I think the better plan is to see what were the rights as between the parties themselves and then see how far the rights of the bank had been displaced by anything that occurred. I think it is clear on the facts that I have stated, that the intention of the parties was that the logs should be delivered to McKendrick without the bank insisting upon payment as a condition precedent to the delivery, but that it was intended that McKendrick should get possession of the logs, the property of the logs to remain in the bank until payment was received. Such a transaction is, in the absence of statutory enactment, a perfectly valid and binding one. It is quite competent for parties to make such an agreement as that an unpaid vendor may reserve property in goods sold, the passing of the property being in either case a matter of intention which can be controlled by the contract of the parties, and it is equally law, now too well settled to admit of dispute, that upon a sale and delivery of personal estate on condition that the title is not vested in the

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

Nesbitt J.

vendee until the purchase money is paid, the vendor may recover the property from an innocent third person obtaining title from such a vendee, assuming the vendor is guilty of no conduct which as between him and the *bonâ fide* purchaser disentitles him to enforce his remedy. It is equally well settled that, apart from statute, entrusting a person with possession of goods does not constitute a holding of such person out as entitled to dispose of them, and that at common law no man can give a better title to his personal property than he himself has, with the engrafted exceptions that if the sale was a sale in market overt, or if it was a sale made to one engaged in the daily traffic of goods in small quantities, such as a shopkeeper who resold, then the sale to a *bonâ fide* purchaser was good, the principle apparently being that if one puts another in the possession of goods for the very purpose as the vendor must be aware of the vendee retailing them to the general public, then such a disposition is repugnant to the retention in good faith of a property in the goods, and the vendor can not claim as against a *bonâ fide* purchaser of the goods in such case that the property has not passed. Such also are cases of giving possession and apparent title to sale agents or factors. Can it be pretended here that this transaction comes within such an exception? As between the parties clearly it was not so intended. McKendrick admits that the parties to the document assumed that if he proposed making any sale of sawn lumber obtained from the logs that he should get that quantity released and the draft or cheque received in payment handed to the bank in exchange for the release. I cannot see that this transaction differs at all in principle from the daily transactions under section 74 of the Bank Act and which are well known throughout this country. It has been deemed in the public interest that banks

should be allowed to make advances to their customers to enable them to get out logs, and when the logs were gotten out that the bank should receive security. It is not necessary to register and under such security the bank retained a title in the logs and any lumber manufactured therefrom, and the practice has grown up to the extent of millions of dollars per annum. The lumberman making a sale of the lumber ships same to the order of the bank, and the bill of lading is held by the bank until it receives either a draft or cheque in payment. It is perfectly apparent, not only from McKendrick's evidence but the letter from the bank relied on by the defendant, which I quoted above, that the intention was to send deals, boards and scantlings to St. John, there to be held, meaning, to be held to the order of the bank, otherwise the letter would have no meaning.

I think this entirely disposes of the second and third contentions of the plaintiff, and but for the telephone conversation, to be hereafter referred to, the bank would have had a perfect right to follow the goods as has been done in numerous cases in the reports and recover them from a party who had not the title; in other words, that Estey could receive no better nor higher title than McKendrick had.

I do not think there is anything in the fourth contention as it is perfectly plain that what was intended was that a certain quantity of deals, to the extent of about 1,000,000 feet, were to be released, and that whatever lumber was first cut from the logs should be applicable to this, and that no other property was intended to be released.

This brings us now to the consideration of the so-called estoppel by the telephone conversation. In my opinion this question must be found in favour of the bank. In the first place there is no evidence to shew

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

Nesbitt J.

that White was aware who the person was who was asking the question, and while it may be said that it is fair to assume upon the evidence that White did probably understand that it was the defendant who was asking the question, I think the surrounding circumstances must determine the question of an estoppel. The bank had the Upham logs for sale. Various parties had been inquiring as to the purchase. Two or three days before the bank had disposed of them to McKendrick, giving him at the same time a lease of a mill, as I pointed out, with the apparent intention that they should be sawn into lumber. At any rate all this shows is that a person called up to know if "the bank" had the logs for sale. It is not shown that White had any reason to suppose that the question was directed to anything more than that point, and his answer, "No, the logs have been sold to McKendrick" to my mind only points to a statement of fact that the bank had put it out of its power to sell the logs. There is no suggestion that the person inquiring gave any indication that he was making any inquiry except for the purpose of ascertaining whether the bank was still in a position to make a sale. There was nothing in such a simple inquiry to lead any reasonable man to suppose that under the circumstances McKendrick was likely to be applied to for the purchase of the logs, or, as I have before pointed out, that McKendrick, if he was applied to, would in any sense attempt to deal with the logs without obtaining a release from the bank as he did in the case of a sale to the Bank of Montreal. Had anything been said by Estey to indicate to manager of the bank that he was likely to pursue the inquiry further and to go to the person to whom the logs had been stated to be sold, I think then and then only would an estoppel have arisen had the manager failed to point out that although

he had said that he had sold them to McKendrick that he still retained an interest in them by way of vendor's lien. The very nature of estoppel means that a person has misled another; that he in good faith ought to be precluded from setting up that a certain state of facts existed because he has asserted by his language or conduct the contrary to a person who, he had reason to suppose or believe, would act upon his statement or conduct, or that the person could reasonably believe that it was meant to be acted upon. I think the best statement of the law that I have seen is to be found in 11 Am. & Eng. Ency., (2 ed.) at page 431. It is stated that

> to constitute an estoppel it must be shewn that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or which he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up. It appears however to be the prevailing rule that it is not essential that the conduct creating the estoppel should be characterized by an actual intention to mislead and deceive. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the act or representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation will be precluded from contesting its truth.

I may say that this goes further in favour of the defendant than any of three celebrated rules laid down by Brett J. in *Carr* v. *London and Northwestern Railway Co.* (1) at pages 316-317, which are as follows:

> One such proposition is, if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of thing which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist. * * * * * *
>
> Another recognized proposition seems to be that if a man, either in express terms or conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon

(1) L. R. 10 C. P. 307.

1904

PEOPLES BANK OF HALIFAX v. ESTEY.

Nesbitt J.

in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

And another proposition is that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

I think the evidence fails as to both "knowledge and intent" which are essentials to estoppel. I quote as most applicable the observation of Parke B. to counsel in *Freeman* v. *Cooke* (1).

You do not mean to argue, that, if a person makes a misstatement, without any intention that another party should act upon it, and when he could not expect that another party would act upon it, that, in such a case, he is bound?

I think that the defendant has failed to bring himself within the rule and that the plaintiff bank is entitled to recover the sum found by the trial judge together with costs in all the courts.

KILLAM J. also dissented from the judgment of the majority of the court for the reasons stated by Nesbitt J.

Appeal dismissed with costs.

Solicitor for the appellant: *A. B. Connell.*

Solicitor for the respondent: *A. J. Gregory.*

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(1) 2 Ex. 654, 660.

ANNA L. WHITING (DEFENDANT).....APPELLANT;

AND

ADRIEN BLONDIN AND OSCAR DAOUST (PLAINTIFFS)..... } RESPONDENTS.

1904
*Feb. 29.
*March. 10.

ON APPEAL FROM THE SUPERIOR COURT, PROVINCE OF QUEBEC, SITTING IN REVIEW AT MONTREAL.

Contract—Condition precedent—Right of action.

In a contract for the construction of works, it was provided that the works should be fully completed at a certain time and that no money should be payable to the contractors until the whole of the works were completed. In an action by the contractors for the full amount of the contract price, the trial judge refused leave to amend the claim by adding a count for *quantum meruit;* found that the works were still incomplete at the time of action; but entered judgment in favour of the plaintiffs for a portion of the contract price with nine-tenths of the costs. The defendant alone appealed from this decision and the trial court judgment was affirmed by the Court of Review.

Held, reversing the judgment appealed from, that, as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been accomplished and the plaintiffs had no right of action under the contract.

APPEAL from the judgment of the Superior Court, sitting in review, at the City of Montreal, affirming the judgment of the Superior Court, District of Saint Francis, which maintained the plaintiffs action, to the amount of $3,791.71, with costs.

The questions at issue on this appeal are stated in the judgment of the court, delivered by His Lordship, Mr. Justice Girouard.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

1904

WHITING v. BLONDIN.

Lafleur K.C. and *Cate* for the appellant.

Belcourt K.C. and *Panneton K.C.* for the respondents.

The judgment of the court was delivered by:

GIROUARD J.—On the 26th March, 1900, in the City of Sherbrooke, the firm of A. Blondin & Co., plumbers and gas fitters, at St. Hyacinthe, undertook to perform certain work of plumbing and heating in a certain building of the appellant then in course of construction in the City of Sherbrooke. The work was stipulated to be finished on the 1st July, 1900; the price as stipulated for the plumbing job was $1,500, and for the heating $4,000. Two contracts were signed containing about the same clauses, especially as to the completion and payment of the work. In the plumbing contract the respondents agreed

to furnish all the labour and material for a first class plumbing job al complete,

according to certain plans and specifications fully set out. The price of $1,500

was to be paid when the work is all completed satisfactorily to said Whiting.

Finally the two following clauses are to be found in the plumbing contract:

All work to be completed and tested by July 1st, 1900, any work on this contract left undone after that date shall be deducted from our contract price, twenty dollars per day for each and every day, and retained by said Whiting as liquidated damages and the same shall be satisfactory to us. * *

Should the contractors not complete this contract, that is, fail so to do, they shall then pay to the said Whiting one thousand dollars within thirty days from such failure for damage she will have sustained thereby.

In the heating contract the respondents agreed

to furnish all labour and material necessary for a first class heating apparatus to heat the entire building

according to certain plans and specifications fully set out. The respondents guaranteed to heat the whole building to seventy degrees Far. when the temperature would be ten degrees below zero, and that

they shall not receive any pay on this contract until the work is all completed to the satisfaction of the said Whiting.

It was also understood between the parties

that the price agreed upon by the said contractors will be $4,000, to to be paid when all such work is completed, not any pay before the completion of all this contract.

The following clauses are also to be found in the heating contract:

The contractors hereby agree to commence working on said contract within eight days after signing this contract, also to complete all said contract by the first day of July, 1900, that is to say all work above basement. Should the said contractors fail to complete any of the contract above basement by that date, then the said contractors shall pay to the said Whiting twenty dollars per day for each and every day the said contract remains incomplete, and the said Whiting shall deduct such from the contract price and retain such as liquidated damages.

All work on this contract in basement must be completed by July 1st, 1900, if not, the same forfeit by the contractors, twenty dollars per day, shall be made by them from their contract price. * *

Should the contractors not carry out their part of this contract, that is, fail to complete, they then, within thirty days, shall pay to the said Whiting one thousand dollars for damages that she has sustained by them not fulfilling their contract.

The work was not completed on the first July, 1900, and in fact late in the fall, on the 10th November, 1900, and on the 15th December of the same year, the respondents were protested and requested to complete their work, giving particulars at the same time.

On the 1st February, 1900, the respondents sued the appellant for the full contract price of the two jobs, and also for certain damages, alleging that they were complete and that any defect or delay in the comple-

1904

WHITING v. BLONDIN.

Girouard J.

tion of the work was due to the fault of the appellant and her agents.

The appellant met this action by referring to the above clauses of the contract and that as the respondents had not completed their work no action had accrued to them for any part of the price money and that the action taken was premature, reserving to herself a right to recover such damages as the respondents might be liable for. At the closing of the *enquête*, the respondents moved to amend their declaration by adding a count for *quantum meruit* which was rightly refused three days later.

Finally on the 21st March, 1902, after a voluminous enquête covering over a thousand pages of the printed case, Mr. Justice Lemieux, who heard and saw the witnesses, found that the respondents had not completed their work and proceeded to deduct from the contract price, first, the sum of $1200 from the price of the heating apparatus contract, and one hundred dollars from the price of the plumbing contract, and finally condemned the appellant to pay the sum of $3,791.71 with interest and costs, the appellant paying nine tenths of the cost of *enquête*. The learned judge has left no notes of his judgment, but his formal judgment is fully *motivé*. I extract from it three *considérants* bearing upon the point which is the ground for our judgment:

Considérant que les dits Demandeurs, bien que dûment requis par protêt de compléter le dit contrat et de poser la quantité additionnelle tuyaux requise par les spécifications qui faisaient partie du dit contrat, ont refusé de ce faire et que la Défenderesse avait le droit de faire compléter le dit contrat et de retenir sur le prix arrêté entre les parties le coût additionnel de travaux de complétion. * *

Considérant que telle somme de douze cents piastres doit être déduite de celle de trois mille six cents piastres, montant reclamé par les demandeurs, en vertu du dit contrat laissant en leur faveur une balance de deux mille quatre cents piastres qui est la valeur des tra-

vaux de posage du dit appareil de chauffage, faits par les demandeurs, prouvée par nombre de témoins et non contredite par la défence * *

Considérant, néanmoins, comme le disent plusieurs témoins, les nommés Lamarche et Ballentyne, qu'il est inévitable dans les grands contrats de cette nature, que quelques pièces de plomberie ne soient pas quelque peu défectueuses et incomplètes et qu'il y a lieu pour éviter de nouvelles litigations entre les parties, et ce bien que le montant n'en ait pas été parfaitement déterminé par la preuve de retrancher et déduire sur la somme de quinze cents piastres, montant du dit contrat pour travaux de plomberie, celle de cent piastres pour la réparation ou complétion de certaines pièces de plomberie incomplètes ou défecteuses etc.

The appellant appealed from this judgment to the Court of Review in Montreal, which, on the 18th June, 1903, purely affirmed the same with costs. (Taschereau, Loranger and St. Pierre JJ.)

The appellant now appeals from that judgment to this court.

That judgment establishes beyond doubt that the work contracted for by the respondents, either for heating or plumbing, was not completed when they took their action. In fact the evidence shews that it was so completed by the appellant after the institution of the action. The respondents cannot complain of this judgment as they did not appeal from it and they are consequently found in default within the terms of the contract. As we read the contract the full completion of the work was a condition precedent or suspensive of the payment of any money under the contract and until it is accomplished the respondents have no action; such is the well settled jurisprudence of Quebec: *Bender* v. *Carrier* (1) in 1887; *Saumure* v. *Les Commissaires d'Ecole de St. Jerome* (2), in the Court of Review, in 1888; *Stanton* v. *La Compagnie du Chemin de Fer Atlantique Canadien* (3), in 1891, in the Court of Queen's Bench, and *The Royal*

(1) 15 Can. S. C. R. 19. (2) 16 R. L. 214.
(3) 21 R. L. 168.

1904

WHITING v. BLONDIN.

Girouard J.

Electric Co. v. *The Corporation of the City of Three Rivers* (1) in 1894, in this court.

We fully realise the desire of the learned judge to put an end to a very expensive litigation, but to do so there must be a proper issue between the parties, that is, an action by one or other of the parties to have the various accounts and claims between them adjusted and settled after the completion of the work. Two witnesses were examined to establish the value of the work remaining to be done, but this was done only incidentally in support of the allegation of the defence that the work had not been completed. The evidence was never intended to establish the claim of the appellant for expenses in finishing the work or liquidated damages under the contract.

The appeal is, therefore, allowed with costs in all the courts, *sauf recours*.

Appeal allowed with costs.

Solicitors for the appellant: *Cate, Wells & White.*

Solicitors for the respondents: *Panneton & Leblanc.*

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(1) 23 Can. S. C. R. 289.

CITY OF MONTREAL (PLAINTIFF)....APPELLANT; 1904

AND *Feb. 29. *March. 25.

THE MONTREAL STREET RAILWAY COMPANY (DEFENDANTS).. } RESPONDENTS.

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

Municipal franchise—Operation of tramway—Suburban lines—Earnings outside municipal limits—Construction of contract—Payment of percentages—Blended accounts—Estimation of separate earnings.

The City of Montreal called for tenders for the establishment and operation of an electric passenger railway, within its limits, in accordance with specifications and, subsequently, on the 8th of March, 1893, entered into a contract with a company then operating a system of horse tramways in the city which extended into adjoining municipalities. The contract granted the franchise for the period of thirty years from the 1st of August, 1892, and one of its clauses provided that the company should pay to the city, annually, during the term of the franchise, "from the 1st of September, 1892, upon the total amount of its gross earnings arising from the whole operation of its said railway, either with cars propelled by electricity or with cars drawn by horses" certain percentages specified, according to the gross earnings from year to year. Upon the first settlement, on the 1st of September, 1893, the company paid the percentages without any distinction between earnings arising beyond the city limits and those arising within the city, but, subsequently, they refused to pay the pertages except upon the estimated amount of the gross earnings arising within the city. In an action by the city to recover the percentages upon the gross earnings of the tramway lines both inside and outside of the city limits;

Held, reversing the judgment appealed from, the Chief Justice and Killam J. dissenting, that the city was entitled to the specified percentages upon the gross earnings of the company arising from the operation of the tramway both within and outside of the city limits.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, by which the plaintiff's action was dismissed with costs.

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

Atwater K. C. and *Ethier K. C.* for the appellant.

Campbell K. C. for the respondents.

THE CHIEF JUSTICE (dissenting.)—The amount involved in the controversy between these parties is a very large one, for the determination of the case will affect not merely the sum now demanded by the appellants in the present action for the years 1893, 1894, 1895 and 1896, but also the amounts to be paid to them by the respondents under the thirty years' contract in question for the other twenty-six years of its duration.

As correctly stated by the appellant in the factum, the whole controversy upon this appeal is as to whether the appellant is entitled to the percentage in question upon the whole earnings of the respondents or only upon those which the respondents earn and collect within the city limits.

I am of opinion that the appellant is entitled to claim percentage exclusively upon what the respondents earn and collect within the city limits, and that the judgment of the Court of Appeal in that sense should be affirmed.

It appears from the contract itself that tenders had previously been called for by the appellant for the building and operation of a street railway *in the City of Montreal*. The appellant had no powers outside of the city, and did not intend to contract in any way for anything to be done outside of the city limits. And

it clearly did not do so. The by-law of the city council (which has to be read as forming part of the contract) and the contract itself, provide for a passenger railway in the streets mentioned in the schedules thereto (sec. 12 of contract, sec. 43 of by-law) *within the city limits*. Not a single clause of either the contract or the by-law has or could possibly have been intended to have any application outside of the city. The respondents could since, at any time, have ceased to operate their railway outside the city without committing a breach of their contract with the appellant.

The appellant's contention that clauses 36 and 37 can be singled out of the contract, so as to have an extra territorial application, when, it must concede, all and every one of the other clauses of it apply territorially to the City of Montreal exclusively, cannot, in my opinion, prevail. When clause 36 says

> the total amount of its gross earnings arising from the whole operations of its *said railway*;

or as sect. 35 of the by-law as promulgated in French says,

> sur le montant total de ses recettes brûtes provenant de toute l'exploitation de ses *dites voies ferrées*,

that clearly means, it seems to me, the railway authorized by the by-law and contracted for, the "*voies ferrées*" mentioned in the schedules, and no other. And article 37 of the contract likewise applies exclusively to the subject matter of the contract, to the gross earnings of the company *within the City of Montreal*, to the gross earnings of the lines of railway that the company has by the first clause of the contract covenanted to build and operate.

This percentage is the price that the company pays to the city for its franchise in the city and the privilege of using its streets, but that the company should also pay the city for a benefit it gets, not from it, but

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

The Chief Justice.

from the neighbouring municipalities, would appear to me unreasonable. That is a consideration not by itself conclusive, but one, it seems to me, not to be altogether disregarded in the construction of the wording of this contract.

The appellant seems to rely in support of its contention upon the state of facts that existed at the time when this contract was passed, but in a case where the contract itself is clear and explicit no extrinsic facts can be allowed to make it say what it does not say. Then by sect. 42 of the by-law it would seem that the contracting parties intended that all past contracts and agreements should be considered as merged in the new contract.

Then, if, as the appellant contends, the state of things as they existed previously had been in the minds of the contracting parties, would it not have bound the respondents to continue the operation of their railway outside of the city limits, instead of leaving them free to either sell or abandon those parts of it, or run them altogether as a separate undertaking?

The appellant's efforts to get assistance from art. 42 of the contract are exclusively based on taking for granted what may be the subject of a serious controversy between the parties at the termination of the contract. It is expedient, in my opinion, to reserve judgment upon the construction of that article till we, or our successors, are called upon to adjudicate upon it.

By art. 34 of the contract (sec. 22 of the by-law) the company is not entitled to charge any rate exceeding five cents for the conveyance of a passenger *from one point in the city to another in the city*, but that restriction has no application outside the limits of the city, so that the company might well, without breach of this contract, charge 25 cents, or whatever they

please, for conveying a passenger from any point in an outside municipality to another point therein, and the appellant would claim a percentage on these 25 cents. That contention cannot be upheld.

I cannot see that the appellant can invoke in support of its case the contracts that the respondents have made or might have made with any other corporations. These are altogether *res inter alios acta*. It may have been in their interest for the respondents to run all of their lines as one concern, but that does not take away the right they would have had, and now have, of treating their lines outside of the city as entirely separate.

For these reasons, which are substantially those given by Mr. Justice Davidson in the Superior Court, and by the Chief Justice of the Court of Appeal, I would dismiss this appeal with costs.

It is in evidence, and found as a fact by the two courts below as reported by the two referees, one of whom was the appellant's treasurer, that, however unsatisfactory the mode of computation adopted by the respondents may have been, an injustice resulting from it, if any, has worked in favour of appellant. So that the appellant has received at least all, and perhaps more, than the percentage it was entitled to. Then the appellant has not proved any specific amount of the earnings of the company *within the city* upon which a judgment could in any case be entered.

I would add to the judgment, if desired, a reserve of the right the city might have in an action of account or otherwise, that amount to be ascertained, if possible, in any way which might be considered more equitable than that adopted by the respondents.

GIROUARD J.—This appeal gives rise to a nice question of interpretation of contract involving large sums.

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Girouard J.

of money. The respondents, as the name indicates, operate a line of electric railway on the streets of the appellant, extending through a certain number or adjoining towns and villages, which form the suburbs of the city.

The contract recites that tenders having been called for by the appellant, " for the establishment and operation " of an electric passenger railway in the City of Montreal, the tender of the respondents was accepted on the 19th of July, 1892;

that a specification for the establishment and operation of the said railway was, consequently, prepared

by the city council and submitted to the company for approval; that

after discussion of the said specification by the said company and suggestions made by the latter,

the city council passed a by-law, No. 210, on the 21st of December, 1892, "amending such specification;" and that finally, the said by-law constituted the contract which was subsequently, on the 8th March, 1893, put in notarial form and signed by all the parties. It is stated in the deed that copies of the tender and of the specification are annexed to it, signed *ne varietur*, together with a copy of the by-law. The latter is alone filed, and we cannot tell in what particulars it differs from the other documents. The tender might, perhaps, throw some light upon the consideration which the company undertook to pay for the franchise. One thing clearly results from the recitals in the contract; it was not the work of the city alone, but of the two parties. Another fact which appears to be equally certain from the evidence is that, as far as clause 36 is concerned, both parties understood, at the beginning, that it covered the earnings of the whole system.

In consideration of the concession or franchise to run street cars through the city, the respondents have

promised, by clause 36, to pay to the appellants a certain percentage

of the total amount of the gross earnings arising from the whole operation of the said railway.

What is the meaning of this convenant? Does it cover the receipts from the operation of the railway accruing from the carriage of passengers over any part of the railway within the city limits even if entering the car and paying fare outside these limits? That is the main question submitted for our decision.

The Superior Court (Davidson J.) and the Court of Appeal (Lacoste C. J., Blanchet and Würtèle JJ.) held that this obligation was limited to the actual receipts within the city, where the passenger was carried within those limits only, and only a mileage percentage of those receipts where the passenger was carried, either to or from the city, from or to the suburbs; Bossé and Ouimet JJ. dissenting.

With due deference, I must confess that I cannot understand the force of the reasoning of Chief Justice Lacoste speaking for the majority of the Court of Appeal. True the parties have provided for the construction and operation of an electric railway within the city; that was the main object of the contract between them, and for that reason several clauses have reference to that railway only; but quite a few relate to the whole system, for instance clause 36. Nothing prevented them from stipulating that the consideration to be paid by the railway company should consist in a certain percentage of the total amount of its gross earnings, no matter where received. The company has only one system of railway having its head-office, works and power-house in the city with mere ramifications or extensions outside. It is like a body having its head, its heart and arteries within the city and a few distant veins extending without. There

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Girouard J.

is only one system of railway from which the company gets its revenue, puts it in one cash box and undertakes to pay a percentage to the city. Nothing could be more reasonable in a contract with a municipality granting a concession to a street railway company—the charges for travelling upon which were a fixed or lump sum and not a mileage rate—than a stipulation that all fares paid under which the traveller passed over the the rails within city limits should be taken into account in estimating the percentage payable to the City. It must also be remembered that the tickets giving a right to travel anywhere over the system of the street railway company could be purchased anywhere, and so many for $1, and that the holder could use them all strictly within the city limits or in travelling partly within and partly without those limits, but the price paid went into the gross earnings. True the exercise of the franchise granted by the city is confined to the city territory; but it cannot be denied that it was intended to influence and did in fact influence the franchises obtained from the outside municipalities; without it they were of little value to either party. It is not therefore astonishing that in determining the percentage or consideration to be paid to the city, both parties contemplated the operation of the whole railway. The words "*total* amount of the *whole* operation" must mean that, and if not they have no meaning, for they are unnecessary if the earnings are merely those received in the city. Without them, especially the last, the clause would be complete: it would then read:

> The Company shall pay etc, upon the amount of its gross earnings arising from the operation of said railway, etc.

Another way of testing the meaning of the words

> total amount of the gross earnings arising from the whole operation of the said railway

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s to consider what would be meant if, instead, it spoke of the "total operating *expenses* of whole operation of the said railway." It could hardly be suggested that if say 56 per cent would be a fair average for motive expenses that must mean the motive expense of operating the railway in the city alone. And so with respect to that part of the expenses consisting of wages paid. Would it not be plain in the latter case that the words total operating expenses included all the wages paid the men and not only a proportionate part thereof arrived at either on a mileage basis or on that of a population basis or any other arbitrary basis.

In fact there is no justification in the contract for making the deductions "from the total amount of the gross earnings," sanctioned by the judgment appealed from. It is assumed to be an equitable method of dividing such gross earnings. But, apart from the fact that the contract itself does not provide for any such adjustment, the appellant contends that it is most inequitable. As between railways charging for their tickets a sum based upon a mileage rate such an adjustment of receipts, where the ticket covers a part of the mileage travelled on each road, is alike necessary and just. But it is altogether inapplicable to such a contract as this, with a fixed fare irrespective of distance carried, and, besides being largely based upon a rule of thumb, may work most inequitably towards the city.

This aspect of the case seems to have been overlooked by a majority of the judges. It is discussed by Mr. Justice Ouimet. He demonstrates, to my satisfaction at least, that the "gross earnings" of all the cars running within the city, electric and others, was intended by clause 36 of the contract, whether the fares were actually collected in or out of the city. He further points out that the method according to mileage adopted by the railway company of making certain deductions

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Girouard J.

for fares received in outside municipalities is arbitrary and unwarranted by the contract. The learned judge correctly concludes:

> De deux choses l'une ; ou le chemin de fer que la compagnie a construit et opère dans la cité est un chemin de fer indépendant, distinct des prolongements de ses circuits dans la banlieue, ou le tout forme un seul réseau, un seul système dont le tronc se trouve dans la cité avec prolongements à l'extérieur. Dans le premier cas, il faut que les lignes suburbaines soient séparées du tronc principal et opérées séparément comme deux enterprises distinctes. Tant que le tout sera opéré comme un seul et même système de chemin de fer, cette question de séparation des recettes ne peut être soulevée.

We might rest our judgment upon the elaborate and well considered opinion of Mr. Justice Ouimet and allow the appeal. Speaking for myself, who have lived for fifty years in Montreal and its suburbs and, like the learned judges in the courts below, am familiar with the localities and the geography of the country and the *modus operandi* of the Montreal Street Railway Company from its inception to the present day, no more information as to the facts would be required than those given in their notes. But to one not so acquainted, it might be necessary to give details and review the evidence, which is to be found in the charter of the railway company and its amendments, the various by-laws and contracts entered into with the City of Montreal and adjoining municipalities, the plan of the said electric railway, and the documentary and oral evidence adduced. This review, it seems to me, is necessary to truly appreciate the real value of the franchise granted by the City of Montreal and determine the construction of the contract of the 8th of March, 1893. These various sources of information are not disputed by the parties. Both, in the course of the argument of their counsel, presented their case as if they were as well known to this court as they were to themselves and to the judges of the

courts below, and have relied only upon the contract with the city. They did not refer to the plan, nor to the contracts with the adjoining municipalities; they did not print them although filed as exhibits and agreed to form part of the case. It was only when reading the printed evidence before us that we were able to notice their existence and demanded the sending up of the manuscript record so as to be able to judge of their contents. The plan, as explained in the evidence, graphically shows some of the localities interested, and fully indicates (in colour) the electric railway contemplated by the contract, the lines constructed for horse cars and to be constructed for electric cars in the city. The evidence further establishes that, early in 1893, the company commenced the construction of the electric system within the city immediately after the signing of this contract; (clause 15). But the work in the outside municipalities was not started till some time after, and in some of them nearly one year after. At the time of the contract, the company had only horse cars in Ste. Cunégonde and St. Henri along Notre Dame Street, and for a little distance in Maisonneuve and also in Westmount through St. Catherine Street to Green Avenue. So says Mr. St. George, the city surveyor, who produced the plan. Clause 12 of the contract says:

> Until further orders, the cars shall run in the streets mentioned in the schedule of routes herein below indicated, and designated on the plan hereunto annexed, signed by the parties hereto and by the undersigned notary *ne varietur*, and the several circuits shall remain as they are now established.

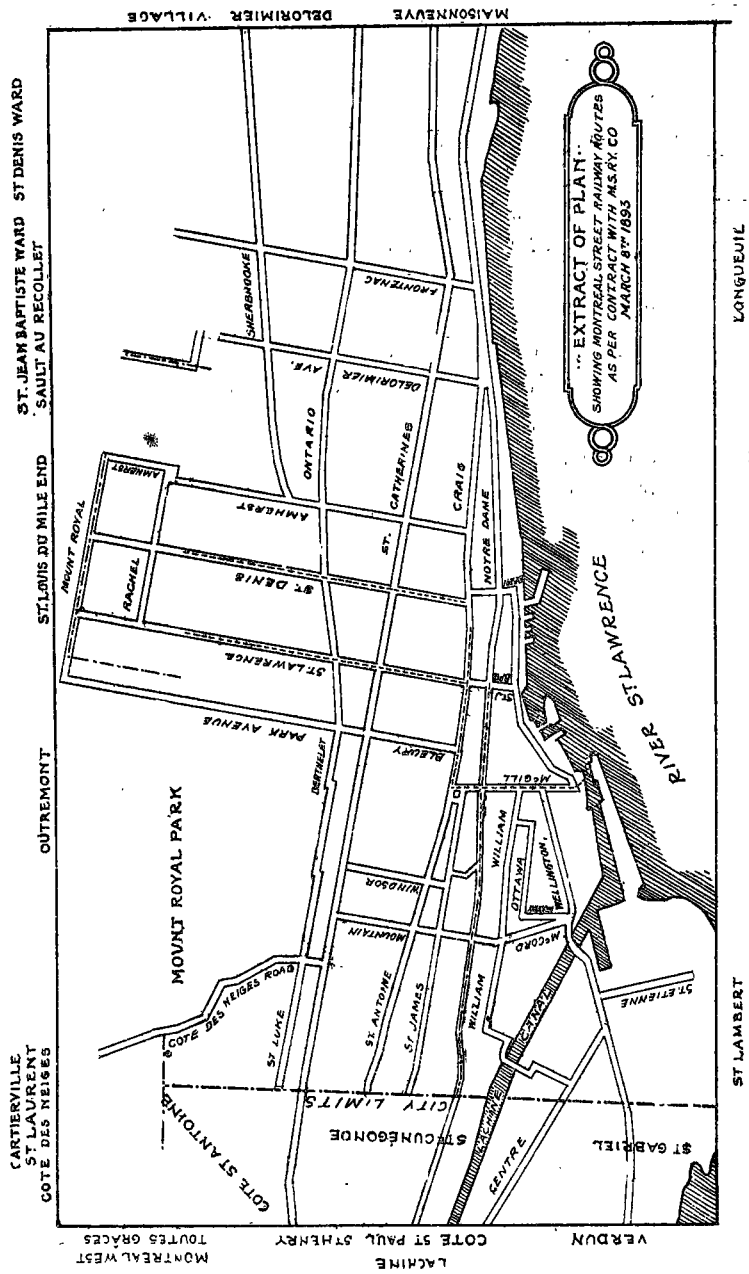
The railway is shown on the plan as passing through Montreal, Ste. Cunégonde and Côte St. Antoine, now Westmount. Mr. St. George testifies that the plan shows this "very clearly." The plan, which is 46 by 33 inches, is reproduced below in a reduced form; it

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Girouard J.

will undoubtedly help to acquire a fair knowledge of the geography of the premises. The streets upon which the railway was not yet intended to pass are left out, although many have since been supplied by the company with electric service; in fact all the leading streets, with the exception of Dorchester and Sherbrooke, were occupied by the railway. I have added outside of the plan a few localities: to the west; Verdun, Côte St. Paul, St. Henri, Lachine, Toutes Grâces and Montreal West; to the north; Côte des Neiges, St. Laurent and Cartierville; on the Back River; Outremont, St. Louis du Mile End, (now the Town of St. Louis,) St. Jean Baptiste and St. Denis Wards, (both parts of the city,) Sault au Récollet on the Back River; to the east; De Lorimier Village, Maisonneuve and Longue Pointe; and finally St. Lambert and Longeuil on the southern side of the River St. Lawrence.


EXTRACT OF PLAN
SHOWING MONTREAL STREET RAILWAY ROUTES
AS PER CONTRACT WITH M.S.RY. CO
MARCH 8TH 1893
MAISONNEUVE
DELORIMIER VILLAGE
ST. JEAN BAPTISTE WARD
ST DENIS WARD
ST. LOUIS DU MILE END
SAULT AU RECOLLET
OUTREMONT
CARTIERVILLE
ST LAURENT
COTE DES NEIGES
LONGUEUIL
ST LAMBERT
MONTREAL WEST
TOUTES GRACES
LACHINE
COTE ST PAUL
ST HENRY
VERDUN
ST GABRIEL
ST CUNEGONDE
CITY LIMITS
COTE ST ANTOINE
COTE DES NEIGES ROAD
MOUNT ROYAL PARK
MOUNT ROYAL AVENUE
PARK AVENUE
ST LAWRENCE
RIVER ST. LAWRENCE
ST DENIS
RACHEL
AMHERST
ONTARIO
SHERBROOKE
MONTCALM
DELORIMIER AVE.
CATHARINES
CRAIG
NOTRE DAME
ST.
BLEURY
DESMARAIS
MOUNTAIN
WINDSOR
WILLIAM
OTTAWA
WELLINGTON
McGILL
McCORD
ST ANTOINE
ST JAMES
ST LUKE
ST ETIENNE
CENTRE
CANAL

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Girouard J.

It seems to me, that this plan, as explained by the witnesses, is an important element in determining the meaning of the words "said railway" in clause 36, for why indicate these outside lines if not contemplated by the contract with the city?

Clause 36 says:

The company shall pay to the city annually, from the first of September, 1892, upon the total amount of its gross earnings arising from the whole operation of its said railway, either with cars propelled by electricity or with cars drawn by horses, etc.

The courts below rely upon the first clause for a definition of the word "railway." This clause declares:

The Montreal Street Railway Company aforesaid shall establish and operate, subject to the conditions hereafter mentioned, lines of railway for the conveyance of passengers in the city by means of cars propelled by electricity, in the streets hereinafter mentioned, and in all other streets which may hereafter be determined by the council of the City of Montreal.

But, as pointed out by Mr. Justice Ouimet, this cannot be the entire meaning of clause 36, as it expressly provides for a percentage on the earnings of horse cars as well. The plan and the evidence give us the explanation of this stipulation. They establish that horse lines extending into outside municipalities might be kept, and were in fact kept, for some years. So city treasurer Robb says. As the city could not provide for electric service within their limits, it exacted the percentage on horse cars as well, to protect its revenue, till the electric system was complete in and out of its limits. Undoubtedly, the city also had in view the term fixed for the completion of the electric system within the city, namely, the 1st September, 1895.

Clause 44 conveys the same intention:

In the case of annexation by the city of any of the outside municipalities, the company shall be obliged, within three months after being ordered by the council, to extend their system through that new annexed portion of territory not already provided with electric cars and to furnish a similar service as is furnished to the city.

Horse cars might be kept on for years in the outside municipalities. This result was out of the control of the city, but if any of them be ever annexed, the electric system shall at once be extended through it by the railway company without any charge or indemnity. In fact all the outside municipalities might come in and the railway company could claim nothing. Why? Because the contract with the city was intended to apply to the whole system of this railway company both in and out of the city.

And what can be the meaning of clause 37 of the contract if the contention of the respondents be upheld? None whatever. It would be of no effect. But are we not bound to construe that clause in a sense that will give some effect to it even if it exceeds clause 36, rather than one in which it can produce none? Art. 1014 C. C. Clause 37 reads as follows:

> The said company shall render quarterly a true and just account and statement in writing of the whole of their gross earnings and allow proper inspection of all books, accounts, returns and vouchers for the purpose of checking and verifying such accounts by the city treasurer, city auditor or other accountant appointed by the city council, such accounts to be rendered and to date from the first day of September, 1892, and to take place every three months on the first days of December, March, June and September in each succeeding year.
>
> The statements rendered by the company of their gross earnings shall be so rendered accompanied by a statutory declaration to be made by the president, vice-president, treasurer or other authorised officer of the company verifying the correctness thereof.

This clause was clearly intended to give an indisputable effect to clause 36 and to permit the city to collect without trouble or question its proportion of the gross earnings of the railway. It is in evidence that at the beginning no claim was made for any deduction; just the reverse actually happened. It was only asserted on the 27th October, 1893, when the company passed the following resolution:

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Girouard J.

Mr. Cunningham (the general manager), submitted a statement showing the amount of revenue collected in St. Cunegonde and St. Henri during the past year, and which has been included in the returns made to the city and subject to a fixed charge of four per cent, but which he suggested should properly be deducted, as also the estimated earnings received in Cote St. Antoine and Maisonneuve. The deduction referred to meeting the approval of the board, the secretary was directed to declare accordingly.

How can such a declaration with arbitrary deductions made, such as those suggested in this resolution, be held to be a compliance with a clause requiring "the said *company* to give a *true* account of the *whole* of their gross earnings?" Where is such a deduction authorised? It is purely arbitrary, and without any authority.

The city protested, but to the present time deductions for what is assumed to form the outside receipts have been regularly made by the company, notwithstanding the city's repeated protestations and reservations. Hence the present action for the difference for the years 1893 to 1896, inclusive, amounting altogether to $21,050.87 according to the returns of the company.

The position taken by the company is untenable; it amounts to this: Clause 37 does not establish the amount which you are entitled to under clause 36; we are willing that you should use it, but only to a certain limit; you must accept our deductions for gross earnings estimated as received outside the city limits, and if you are not satisfied with this prove your case the best way you can. They admit at the same time that this cannot be done, because all the receipts have been mixed up and cannot be separated. Articles 430 and 442 of the Civil Code enumerate certain rules which are obligatory in certain specified cases of admixture and confusion or *mélange*, but the present one does not fall within that class of cases.

Article 429 however lays down, as a principle applicable to all the other cases, that they are subordinate to the general rules of "natural equity." In a case like this, according to the English law, the wrongdoer, that is the party who does the admixture, is the one to suffer. *Lawrie* v. *Rathbun* (1). I believe that this reasonable rule is within the spirit of the Roman law, although I cannot find any text in point. Probably the law of Quebec is to the same effect under articles 429 and 1053 of the Civil Code. It was a fault on the part of the company to have so mixed up the receipts that they cannot be separated. The two accounts, if two must exist as contended by the respondents, should have been kept apart, according to actual figures and not imaginary ones. At all events, under the circumstances, there is only one right course to follow, which is not only equitable but also legal: give full effect to clause 37, so as to make clause 36 workable. I must add that I cannot see upon what ground the company can claim any deduction, at least as long as the service in the outside municipalities is part of the city railway system. I do not wish, however, to be understood as expressing any opinion as to its right under its contract with the city to establish an independent service in these municipalities.

Clause 34 and 35 provide for the collection of fares.

34. The company shall not be entitled to charge any rate exceeding five cents for the conveyance of a passenger from one point to another (either going or returning) except between the hours of twelve p.m. and six a.m., when they shall have the right to charge ten cents, without transfer, as above provided in article twenty-nine. A passenger, on paying his fare, shall be entitled to a transfer without further charge from any one of the company's cars to another at a point where routes connect or intersect, so as to enable him to make one continous trip from one point to another. Children carried on their parents' knees shall be conveyed free of charge.

(1) 38 U. C. Q. B. 255, 263.

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Girouard J.

35. The Company shall also be held to sell tickets in all their offices and cars at the rate of six for twenty-five cents, and twenty-five for a dollar, and to provide tickets for school children at the rate of ten for twenty-five cents, and the Company shall also sell eight tickets for twenty-five cents available between the hours of six and eight o'clock in the morning and between the hours of five and seven o'clock in the evening, on all week days ; said hours variable at option of the City Council.

It is not suggested that in these two clauses the contract contemplates only the railway within the city. Ever since it has been operated, the uniform and daily practice of the company has been to convey city passengers to any part of the system, without charging any extra fare, whether carried in the city only or to and through outside municipalities. "From one point to another", according to the interpretation thus sanctioned by the parties themselves, refers undoubtedly to the whole railway system.

Likewise, the contracts with the outside municipalities deal with the railway as a whole, running through the city and the adjoining municipalities and not as an operation confined to their respective limits. By its charter in 1861, the company, then known as The Montreal City Passsenger Railway Co., was empowered to run, with the license of the City Council, horse cars upon the streets of the city and also

along the highways in the parish of Montreal, leading into the said streets and contiguous thereto,

in consideration, as explained by the evidence, of a license or business tax which in 1892 amounted to $5,000 and so much for each car or horse. (Old Canada, 24 Vict. c. 84). This parish of Montreal, situated round and out of the city limits, formed what, for more than two hundred years, was known as *la banlieue* or the suburbs of the city, and comprised, among others, the very municipalities in question in this cause. It is fully described in the *Arrêt des Paroisses* of the 3rd

March, 1722, published in the *Edits et Ordonnances*, vol. 1, p. 443. At that time the city was confined to the territory enclosed in stone walls, within the boundaries of the West, Centre and East Wards of to-day; between the River, Craig, Lacroix (near C.P.R. depôt) and McGill streets as shewn on the plan, and is yet designated by the name of Old Montreal, forming an independent parish called" Notre-Dame de Montréal." At the time of the execution of the contract with the city in 1893, the suburbs were not the old ones known as Faubourgs St. Joseph, St. Antoine, St. Laurent and Quebec, which had already been absorbed by the city; they were new and were, nearly all, almost in their infancy. Ste. Cunégonde which in 1871 had a population of 1500 had one of 9,291 in 1891; St. Henri, an old village heretofore called " Les Tanneries des Rolland ", with a population of 2,815 in 1871, had 13,413 in 1891; Westmount which in 1871 had a population of 200 mostly composed of farmers and gardiners, had 3,076 in 1891. St. Louis, which had 800 in 1871 had increased to 3,537 in 1891. Maisonneuve, unknown in 1871 had a population of 3,958 in 1891. The total population of the suburbs is now about 64,000. These figures and details of past and present geography are taken partly from the evidence and partly from public statutes and official census which under article 1,207 of the Civil Code we are bound to notice and are essential to determine the meaning of the words " Parish of Montreal " used in the charter of the railway company.

Having secured the city franchise, the company turned its eyes to the outside municipalities and obtained from them similar and even greater privileges: 1°. from Maisonneuve by contract signed on the 27th of May, 1893; 2°. from côte St. Antoine, now Westmount, by contract of the 11th August, 1893;

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Girouard J.

3°. from Ste. Cunégonde by contract of the 10th April, 1894; and 4°. from St. Henri also by contract of the 10th April, 1894. The contract with the city was probably executed under powers granted by the legislature in 1886, 49 & 50 Vict. ch. 86. The contracts with the outside municipalities contain pretty nearly the clauses and conditions of the city contract, except that the company is free from the payment of any percentage, and is exempted from all taxes, and finally Ste. Cunégonde and St. Henri promised not to license any elevated railway. The passengers from these outside towns and cities became entitled to travel on the city street cars not only through their own territory, but also through the City of Montreal, on a footing of equality with its citizens as to fares, tickets, transfers and connections. The contracts with Maisonneuve and Ste. Cunégonde will illustrate this: Maisonneuve, clause 17:

> The company shall not be entitled to charge any rate exceeding five cents for the conveyance of a passenger from one point to another in the limits of the town or in the City of Montreal, or in the town of Maisonneuve and the City of Montreal together (either going or returning). A passenger on paying his fare shall be entitled to a transfer without further charge from any of the company's cars to another at a point where routes connect or intersect, so as to enable him to go without interruption from one point to another in Maisonneuve or in the City of Montreal.

The contract with Ste. Cunégonde is more liberal:

> The company shall be bound to carry passengers upon the line to be so constructed, as well as upon all its lines which shall be in operation within the City of Montreal, Maisonneuve, Côte St. Antoine and St. Henri, at the same prices, charges, conditions and privileges as those imposed on the said company by the City of Montreal.

Fully equipped with these extraordinary powers, equal to if not greater than those held by any street railway in the Dominion, the Montreal Street Railway Company, in 1894, went to the Legislature of Quebec for confirmation of these powers. It represented

that it has converted part of its street railway system into an electric railway system, and has made contracts with the City of Montreal, the town of Maisonneuve and the town of Côte St. Antoine, etc.

The contract with Ste. Cunégonde and St. Henri are not mentioned as no arrangement had yet been concluded with them. An Act, 51 Vict. ch. 73, was passed on the 8th January, 1894, whereby the said contracts are

confirmed and shall have force and effect, according to their tenor, as fully as if the same were incorporated in the present Act.

Few street railway companies possess greater privileges and a more valuable property. The outside municipalities have made wonderful progress under the operation of the electric tramway. Ste. Cunégonde has now a population of 10,912; St. Henri, 21,192; Westmount, 8,856; St. Louis, 19,033; Maisonneuve, 3,958. Montreal has also increased, not however in the same proportion; its population, which in 1891 was 219,616, is now 267,730. This difference is due in a great measure to the electric service, which secures to the inhabitants of outside municipalities one of the most important advantages enjoyed by the citizens of Montreal, namely cheap and quick transportation, without sharing their high rate of taxation, their large public debt and some antiquated public works. From the evidence, I gather that the company is operating 60 miles of railway, one third being in the outside municipalities or suburbs. Its franchise is nominally for thirty years, but practically for a longer period if not for ever, for under clause 42 of the contract the city cannot then, nor at any time after, assume the ownership of the railway without paying, not its cost price, but its value, and I presume its market value. By clause 43, the contract is not to be deemed as giving "an exclusive franchise"; but under clauses 12 and 13 no rival line can be licensed

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Girouard J.

by the city even over streets not used by the company, unless the latter be given the preference to establish said line. Lines of omnibuses are unknown in Montreal, and the only public mode of transportation within the city is by the street cars of the respondents, or cabs. The city may however grant a franchise for an elevated or suspended railway; but by its contracts with Ste. Cunégonde and St. Henri, the company has rendered this reservation almost valueless, for these outside municipalties have agreed not to allow any such elevated company. The company has no business tax to pay, in fact no tax whatever except on its real estate, which however must be considerable, for under clause 45

> all plant, rolling stock, generators and motors necessary for the working of the *said road*, shall be manufactured within the limits of the City of Montreal. The shops, power houses and offices of the company shall also be situated within the city limits,

under the penalty of the forfeiture of its franchise (clause 40). I presume that the words "said road" mean undoubtedly the whole system and are used in the same sense as "said railway" in clause 36.

I have entered into these details to show the value of the franchises granted by the city. This point is not foreign to the case before us; it is on the contrary most pertinent and *à propos*. A sound and salutory rule has been established by almost a universal jurisprudence that franchises of this kind must be construed liberally in favour of the grantor and most strictly against the grantee See *Cyc. of Law and Procedure*, vo. "Corporations," vol, 10, p. 1088, and Broom's Legal Maxims, (7 ed.) p. 448, where all the cases are collected.

Taken apart from the other clauses of the contract, clause 36 is perhaps open to some doubt, which has already divided the judges of the court below and

divides the members of this court. Taken with the other clauses of the contract, the majority of this court have come to the conclusion that the clause is not open to any doubt. But even if it is, we think that the above rule should be applied and that the city be given the benefit of the doubt.

For these reasons, the appeal is allowed with costs and the conclusion of the appellant's demand is maintained in principal, interest and costs as prayed for.

DAVIES and NESBITT JJ. concurred in the judgment allowing the appeal for the reasons stated by Girouard J.

KILLAM J. (dissenting) —The questions involved in this appeal arise upon the construction of a written agreement under which the respondent company operates a street railway system in the City of Montreal.

The agreement bore date the 8th March, 1893. It began with the recitals that the city corporation had called for tenders for "the establishment and operation of an electric passenger railway *in the City of Montreal*;" that the tender of this company (a copy of which was said to be annexed) had been accepted by the city at a meeting of the city council held on the 19th July, 1892; that "a specification for the establishment and operation *of the said railway* (a copy of which was said to be annexed) had been prepared by the council of the city and submitted to the company for approval; that, after discussion of the specification by the company and suggestions by it, the city, on the 21st December, 1892, had passed a by-law (also said to be annexed) amending the specification; and that the company had accepted the by-law and authorized its president and secretary to sign an agreement in conformity with the by-law.

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Killam J.

By the first article:

The Montreal Street Railway Company aforesaid shall establish and operate, subject to the conditions hereinafter mentioned, lines of railway for the conveyance of passengers in the city by means of cars propelled by electricity, in the streets hereinafter mentioned, and in all other streets which may hereafter be determined by the council of the City of Montreal.

Then followed a large number of articles relating to the system to be used, the powers to be conferred upon the company, the mode of construction, powers reserved to the city, the streets to be traversed, the time of completion, the removal of snow and ice, and regulations respecting the running of the cars.

By article 34:

The company shall not be entitled to charge any rate exceeding five cents for the conveyance of a passenger from one point to another (either going or returning) except between the hours of twelve p.m. and six a.m., when they shall have the right to charge ten cents, without transfer, as above provided in article 29. A passenger, on paying his fare, shall be entitled to a transfer, without further charge, from any one of the company's cars to another at a point where routes connect or intersect, so as to enable him to make one continuous trip from one point to another.

The 35th article provided for the sale of tickets at somewhat reduced rates.

Then came the article upon which this action is based.

By article 36:

The company shall pay to the city annually from the first of September, eighteen hundred and ninety-two, upon the total amount of *its gross earnings arising from the whole operation of its said railway* either with cars propelled by electricity or with cars drawn by horses:

Four per cent of its gross earnings up to one million dollars;

Six per cent of its gross earnings from one million to one million five hundred thousand dollars, &c., &c.,

the rate increasing with the increase of earnings.

By article 37:

The said company shall render quarterly a true and just account and statement in writing of the whole of their gross earnings, and allow proper inspection of all books, accounts, returns and vouchers for the purpose of checking and verifying such accounts by the city treasurer, city auditor or other accountant appointed by the city council, such accounts to be rendered and to date from the first day of September eighteen hundred and ninety-two, and to take place every three months on the first days of December, March, June and September in each succeeding year.

The statements rendered by the company of their gross earning shall be so rendered accompanied by a statutory declaration to be made by the president, vice-president, treasurer or other authorized officer of the company verifying the correctness thereof.

By article 39 :

The company shall be liable for all damages which may be occasioned to any person or property by reason of the construction, maintenance, repairs or operation *of the railway*.

By article 40 :

The company shall be bound to construct the *different railway lines* in the manner and within the delays mentioned in the present contract; to establish their shops, workshops, offices and other buildings within the limits of the City of Montreal, and to comply with the other requirements of article 45 under the penalty of the forfeiture of their contract and privileges, &c.

Article 41 provided penalties to be paid by the company for contravention of the contract.

By article 42 :

It is agreed between the said city and the said company that the present arrangement or contract for the establishment and operation of the said electric railway shall extend over a period of thirty years from the first of August eighteen hundred and ninety-two.

This article then went on to give to the city the right, after the expiration of the thirty years, and upon certain specified terms and conditions, to

assume the ownership of the said railway and all its real estate, appurtenances, plant and vehicles belonging to the company and necessary for the operation of its line.

By article 44 :

In the case of annexation by the city of any of the outside municipalities, the company shall be obliged, within three months after being

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Killam J.

ordered by the council, to extend their system through that new annexed portion of the territory not already provided with electric cars, and to furnish a similar service as is furnished to the city.

By article 45:

All plant, rolling stock, generators and motors necessary for the working of the said road shall be manufactured within the limits of the City of Montreal. The shops, power-houses and offices of the company shall also be situated within the city limits.

Articles 12 and 46 provided a detailed schedule of the routes and streets by and on which the railway was to be operated.

Article 12:

The *tracé* of routes in the different streets of the city, as well as the establishment of circuits and transfer connections, shall be made and shall remain under the control of the city council. Until further orders, the cars shall be run in the streets mentioned in the schedule of routes herein below indicated and designated on the plan hereunto annexed, signed by the parties hereto and by the undersigned notary, *ne varietur*, and the several circuits shall remain as they now are established. But whenever the public service shall require it, the city shall have the right, by simple resolution of the council, to change and modify such circuits. etc.

Article 46:

The company shall establish and operate their electric passenger railway in the following routes and in the manner hereafter mentioned, to wit;

(Here follow details specifying the various routes).

By article 48 former by-laws concerning the company were to be repealed, and the company relinquished all its franchises and privileges conferred by such by-laws and its contracts with the city.

The copy of the company's tender and of the original specification stated in the agreement to have been annexed to the agreement do not appear to have been put in evidence. One can only conjecture that the amended specifications were really embodied in the agreement and by-law.

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Killam J.

The by-law was passed the 21st December, 1892. It did not merely authorize the making of the agreement. It enacted in imperative terms most of the provisions of the agreement.

The terms of the previous by-laws and of the contracts between the city and the company are not shewn.

The company was incorporated in 1861 by Act of Parliament of the former Province of Canada, which has several times been amended by Acts of the Legislature of the Province of Quebec.

Speaking very generally, the company was authorized to construct and operate railways upon and along the streets in the city of Montreal, and upon and along the roads and highways in the Parish of Montreal (admittedly more extensive than the city), and in the municipalities adjoining the city, and the company was authorized to enter into agreements with the city and the municipalities, and they respectively with the company, upon various point relating to such railways; *inter alia*, the amounts of license fees to be paid by the company annually and the amounts of the fares to be paid by passengers.

On the 8th January, 1894, the Provincial Legislature passed an Act ratifying the agreements theretofore made with the city and with the towns of Maisonneuve and Côte St. Antoine, and giving the company power to consolidate with, or acquire the lines of, any other company upon the island of Montreal. By that Act it was recited that the company had converted part of its street railway system into an electric railway system and had made contracts with the city and the two towns mentioned with reference to the operations of an electric street railway within these municipalities.

When the by-law was passed and when the agreement was made, the company owned and was oper-

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Killam J.

ating a street railway system in Montreal, with extensions into surrounding municipalities. Originally the cars were drawn by horses and continued to be so, at least for the most part, until the making of the formal agreement. The purpose of the new agreement evidently was to provide for a change of motive power. The city engineer stated, in his evidence, that the change to electricity was made in 1892. It is not clear whether he meant by this to refer to the affecting of the arrangements for the change, or to an actual change in fact of the motive power in use on some part of the railway. Possibly the construction of the new system had been begun in 1892, but it does not appear whether any part of the railway was operated by electricity when the agreement was finally executed.

It appears to me absolutely clear that the agreement was intended to apply solely to a street railway system within the limits of the city of Montreal, including of course territory that might from time to time be added to the city. *Primâ facie*, that would be all that the city would assume to contract about. The agreement originated in the call of the city authorities for tenders "for the establishment and operation of an electric passenger railway in the City of Montreal." The enactments of the by-law could have force, as enactments, only within the city, and it must be implied that they were intended to have force respecting railway lines within the city only. The details relating to dealings with the streets by the city or the company could refer only to streets within the city. So, also, provisions respecting the speed of cars, the places and periods of stopping and many other matters which were not proper for the interference of the council in localities beyond the city limits. The stipulation respecting the company's liability for damages comes within the same reasoning. The pro-

visions for assumption by the city of the ownership of the railway, &c., should be presumed to refer only to lines within the city. In agreements with outlying municipalities similar powers were reserved to them respecting lines within their limits.

The plan referred to in the contract was one indicating the streets of the City of Montreal. The limits of the city were not shewn, except upon the west. Along many of the streets were drawn red lines. There was nothing in the contract or upon the plan to shew that these indicated lines of railway, existing or proposed, though the city engineer stated in his evidence that the routes were indicated by different colours. Two of these lines in red, one along Wellington Street and one along Centre Street, extended beyond the line marking the western limit of the city, but the detailed enumeration of the routes, Nos. 4 and 18, distinctly specified the proposed lines as extending on those streets to the city limits. Indeed, on a large number of the routes the city limits were expressly mentioned as the starting or finishing point. In the cases of many others they were clearly within the city limits. Neither upon the plan nor in the schedule of routes does there appear to me to be any indication whatever that the lines of railway forming the subject matter of the contract extended or were to extend outside the limits of the city.

Upon the argument before us there was no suggestion whatever that the plan or the schedule afforded any evidence that the words "the said railway" in the 36th article were intended to include extensions into the suburbs.

I take it, then, that neither agreement nor by-law upon its face purported to deal with any railway lines or system beyond the limits of the city. The sole reference to outside municipalities or territory was

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Killam J.

contained in the 44th article, and that assumed to deal with them only upon the hypothesis of future annexation to the city, and when annexed. In that event the company could be required to extend its system into the added territory if this should not then be provided with electric cars. And this was not confined to the case of its being so provided by this company; it extended to such a provision from any source.

It is true that there were some stipulations not explicitly confined to "the said railway," or to the lines within the city only; thus, the 34th article provided for the limit of the charge for conveyance "from one point to another," and the right of transfer where routes connected or intersected; the 39th article for liability for damages by reason of the construction, &c., "of the railway." The 40th for the periods of construction of "the different railway lines." But all of these must necessarily be confined by construction to the subject matter of the contract "an electric passenger railway in the City of Montreal" (as in the recital), or "lines of railway for the conveyance of passengers in the city" (as in the first article of the contract). These provisions come directly within article 1020 of the Civil Code, applied by the court below,

> However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.

In this class comes the 37th article of the contract, requiring the company to render quarterly an account "of the whole of their gross earnings." This clause was ancillary to the 36th article, and intended only to provide a scheme for ascertaining the earnings upon which the percentages were to be paid. It appears to me utterly unreasonable to use it for the purpose of attaching to the 36th article an extended meaning.

The very fact that when the contract was made, the company had and was operating lines outside the city seems to me to weaken rather than to strengthen the case for the city. If it had been intended that payments were to be made upon the earnings of the outside lines, one would expect this to be clearly stipulated for.

And I can attach no weight to the circumstances that the earnings from cars drawn by horses were included, and that the earnings were to be computed from a day anterior to the execution of the contract.

Naturally, time was required for the completion of the electric system, and in the interval portions of the lines would be operated by horse power. The tender of the company was accepted in July, 1892; then followed negotiations upon the details; in December the by-law was passed. When construction of the new system was in fact begun, when electric power was first used on any part of the lines, we do not know. Nor do we know when the period expired for which payments under the former system were made. The parties chose to fix the first of September, 1892, as the commencement of the first yearly period in computing the payments, as they chose to fix the first of August, 1892, from which to compute the thirty years of duration. None of those matters throw any light whatever upon the point now in controversy.

The company's agreement was to pay specified percentages

upon the total amount of its gross earnings arising from the whole operation of *its said railway*.

The natural meaning of these words confines the stipulation to the earnings from the operation of the lines within the city. The word "whole" does not extend the natural meaning. It is still a question as to what it is the whole operation of which is referred

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Killam J.

to. I think it very probable that the word "whole" was inserted in connection with the words "either with cars propelled by electricity or with cars drawn by horses," with a view to assist in including both methods of operation.

A perusal of the whole contract and a consideration of the circumstances existing and necessarily contemplated at the time of the execution of the contract appear to me to establish, beyond any doubt, that the parties intended the stipulation to be confined to the earnings from the city lines only. Indeed, had it not been for the strong contention to the contrary on the part of the counsel for the city, and its apparent acceptance by some of the members of the court, I should not have felt it necessary to indicate at such length the reasons for my own opinion.

Then, we come to the question: What were the gross earnings of the company "from the whole operation of its said railway?" The company continued the operation of its lines within and without the city. What were the terms upon which it was operating when the contract in question was made we do not know; whether it then kept separate the receipts from the lines within and without the city we are not informed. Whether single fares were then charged for one journey from without the city to points within, or *vice versâ*, whatever the distance, we are not told. After the completion of the contract with the city, the company entered into contracts for the operation of street railway systems in surrounding municipalities, connecting with the city system. By these it agreed to carry passengers to and from these municipalities and from and to points in the city and other points on its lines, irrespective of distances, at single fares of the same amounts as between different points in the city. It conducted its operations accordingly. No account was

kept of the portions of the railways for conveyance upon which these fares were paid. The whole set of railways was operated as one system, with motive power supplied from the same plant within the city, and managed from the same office; and all the receipts went, without distinction, into the same treasury. It is contended that, under these circumstances, the receipts from all sources were receipts upon which the percentages were payable under the 36th article of the contract. I cannot agree with that contention.

It does not appear to me that the extension of the lines and the system of operating them made the extensions beyond the city a part of "the said railway" referred to in the contract within its meaning. The reasoning which I have already used excludes that conclusion.

Nor does it seem to me that either the fares for carriage wholly outside the city or the whole of the fares for carriage between points within and points without can properly be said to arise from the operation of the lines which alone formed the subject matter of the contract. The existence and operation of the lines within the city may have been necessary to the existence and profitable operation of the outside lines, but the earnings of the latter arise so indirectly from the operation of the former that they cannot properly come within the class of earnings to which the contract refers. And in the case of fares earned for carriage partly within and partly without, while the operation of the city lines was a necessary condition precedent to their being earned in that way, so also was the operation of the other lines. I think that the proper way is to consider for what services such fares are paid. The fare for such a journey is paid partly for carriage within and partly for carriage without the city. The earning arises equally from the operation of both sets of lines.

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Killam J.

The portion which should be deemed to be earned by the outside line cannot properly be said to be an earning arising from the operation of the portion within the city, to any other extent or in any other manner than if these were two systems under different managements with arrangements for the interchange of traffic.

While the city stipulated against excessive fares, it did not stipulate that the maximum should be charged. The company was not bound to charge the maximum for the portion of a journey which should be wholly within the city. There seems to have been nothing in the contract which would prevent the company from making traffic arrangements with connecting companies upon a basis of charges similar to those upon its own lines, with provisions for a fair apportionment. Indeed, a contract of that kind was made with another company in July, 1893, under which, as I would infer from the evidence of the respondent company's manager, the companies are now working.

The local situation of the power plant and of the business office is wholly immaterial. The case would not be different if they were placed without the city.

The sole difficulty in the case arises from the system under which a single fare is charged for an entire journey, irrespective of distance. This was a system which the parties must have contemplated as not unlikely to be extended to connecting lines.

The Legislature confirmed agreements to that effect with two outside towns at the same time as that with the city.

If it once be granted, as I think it must, that the company could apportion by arrangement with another company, it must follow, I conceive, that it could apportion as between its inside and its outside lines. And in that case it becomes only a question of fact

whether the apportionment made by the company is the proper one, or, if not, what other should be adopted.

The apportionment of earnings between different portions of a railway, or different railways operated in one system, must be found necessary from time to time in the Courts, and in such cases reference must be had to the principles upon which those interested in such works are accustomed to act. It is not always possible to do this upon a basis of mileage or one otherwise capable of strict mathematical calculation.

In *Pullan* v. *Cincinnati & Chicago Air Line Railroad Co.* (1) an apportionment by the master of the court was considered and approved, although admittedly approximate.

In the case of the Manitoba and North Western Railway, where there was a mortgage on one portion of the line and the whole line was subsequently mortgaged together, separate receivers were appointed, and it was necessary for them to settle upon a basis of apportionment under the sanction of the court in Manitoba. It was also found necessary, during the litigation, to settle on a basis of apportionment between that railway and the Canadian Pacific Railway, which was then its only connection.

Under The Railway Taxation Act of Manitoba, R. S. M. [1902] c. 166, s. 5, a provincial tax is imposed upon the gross earnings in the province of railway companies owning or operating lines of railway within the province. All, or nearly all, of those railways extend into other parts of Canada, and a large portion of their traffic is between Manitoba and outside points.

Similarly, the City of Montreal and the neighbouring municipalities might be empowered to tax the earnings of the street railway lines within their respective boundaries.

(1) 5 Biss. 237.

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Killam J.

In any such case it becomes necessary to devise an equitable basis of apportionment of through traffic, and the fact that it could not be ascertained with absolute mathematical accuracy would not be a ground for assigning to any one part of a line the earnings of the whole.

The city had no direct right or interest to or in any portion of the earnings. It was not even a mortgagee thereof. It had simply a contractual right to be paid amounts based upon the earnings of the city lines. The receipts were the absolute property of the company which could mix them together and do with them as it chose. The company was under no obligation to keep books or accounts in any particular manner. It was bound only to allow such as it should keep to be inspected by the civic officials, and to render statements of its earnings, though its mode of keeping accounts might raise inferences against it

The rendering of statements showing the amounts of the gross earnings from all sources does not appear to me to estop the company or to bind it otherwise to pay percentages upon the whole amounts, as deductions were made in these very accounts for the proportions claimed by the company to be due to the outside lines There may have been some confusion or some errors at first ; but the amount now sued for includes percentages upon sums earned during the first and every succeeding year under the contract and claimed by the company as not proper to be included. The statements have been made up in different forms at different times ; but the claim of the company in each year has been the same, and the differences of form were matters of book-keeping only.

The courts below were satisfied that the system of division adopted gave to the city all that it could properly be entitled to, and, indeed, operated to the

advantage of the city. I see no reason to dissent from that conclusion.

In my opinion the appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Ethier & Archambault.*

Solicitors for the respondents: *Campbell, Meredith, Macpherson & Hague.*

1904

CITY OF MONTREAL v. MONTREAL STREET RWAY. CO.

Killam J.

THE CITIZENS LIGHT AND POWER COMPANY (PLAINTIFFS)..... APPELLANTS;

AND

THE TOWN OF SAINT LOUIS (DEFENDANT)..... RESPONDENT.

1904

*March 1.

*March 25.

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

Contract by municipal corporation—Powers—By-law or resolution—Right of action—Confession of judgment—Evidence—Admissions—Pleading—Estoppel by record—Art. 1245 C. C.—Concurrent findings of fact.

A confession of judgment for a portion of the amount claimed is a judicial admission of the plaintiff's right of action and constitutes complete proof against the party making it. *The V. Hudon Cotton Co.* v. *The Canada Shipping Co.* (13 Can. S. C. R. 401) followed; *The Great North-West Central Railway Co.* v. *Charlebois et al.* ([1899] A. C. 114; 26 Can. S. C. R. 221) distinguished.

Upon issues raised as to matters of fact, the court refused to disturb the concurrent findings of the courts below.

Judgment appealed from (Q. R. 13 K. B. 19) reversed and judgment at the trial (Q. R. 21 S. C. 241) restored.

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* PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Nesbitt and Killam JJ.

1904

CITIZENS LIGHT AND POWER CO. v. TOWN OF SAINT LOUIS.

APPEAL from the judgment of the Court of King's Bench appeal side (1), reversing the judgment of the Superior Court, District of Montreal, (2) and dismissing the plaintiff's action with costs.

The action was for the recovery of $3,235.68, under a contract between the parties for lighting the streets by electricity in the Village of Saint Louis du Mile End, subsequently erected into a town municipality under the name of the "Town of Saint Louis" by Act of the Quebec Legislature, 59 Vict. ch. 55. The amount sued for consisted of three quarterly instalments which fell due under the contract in January, April and July, 1900, and for which the municipality denied liability. The defendant, before pleading, confessed judgment in favour of the plaintiffs for $2,633.95, but the plaintiffs refused to accept this amount in satisfaction of their claim. The defendant then pleaded to the action, persisting in the confession and praying for the dismissal of the plaintiffs' action as to the balance of the claim, denying liability under the contract, alleging that it had been executed in virtue of a simple resolution, whereas the municipality could act only by by-law in such matters; that no proper by-law had ever been passed in relation to the contract and that, consequently, the contract sued upon was null and void. The plea also set up non-performance of the obligations undertaken by the company, under the contract, in respect to the establishment of a system of electric lighting in certain streets of the town, outages, inferiority of the system, operation etc. The plaintiffs answered, alleging that the contract had been legally entered into, acquiesced in by the defendant and confirmed and validated by the statute above cited; that the outages were inevitable, resulting from *vis major* and that the

(1) Q. R. 13 K. B. 19. (2) Q. R. 21 S. C. 241.

defendant had admitted this fact and made settlements of accounts rendered in respect thereto.

In the trial court, Mr. Justice Archibald found the facts in favour of the plaintiffs (1); held that the contract was valid and entered judgment in favour of the plaintiffs for the amount claimed, less deductions for outages, with costs. The Court of King's Bench (2) reversed this judgment, reduced the amount to the $2,633.97, (admitted by the confession of judgment), with $50 for costs and condemned the company to pay all costs incurred subsequently to the filing of the confession. Justices Bossé and Hall dissented from the latter judgment, from which the company now appeals.

R. C. Smith K.C. for the appellants. The contract was *intra vires* of the Village of Saint Louis du Mile End; Arts. 4, and 638, Quebec Municipal Code; Art. 358 C. C.; and it is an executed contract. The municipality could exercise its powers by mere resolution of the council; Arts. 460, 464, 525, 616 Que. Mun. Code; *Légaré* v. *Town of Chicoutimi* (3); *Bernardin* v. *Municipality of North Dufferin* (4); Art. 1177 C. P. Q.; *Kellond* v. *Reed* (5), *per* Ramsay J. at page 313; *Town of Rat Portage* v. *Citizens' Electric Co.* (6).

The contract was, moreover, ratified by the Act 59 Vict. ch. 55, (Que.) secs. 2 and 5.

The defendant is also estopped by its conduct in respect to the contract, settlements of disputes in respect to it and the confession of judgment for part of the amount claimed under it. It cannot say that

(1) Q. R. 21 S. C. 241.
(2) Q. R. 13 K. B. 19.
(3) Q. R. 5 Q. B. 542; 27 Can. S. C. R. 329.
(4) 19 Can. S. C. R. 581.
(5) 18 L. C. Jur. 309.
(6) 1 Ont. W. R. 44.

1904

CITIZENS LIGHT AND POWER CO. v. TOWN OF SAINT LOUIS.

the contract is valid as to part of the claim and otherwise a nullity. 20 Am. & Eng. Encyc. 1182; *Simard* v. *County of Montmorency* (1); *Parent* v. *Paroisse ae St. Sauveur* (2); *Village of Frelighsburgh* v. *Davidson* (3); *Girard* v. *Comté d'Arthabaska* (4); *St. Geneviève* v. *Charest* (5).

We also refer to *Simpson* v. *Paroisse de Ste Malachie d'Ormstown* (6); *Vincent* v. *County of Beauharnois* (7); *Marquis* v. *Couillard* (8); *Canadian Pacific Railway Co.* v. *Township of Chatham* (9); *Town of Richmond* v. *Lafontaine* (10); Brice (3 ed.) p. 710, No. 289; Spelling, Private Corporations, "Executed Contracts," pars. 766 and 767; Morawetz, pars. 648, 650, 653, 678, 686, 689 and 635.

The plaintiffs were not in default in the fulfilment of any of the conditions specified and had never been put *en demeure*. Consequently, there can be no ground for the cancellation of the contract. The resolution of the council to terminate the contract can have no effect.

Bisaillon K.C. and *H. R. Bisaillon* for the respondent. At the time of the contract the Municipal Code ruled as to the powers of the municipality and, under its provisions, (Arts. 451, 460, 464, 616, 638), it could act in such matters only by by-law. Tiedman, Municipal Corporations, No. 146, 165; Dillon, Municipal Corporations, pp. 307, 309, 769; *Marchildon* v. *Baril* (11); *Hull Electric Co.* v. *Ottawa Electric Co.* (12); *Waterous Engine Works Co.* v. *Town of Palmerston* (13); Art. 1214 C. C.

(1) 4 Q. L. R. 208.
(2) 2 Q. L. R. 258.
(3) Q. R. 2 S. C. 371.
(4) 16 R. L. 580.
(5) 33 L. C. Jur. 116.
(6) 14 R. L. 485.
(7) 3 Rev. de Jur. 7.
(8) 10 Q. L. R. 98.
(9) 25 Can. S. C. R. 608.
(10) 30 Can. S. C. R. 155.
(11) Q. R. 15 S. C. 499.
(12) Q. R. 16 S. C. 1.
(13) 21 Can. S. C. R. 556.

In regard to the questions of fact, the quality and the quantity of light supplied to the town by the appellants were not what they should have been, according to the contract and the specifications annexed thereto. Their installations were imperfect and insufficient; their materials poor and their operation faulty. The usual and necessary precautions against storms and atmospheric conditions were neglected by the appellants. There was no *vis major* sufficient to excuse them for the large percentage of outages nor for failing to comply with their obligations. The resolution in cancellation of the contract was, consequently, fully justified and authorized under the resolutory clauses therein contained. The settlements made on the disputed accounts, from time to time, can have no effect upon the right of the municipality to put an end to the contract for cause assigned; they were not a waiver as to any other claims. So far as the executed portion of the appellants' obligations is concerned, it is covered by the sum for which the confession of judgment was made, and, as to the balance, the action must fail. We also refer to *Armstrong* v. *Portage, Westbourne and Northwestern Railway Co.* (1); *Wigle* v. *Village of Kingsville* (2); *Young & Co.* v. *Mayor and Corporation of Royal Leamington Spa.* (3); *Hunt* v. *Wimbledon Local Board* (4); Story on Contracts (5 ed.) par. 22.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an action by the appellants claiming $3,235.68, under a contract for supplying to the respondent municipality the lighting by electricity required for its streets. Before pleading, the respondent filed a confession of judgment for

(1) 1 Man. L. R. 344.
(2) 28 O. R. 378.
(3) 8 App. Cas. 517.
(4) 4 C. P. D. 48.

1904

CITIZENS LIGHT AND POWER CO. v. TOWN OF SAINT LOUIS.

The Chief Justice.

$2,633.97. Upon the appellants' refusal to accept such confession of judgment in full satisfaction of their claim, the respondent pleaded that, as the said contract had not been authorized by a by-law, but simply by resolution of the municipal council, it was *ultra vires*, and that, therefore, the appellants' action could not be maintained; reiterating, however, in the said plea, the confession of judgment for $2,633.97, and asking for the dismissal of the action only as to the difference between the *demande* and the amount for which judgment had been so confessed.

The judgment of the Superior Court maintained the action for the full amount demanded, less deductions for outages, but the Court of King's Bench reversed that judgment upon the ground taken by the respondent, that the contract upon which the action was based was *ultra vires* of the municipality respondent, as it had not been previously authorized by a by-law, and dismissed the action as to $591.71, condemning the respondent, however, to pay $2,633.97 for which judgment had been confessed.

The appellants now appeal from that part of the judgment which deducted $591.71 from their claim. I am of opinion that their appeal should be allowed.

The confession of judgment and the judgment entered upon it stand unimpeached. It is, therefore, a matter of record, by that judgment, that the contract is one upon which the appellants are entitled to recover. A defendant who confesses judgment admits the plaintiff's right of action; *The V. Hudon Cotton Company* v. *The Canada Shipping Company* (1); and the appellants could not have had a right to their action brought upon the contract if that contract had been *ultra vires*, so that the judgment against the respondent upon its confession is *res judicata* that the

(1) 13 Can. S. C. R. 401.

1904

CITIZENS LIGHT AND POWER CO. v. TOWN OF SAINT LOUIS.

The Chief Justice.

contract was not *ultra vires*, and if it was not *ultra vires* for the $2,633.97, the amount of the judgment, it cannot be held *ultra vires* for the remaining $591.71.

When the appellants refused to accept the confession of judgment, the respondent might have withdrawn it, but instead of doing that, persisted in it by the plea and a judgment was accordingly entered upon it in the appellants' favour. The respondent cannot, and does not attack that judgment and it stands in full force. Art. 1245 C. C. The respondent was, therefore, debarred from further impeaching the validity of the contract and the judgment appealed from should have so determined.

The case of *The Great North-West Central Railway Company et al.* v. *Charlebois et al.* (1) reported in this court *sub nom.* *Charlebois et al.* v. *Delap et al.* (2) has no application. Far from impeaching the confession of judgment and the judgment entered upon it, as was done in that case, the respondent here asks that the judgment be affirmed.

The controversy raised by the respondent, upon the alleged non-fulfilment by the appellants of their contract relates merely to questions of fact upon which the two courts below have unanimously found against the respondent's contentions, a finding with which nothing in the case would justify us in interfering.

This appeal is allowed with costs and the judgment of the Superior Court is restored.

Appeal allowed with costs.

Solicitors for the appellants: *Smith, Markey & Montgomery.*

Solicitors for the respondent: *Bisaillon & Brossard.*

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(1) [1899] A. C. 114.

(2) 26 Can. S. C. R. 221.

1904

*March 3, 4.
*March 25.

THE CHAMBLY MANUFACTURING COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

SAMUEL T. WILLET (PLAINTIFF).....RESPONDENT.

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

Appeal — Practice — Exception — Art. 1220 *C. P. Q. — Acquiescence — Motion to quash — River improvements — Continuing damages — Contract—Protective works—Discretion of court below — Practice— Varying minutes of judgment—Costs.*

Owing to the condition of the locality and the character of certain improvements made for the purpose of increasing the water power at Chambly Rapids, in the Richelieu River, the parties entered into an agreement respecting the construction of dams and other works at the *locus in quo*, and it was provided that the company should assume the responsibility and pay for all damages caused by "flooding of land, bridges or roads, if any, as well as all other damages caused" to the plaintiff "during or by reason of" the constructions.

Held, reversing the judgment appealed from, that, under the agreement, the plaintiff could recover only such damages as he might suffer from time to time in consequence of the floods at certain seasons being aggravated by the constructions in the stream and that, in the special circumstances of the case, the courts below erred in decreeing the construction of protective works, inasmuch as the company was entitled to take the risks on payment of indemnity as provided by the contract.

Where a respondent, on an appeal to the court below, has failed to set up the exception resulting from acquiescence in the trial court judgment, as provided by article 1220 of the Code of Civil Procedure, he cannot, afterwards, take advantage of the same objection by motion to quash a further appeal to the Supreme Court of Canada.

On an application to vary the minutes of judgment, as settled by the Registrar, for reasons which had not been mentioned at the hearing of the appeal, the motion was granted, but without costs.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Nesbitt and Killam JJ.

1904

CHAMBLY MANUFACTURING CO. v. WILLET.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

The action was brought by the respondent, owner of certain water privileges and mills on the Richelieu River at Chambly Canton, against the company, which has power to erect dams and works on that river, and to expropriate private property for their purposes. The parties entered into an agreement as to the use of the water power at the point in question, the company agreeing that they would not expropriate any properties belonging to the plaintiff. The company was bound by its charter of incorporation to indemnify riparian proprietors for any damages which might be caused by the works constructed by them in the river for their purposes, but, by another agreement with the plaintiff, the company specially covenanted to indemnify the plaintiff for all damages that might be caused to his properties in consequence of the works constructed and to be constructed by the company, by the flooding of land, bridges or roads, and also all other damages caused to the plaintiff during or by reason of the construction of the dams and other works undertaken by them for the purpose of increasing and utilizing their water power at the Chambly Rapids, opposite the plaintiff's mills.

The company constructed certain dams and other works, at the point in question, which, the plaintiff alleged had the effect of flooding his lands, injuring his water power and otherwise causing him damages. He claimed $22,000 for damages and asked that the company should be ordered to demolish the works and to have protective works erected to prevent further damages to his properties.

1904

CHAMBLY MANUFACTURING CO. v. WILLET.

At the trial Mr. Justice Davidson was of the opinion that the plaintiff had suffered damages to the extent of $12,042, but, before pronouncing final judgment, ordered an *expertise* for the purpose of determining the extent and nature of the works which were necessary for the protection, in future, of the plaintiff's property from floods and the deflection of the outflow of the river caused by the dam in question, and for further report as to how far the proposed protective works would do away with certain items of damage included in the said sum of $12,042.

Upon the making of the expert's report, Mr. Justice Davidson, on the 18th day of November, 1902, made his final judgment awarding to the plaintiff the sum of $9,247.75 with interest, and ordered and directed the defendants to construct certain protective works as therein set out.

This judgment was affirmed, with slight modifications, by the judgment now appealed from. The appellants now ask for the dismissal of the action, or, at any rate, that the order respecting protective works should be struck out and the damages reduced in respect to the items added by the Court of King's Bench, on appeal

At the hearing of the appeal, in the Supreme Court of Canada, the respondent moved to quash the appeal on the ground that, by the construction, or attempted construction of certain of the protective works, the company had acquiesced in the judgment appealed from and that their appeal could not now be asserted. This ground had been open to the respondent on the appeal in the court below but he had not there taken the objection by means of the exception provided by article 1220 of the Code of Civil Procedure.

R. C. Smith K.C. and *Campbell K.C.* for the appellants.

1904

CHAMBLY MANUFACTURING CO. v. WILLET.

Girouard J.

Lafleur K. C. and *Aimé Geoffrion K. C.* for the respondent.

The judgment of the court was delivered by:

GIROUARD J.—In this case there is first to be disposed of a motion to quash the appeal upon the ground of acquiescence in the judgment of the trial court. The respondent has failed to take advantage of this exception before the Court of Appeal in accordance with article 1220 of the Code of Civil Procedure. He is too late do so now and the motion is rejected with costs.

On the merits, we have only a few remarks to make. While recognizing the power of the Superior Court of the Province of Quebec, and in some cases its duty, to provide for the construction of protective works for the purpose of putting an end to further damages and of avoiding multiplicity of actions for the same causes, we do not think that this is a case where that power should be exercised.

The dam ordered by the court to be constructed in the Chambly Rapids is a difficult piece of work, involving the expenditure of a large sum of money, fixed by the experts named by the court at $20,993; it may be more, for, as we know, experts' estimates are seldom not exceeded in the execution. After the rendering of the judgment of the trial court, the appellants commenced to comply with its directions, but they soon had to stop, the work done being carried away by the strong current. It was, no doubt, in view of these difficulties, due to the locality and the character of the constructions, that the building of the original dam and other works and the specifications were settled and agreed to by both parties. They proved to have been insufficient. The parties had foreseen this possible result and have agreed upon the remedy

1904

CHAMBLY MANUFACTURING CO. v. WILLET.

Girouard J.

to be taken in such an eventuality. Clause 11 of the agreement says:

> The said parties of the first part shall also be responsible for and shall pay all damages caused by flooding of land, bridges or roads, if any, as well as all other damages caused to the party of the second part during or by reason of the construction of said dam.

We believe that, under this clause, the respondent has only an action for the recovery of such damages as he may suffer from the works in question at any time, and especially in the spring, for it is admitted that it is generally during that season that floods may happen. The appellants prefer to run the risk of the money satisfaction or indemnity provided for in the contract rather than the more or less expensive and uncertain protective works ordered by the court. We believe that this agreement between the parties should be carried out. We will, therefore, reform the judgment appealed from by striking out that part which provides for the construction of protective works.

We have also come to the conclusion not to admit the three items of $150, $350, and $347, which the Superior Court had also rejected and the Court of Appeal accepted, for no apparent reason, amounting altogether to $747.

The appeal is allowed with costs. The judgment appealed from is modified accordingly, and the judgment on the appeal from the interlocutory judgment of the 10th of June, 1901, is reversed with costs, on both appeals, against the respondent. The action of the respondent is maintained for $8,500 and interest from the date of the judgment of the Superior Court, 18th November, 1902, and costs of suit incurred in said Superior Court, less all costs of *expertise* which shall be paid by the respondent.

Appeal allowed with costs.

Upon the argument of the appeal the attention of the court was not called to the fact that if the appellant succeeded in having the order for the protective works set aside, the items of damage which had been struck off by reason of the contemplated works should be added to the damages awarded to the plaintiff, or a reference made to the courts below for some final adjudication with respect thereto. This point was first raised upon the settlement of the minutes of judgment, and an application was subsequently made, on 31st May, 1904, to the full court* to vary the form of the judgment as pronounced, and to increase the amount of damages to the $12,042 found by the trial judge.

The court having heard the parties by their counsel upon the motion to vary the minutes of judgment, as drafted by the Registrar, on the 1st June, 1904,* added a paragraph to the minutes reciting that, whereas three items of damages forming part of the statement or group of items referred to in the judgments of the Superior Court as "Group B.," namely, item 2, for $3,300; item 7, for $190; and item 12, for $1,650, had not been finally passed upon, either by the Superior Court or the Court of King's Bench, and inasmuch as they were considered as provided for and included in the protective works recommended by the experts, and it was ordered that the said three items should be referred back to the Superior Court to be investigated and adjudicated upon, the costs of such investigation and adjudication to follow the event. No costs were allowed on the motion, as the question was not raised at the hearing of the appeal.

Motion allowed without costs.

Solicitors for the appellants: *Campbell, Meredith, Macpherson & Hague.*

Solicitors for the respondent: *Geoffrion, Geoffrion & Cusson.*

* PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

1904
*March 25,28.
*April 27.

THE OTTAWA DAIRY COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

JAMES SORLEY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Joint stock company—Subscription for shares—Principal and agent—Authority of agent—Conditional agreement.

S. signed a subscription for shares in a company to be formed and a promissory note for the first payment, both of which documents he delivered to the promoter of the company to which they were transferred after incorporation. In an action for payment of calls S. swore that the stock was to be given to him in part payment for the good will of his business which the company was to take over. The promoter testified that the shares subscribed for were to be an addition to those to be received for the goodwill.

Held, that, though S. could, before incorporation, constitute the promoter his agent to procure the allotment of shares for him and give his note in payment, yet the possession by the promoter did not relieve the company from the duty of inquiring into the extent of his authority and, whichever of the two statements at the trial was true, the promoter could not bind S. by an unconditional application.

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

The material facts are sufficiently stated in the above head-note. The action was tried at Ottawa before Judge MacTavish sitting as a local Judge of the High Court of Justice, and resulted in a judgment against the respondent Sorley which was reversed by the Court of Appeal. The company then appealed to this court.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ.

McVeity for the appellants, referred to *Nasmith* v. *Manning* (1); *Denison* v. *Lesslie* (2).

Fraser K.C. and *Burbidge* for the respondent, cited *In re London Speaker Printing Co.* (3); *In re Bishop Engraving & Printing Co.; Ex parte Howard* (4); *In re Northumberland Avenue Hotel Co.* (5); *In re Standard Fire Ins. Co.; Turner's Case* (6); *In re Aldborough Hotel Co.* (7).

The judgment of the court was delivered by:

KILLAM J.—This action was brought to compel the defendant, as an alleged holder of shares of the capital stock of the plaintiff company, to pay calls on such shares, and to pay a promissory note claimed to have been given by him for the first instalment required to be paid upon such shares.

The claim is that, by a memorandum in writing, dated and given to a promoter of the company before its incorporation and handed over to the company after incorporation, the defendant applied for the shares, and that, after the incorporation, they were allotted to him and calls duly made thereon. Notices of the allotment and of the calls are not disputed.

The promissory note was made in favour of the company. It was dated and delivered to the promoter before the company's incorporation, and was payable at a specified date before which the company became incorporated.

It is clear, upon principle, that, in contemplation of the incorporation of a proposed company, a person may effectively constitute an agent to apply on his behalf for shares of the stock of the company when it

(1) 5 Can. S. C. R. 417.
(2) 3 Ont. App. R. 536.
(3) 16 Ont. App. R. 508.
(4) 4 Man. L. R. 429.
(5) 33 Ch. D. 16.
(6) 7 O. R. 448.
(7) 4 Ch. App. 184.

1904

OTTAWA DAIRY CO. v. SORLEY.

Killam J.

becomes incorporated, and to give a promissory note for the amount to be subscribed or any part thereof.

If the authority is, in fact, given and, before its withdrawal, the application is made and accepted and the note given, the effect must be the same as if the principal should make the application and give the note personally. And the authority may be given by the signing of the application and of the note and their delivery to the promoter to be handed over after the incorporation.

I conceive it also to be clear that, if such an application and promissory note be signed and delivered, the authority to bind the signer need not be expressed but may be inferred from circumstances.

None of the decisions cited appear to me to be inconsistent with these views.

But the mere possession of instruments of this character, signed by another person, should not, of itself, be taken as giving or implying authority to apply for shares on his behalf and to deliver the note on account thereof. The company should still be required to inquire into the authority.

Upon the defendant's statement of the facts, he signed the writings and gave them to Kelly as a step in a transaction by which the shares were to be acquired in part payment of the purchase money for the good-will of the defendant's business.

Upon Kelly's statement, the defendant was to take the shares in addition to those to be acquired by him for the good-will, and to pay up their amount in money.

But in neither view does it appear to me that it should be inferred that Kelly was authorized to bind the defendant by an unconditional application for the shares. In the first case, clearly, he would not be. In the second, the subscription would not be intended to be made independently of the proposed transfer of the

business. If the defendant did intend to contribute this amount in cash to the capital of the company, it is not reasonable to suppose that he intended to do this if his own business was not to be taken over and the company was to become his business rival. Of course, if the authority had been expressed these considerations would be without weight; but the onus being upon the company to show implied authority, they are of importance.

As was said by Sir W. Page Wood L.J., in *Rogers' Case* (1):

> The course of the decisions has determined that to obtain a binding allotment there must be an application, an allotment, and a communication of the allotment. If, as in *Shackleford's Case* (2) there is a conditional application and an unconditional allotment, there is no contract.

Here the defendant made no application personally. An unconditional application by Kelly, on his behalf, is not shown to have been authorized. The defendant's conduct, in attending the meetings and in receiving notices of the allotment and of the calls without objection, does not appear to me sufficient either as an admission of Kelly's authority or as an adoption of his application or as an acceptance of any offer to be inferred from the allotment. Everything is consistent with the view that he was treating all of these matters as a part of the transaction for the acquisition of his business by the company. See *In re Aldborough Hotel, Company; Simpson's Case* (3).

Lord Lurgan's Case (4), upon which the learned trial judge relied, does not seem to me to have any application to the case before us. Under the Companies' Act, 1862, Lord Lurgan became, in fact, a shareholder by signing the memorandum of association and by the registration of the company. He endeavoured to have

(1) 3 Ch. App. 633, at p. 637.
(2) 1 Ch. App. 567.
(3) 4 Ch. App. 184.
(4) [1902] 1 Ch. 707.

1904

OTTAWA DAIRY CO. v. SORLEY.

Killam J.

his contract rescinded by shewing that it was induced by the misrepresentation of a promoter of the company. Here the question is whether the defendant ever contracted with the company to become a shareholder. The position taken by the Court of Appeal, that his transaction with Kelly did not, of itself, constitute a contract with the company, and could not be made so by any ratification, is beyond question. The argument before us was that the contract was made through Kelly's agency. This contention, also, is not sustained.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Taylor McVeity.*

Solicitors for the respondent: *Perkins, Fraser & Burbidge.*

THE TOWNSHIP OF EAST HAWKESBURY, (DEFENDANT) ... } APPELLANT;

1904
*Mar. 8,9,10.
*April. 27.

AND

THE TOWNSHIP OF LOCHIEL (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Highway—Road allowances—Reservations in township survey—General instructions—Model plan—Evidence.

Where the Crown surveyor returned the plan of original survey of a township without indicating reservations for road allowances upon the boundaries of the township and his field notes appeared to the court to support the view that no such allowances had been made by him ;—

Held, that the general instructions and model plan for similar surveys did not afford a presumption sufficiently strong for the inference that there was an intention upon the part of the Crown to establish such road allowances.

Judgment appealed from reversed. *Tanner* v. *Bissell* (21 U. C. Q. B. 553), and *Boley* v. *McLean* (41 U. C. Q. B. 260) approved.

APPEAL from a decision of the Court of Appeal for Ontario, reversing the judgment of the trial court and declaring that an allowance for a road existed along the western boundary of Hawkesbury, located on the East Hawkesbury side of the boundary line, with the exception of certain places where eight specified lots had been granted by letters patent describing them as extending to the boundary line.

This action was brought for a declaration that a government allowance for a road existed between East Hawkesbury and Lochiel and the gores thereof,

*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

1904

TOWNSHIP OF EAST HAWKESBURY v. TOWNSHIP OF LOCHIEL.

located in the boundary line between them. The question had previously been considered by a board of three County Court Judges upon a reference to them as arbitrators under the Municipal Act. A majority of the board having found that the plaintiffs failed to establish the existence of such allowance for a road, and having made their award accordingly, the Township of Lochiel appealed from the award, and upon such appeal, Chief Justice Meredith decided that the arbitrators had no jurisdiction to try the question as to the existence of such road allowance and made an order directing the appeal to stand over until after the determination of an action for a judicial declaration which the Township of Lochiel should have liberty to bring, and thereupon the present action was instituted.

The action was tried before Mr. Justice Ferguson, who dismissed the action and held that an original road allowance had been laid out across the gore of Lochiel adjoining the southerly boundary of Hawkesbury. He also found that no road allowance whatever existed along the remainder of the boundary in question, sometimes called the western boundary of Hawkesbury. On an appeal from that part of the judgment which held that there was no allowance for road along the western boundary of Hawkesbury, the finding respecting the southern boundary being left undisturbed, the Court of Appeal for Ontario, (Osler J. dissenting), allowed the appeal without costs, and declared that an allowance for a road existed along the western boundary of Hawkesbury, located on the Hawkesbury side, and of the uniform width of one chain measured at right angles to the boundary line, excepting upon and across the ends of eight different specified lots in Hawkesbury which were patented with particular descriptions extending to the boundary line. The plaintiffs now appeal.

The questions at issue upon the present appeal are stated in the judgment of the court delivered by His Lordship Mr. Justice Killam.

Leitch K.C. and *O'Brian* for the appellant.

Maclennan K.C. and *Tiffany* for the respondent.

The judgment of the court was delivered by:

KILLAM J.—This is an appeal from a judgment of the Court of Appeal for the Province of Ontario declaring that an allowance for a public road exists between the Township of Lochiel, on the one side, and the Township of East Hawkesbury, on the other, located on and along the eastern side of the boundary line, except upon and across certain specified lots in East Hawkesbury.

The action arose out of an attempt by the township of Lochiel, assuming to act under sections 622–4 of the Municipal Act of the Province of Ontario, R. S. O. (1897) c. 223, to compel the Township of East Hawkesbury, which is the adjoining township on the easterly side of Lochiel, to join with the Township of Lochiel in opening up of a highway upon an allowance for a road claimed by the last mentioned township to have been laid out or devoted to the purpose by the Provincial Government upon the original surveys of the township or by subsequent acts.

The council of the Township of Lochiel having passed a by-law for opening up such highway, to go into force upon the passing of a by-law in similar terms by the council of the Township of East Hawkesbury, and the council of the latter township having failed to pass such by-law, the matter was referred to arbitrators a majority of whom found that the Township of Lochiel had failed to establish the existence of the alleged road allowance; and upon an appeal from

1904

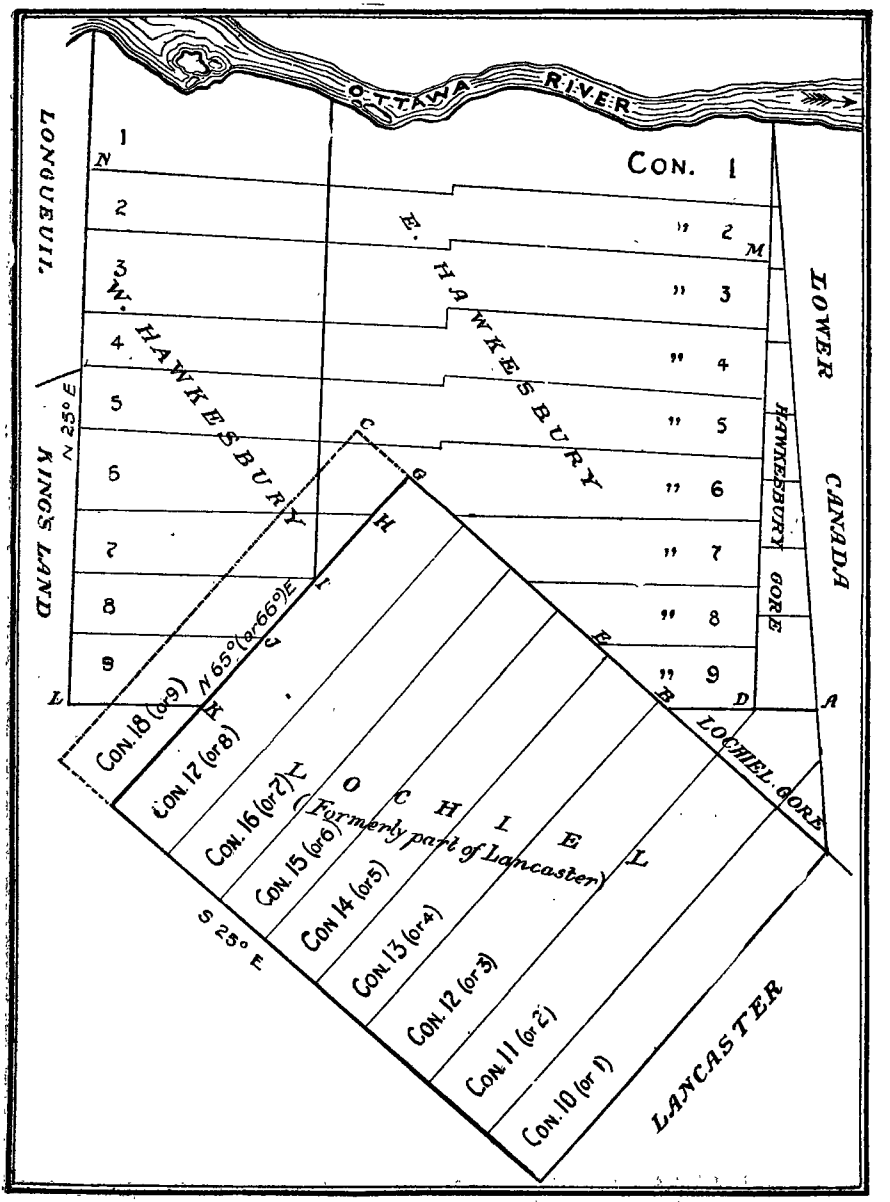
TOWNSHIP OF EAST HAWKESBURY v. TOWNSHIP OF LOCHIEL.

Killam J.

their award to the High Court of Justice of the Province of Ontario, it was ordered that the appeal stand adjourned until the final determination of an action to be brought by the Township of Lochiel to determine the existence and location of the road allowance in dispute.

The statement of claim asked for a declaration that a government allowance for a public road exists between the township of Lochiel in the county of Glengarry and the township of East Hawkesbury in the county of Prescott and between the respective gores of said townships, and that such Government allowance for a public road is located in the boundary line between said townships and the said gores thereof respectively.

The following plan indicates the respective positions of the townships of Lochiel and West Hawkesbury and the gores just mentioned :


OTTAWA RIVER
LONGUEUIL
KINGS LAND
LOWER CANADA
CON. 1
" 2
" 3
" 4
" 5
" 6
" 7
" 8
" 9
E. HAWKESBURY
W. HAWKESBURY
HAWKESBURY GORE
LOCHIEL GORE
N 25° E
N 65° (or 66°) E
S 25° E
CON. 18 (or 9)
CON. 17 (or 8)
CON. 16 (or 7)
CON. 15 (or 6)
CON. 14 (or 5)
CON. 13 (or 4)
CON. 12 (or 3)
CON. 11 (or 2)
CON. 10 (or 1)
OCHIEL
(Formerly part of Lancaster)
LANCASTER

1904

TOWNSHIP OF EAST HAWKESBURY v. TOWNSHIP OF LOCHIEL.

Killam J.

The action was tried before Mr. Justice Ferguson on the 18th, 19th and 20th December, 1900, and he delivered judgment on the 21st of the following February.

By his judgment he declared that no public highway or allowance for road existed on the line between the townships of East Hawkesbury and Lochiel, but that an original allowance for a public road existed along the line between the gore of the Township of Lochiel, on the one side, and the Township and the gore of East Hawkesbury, on the other side.

The Township of Lochiel appealed against the finding that there was no public highway between the original townships. There was no appeal as to the finding of a public road along the gore of Lochiel.

Upon the appeal the court was composed of five judges, one of whom, Mr. Justice Lister, died before the judgment was delivered. Osler J. was of the same opinion as Ferguson J.; Maclennan J. and Moss J. were of the opinion that there was a road allowance originally laid out between the townships of Lochiel and East Hawkesbury; Armour C. J. agreed with Ferguson J. that there was no road allowance laid out between these townships upon the original surveys, but held that by subsequent acts the Crown had made a road allowance between those two townships along the east side of the eastern boundary of the present Township of Lochiel. As, however, subsequent to the original surveys and before the acts referred to, grants had been made of certain lots extending up to the eastern boundary of the Township of Lochiel, the learned Chief Justice held that the road allowance did not extend across these lots. The result of these conflicting opinions is the judgment already referred to, excepting certain lots upon the line of the road allowance found by the court to exist in other respects.

The Township of Lochiel forms part of a township originally laid out and partially surveyed about 1784 or 1785, under the name of the Township of Lancaster, provision being then made for its being composed of seventeen concessions only. The northerly and southerly boundary of the Township of Lancaster, as laid out, ran on a course N. 65° (or 66°) E. the easterly and westerly upon the course S. 25° E. Subsequently an addition was made, at the west end, of another concession, No. 18, and in the year 1818 the concessions from 10 to 18 were separated from the Township of Lancaster and formed into the present Township of Lochiel, the numbers of the concessions being made from 1 to 9.

The Township of Hawkesbury, now divided into East Hawkesbury and West Hawkesbury, was subsequently laid out fronting on the River Ottawa with the easterly and westerly boundaries upon a course N. 25° E. The first and second concessions of this township were surveyed, commencing at the river Ottawa, before the year 1798. In the latter year, William Fortune, D.P.S., assisted by son, Joseph Fortune, laid out the balance of this township and partially subdivided it. Their field notes were put in evidence at the trial. Fortune began his survey in 1798 at a post which had previously been planted by him on the eastern boundary of the Township of Hawkesbury, at the rear of the second concession. He left there an allowance for road along the rear of the second concession, and then went on a course S. 25° W. along the eastern boundary of the township, laying off seven additional concessions, putting a road allowance upon every alternate concession line, the last of these being placed upon the line between the 8th and 9th concessions. On reaching the point marked "D" on the accompanying plan, he turned westerly

1904

TOWNSHIP OF EAST HAWKESBURY v. TOWNSHIP OF LOCHIEL.

Killam J

upon a course north 65° W., in order, as he said in his notes, to intersect the eastern boundary line of the Township of Lancaster. Proceeding upon that line he laid off lots supposed to be in that concession until he reached lot No. 10, without having struck the eastern boundary of Lancaster and supposing it not to have been run. He then went back to lay out lots in the 3rd, 4th and 5th concessions. He was afterwards instructed

> to continue the concession lines of Hawkesbury to their full extent, with the divisional line between the Township of Longueuil and Hawkesbury

and commenced the work on the line on the westerly side of the township then being laid out by him. He began this work at the rear of the first concession and proceeded upon a course S. 25° W., marking off the concession lines at the west side of the township. After doing this he passed beyond the easterly boundary of Longueuil and along the easterly boundary of King's Land until he reached the point marked "L" on the plan, where he turned easterly upon a course S. 65° E. until he came, as he said in his notes, to the line of the Township of Lancaster, bearing N 65° E., on lot No. 28, where he planted a post marked on the western side "H" for Hawkesbury and on the eastern side "L" for Lancaster. Then he measured on a course N. 25° E. the depth of one concession, and ran the line between the 8th and 9th concessions, which struck the boundary of Lancaster again bearing N. 66° E. on lot No. 21, where he again planted a post marked to show that it was on the boundary between the two townships. Similarly he continued the lines between the 7th and 8th and the 6th and 7th concessions to the boundary of Lancaster, striking it on specified lots in the 17th concession of that township. Afterwards he proceeded to what he called the northern corner of

the Township of Lancaster, which would be at the point "G" on the accompanying plan. There he found an old post marked "17-18" and "common" and erected at the same point another post marked on the north eastern and north-western sides "H." for Hawkesbury, and on the opposite sides "L." for Lancaster. His two posts were subsequently found there in the year 1816 by Duncan McDonald, D.P.S., who was then completing a survey of a portion of the Township of Hawkesbury. A witness, William McKenzie, examined at the trial, told of seeing there three posts about forty-five years before the trial took place. After planting his post at the northern corner of Lancaster, Fortune proceeded to run what he called the eastern boundary of Lancaster upon a course S. 25° E. In doing this he planted posts at distances of 104 chains and 12 links apart, going on until he intersected the southern boundary of the Township of Hawkesbury as previously run by him, at a distance of 1 chain and 3 links "from a post marked 7 and 8 on the left of Lancaster line," and planted a post where the lines intersected, which post he marked on the eastern side "H" for Hawkesbury and on the western side "L" for Lancaster. Thence he proceeded to the rear boundary line of the 8th concession upon the easterly boundary line of Hawkesbury, and ran the line in rear of that concession until he struck again the easterly boundary of Lancaster at the point marked E on the accompanying plan, where he again planted a post marked on the western side "L" for Lancaster and on the eastern side "H" for Hawkesbury. In running up the line of the 8th concession he laid out and marked the various lots until he came to lot No. 14, upon which he struck the Lancaster line. He does not seem to have continued the division of 8 into the broken lots to the west of that point, but returned to the eastern boundary and

1904

TOWNSHIP OF EAST HAWKESBURY v. TOWNSHIP OF LOCHIEL.

Killam J.

laid out seven lots in the seventh concession, at which point his notes stopped.

He made out a plan shewing a complete subdivision of the Township of Lancaster, as thus laid out by him, into concessions and lots, putting around the township, including the portion where Lancaster projected into his rectangle, only single lines, and also leaving only single lines between the different concessions. The only parts in which he left the double lines commonly used by surveyors to indicate road allowances were between some of the lots into which the concessions were divided.

When this plan reached the Department it was altered by indicating upon it a continuation of the Township of Lancaster by the addition of another concession, thus further projecting the Township of Lancaster into the Township of Hawkesbury.

In the year 1802 several patents were granted of lots in Hawkesbury along the eastern side of Lancaster, by which they were described as running to the boundary line of the Township of Lancaster.

Mr. Justice Maclennan was of opinion that there had been a previous survey of the Township of Hawkesbury before that of Fortune. With all respect, it appears to me, that in arriving at this conclusion, the learned judge was misled by the memoranda upon copies of the descriptions of lots in Hawkesbury near the boundary of Lancaster contained in the letters patent issued therefor, which were put in evidence. Upon a number of these copies were the words "Order in Council", with dates some of which were in the year 1797. The learned judge appears to have assumed that these dates were the dates of the issue of the letters patent; and the descriptions being by metes and bounds, he naturally inferred that there had been some previous survey upon which these de-

scriptions were based. Looking at the documents, however, it appears to me that these dates were intended only to indicate the orders in council under the authority of which the officials were acting in issuing the letters patent which would be of subsequent dates. And referring to the list of such patents, which is found among the papers in the case, it appears that these patents were really issued after the year 1802, and one of them as late as the year 1829. Nothing has been produced from the records of the Department which shews that there had been any previous survey of any portion of the Township of Hawkesbury, except the first and second concessions, before Fortune's survey of 1798, which must, therefore, be treated as the original survey of the remaining portion of that township. It appears to me clear that Fortune laid out the Township of Hawkesbury abutting directly upon the northern and eastern boundaries of the Township of Lochiel, without any road allowance between them. His concession lines upon the north side, having reference to his notes, clearly came to the line of the 17th concession, and the southern boundary of the 9th concession and the line between the 8th and 9th were run to the line which he had laid out as the eastern boundary of Lancaster, and that line was run from the point where he found the post mentioned by him and planted another of his own, clearly on the north corner of the lot designated "common" and not at a distance of a road allowance therefrom. As to his conduct in marking off approximately the concession lines of Lancaster without making any allowances for roads, it is to be remarked that he was not concerned with finding the exact point at which the concession lines intersected the eastern line of the Township of Lancaster. He was marking that line merely for the

1904

TOWNSHIP OF EAST HAWKESBURY v. TOWNSHIP OF LOCHIEL.

Killam J.

purpose of enabling him to run the line of Hawkesbury at that part of the township, and although his plan gave no indication of the road allowances between the concessions of Hawkesbury, he had marked them down upon the ground, which would govern so far as they are concerned. No marks are found upon the ground to shew that Fortune left any road allowances along the eastern boundary of Lancaster. His plan indicates none. His field notes shew that he did not.

With reference to the point made by Mr. Justice Maclennan respecting the place at which Fortune, in tracing the eastern boundary of Lochiel, struck the southern boundary of Hawkesbury, and the distance which he found from the post upon the line between lots 7 and 8, in the 9th concession, the learned judge again bases his conclusion that an inference was afforded in favour of an intention to put a road allowance there, upon a similar error to that which has already been pointed out. He assumed that lot No. 8 had been patented in the previous year, whereas the patent was not issued until the year 1806.

The gore of Hawkesbury was surveyed by Joseph Fortune in the year 1816, and the gore of Lancaster by Angus Cattenach, in the year 1823. It is upon these later surveys, and not upon those of William Fortune in 1798, that the finding of the road allowance between Hawkesbury and its gore and the gore of Lochiel is based.

After the year 1802 various lots in Hawkesbury, along the boundaries of Lancaster, were granted by letters patent from the Crown. In some of these patents the lands were described by metes and bounds with reference to a specified road allowance along the boundary between Lancaster and Hawkesbury, or "in rear of" one of the concessions of Hawkesbury.

Upon close examination, however, it does not appear to me that so much weight should be given to these grants as has been given by the Court of Appeal.

The first of those to which importance has been attached in this respect was made in 1804, to Marjory McDonald and others, of lots 14, 17 and 18, in the 8th concession of the Township of Hawkesbury. These were described as going to within one chain of the eastern boundary of Lancaster. Two errors appear in the description of the lots in this patent. The point of beginning was stated as being at the north-east angle, and then, after proceeding to the south-east angle, the description turns eastward; and one boundary is specified to be the allowance for road in front of the 8th concession, whereas Fortune left no road allowance in front of the 8th concession.

In 1806 three grants of land were made to Cyrus Anderson, these being of lots 8, in the 8th and 9th concessions, and lot 9 in the 9th concession, and lots 24 and 25 in the 7th concession, of the Township of Hawkesbury. Lots 8 and 9 were specified to run to the allowance for road "in the rear of the said concessions" which would mean both 8th and 9th. And another boundary was specified to be "the allowance for road in front of the said concessions." Here again is an obvious error as no allowance for road had been left in front of the 8th concession. It is, then, not unreasonable to suppose that the reference to a road as in the rear of both concessions was a similar error. The description of lot No. 9, in the 9th concession, was also erroneous, as the width upon the front and the rear was made the same, 19 chains, whereas it is evident that the rear of the lot, being upon a diagonal line, would be much wider than the front; and if the reference to the road allowance as in the rear of lot No. 8 in the 9th concession

1904

TOWNSHIP OF EAST HAWKESBURY v. TOWNSHIP OF LOCHIEL.

Killam J.

arose through error, the other two patents of lot 9 in the 9th concession and of lots 24 and 25 in the 7th concession, being drawn at just about the same time, may have been drawn as they were through a similar error.

In 1809 a patent of lots 28, 29 and 30, in the 6th concession of Hawkesbury, was granted to Alexander McDonald, describing them as running to an allowance for road between Hawkesbury and Lancaster. In this patent also is found an error similar to that in the description of lots 8 in the 8th and 9th concessions, one boundary being made to be "an allowance for road in front of the said concession," where again no road allowance had been left.

In 1818 lot 32 in the 5th concession was granted to Alexander McDonald, it being described as running to an allowance for road on the eastern boundary of Lancaster. This lot abuts upon the line of the 18th concession, which had not been laid out at the time of Fortune's survey.

In 1830 lots 12 and 13, in the 9th concession, were granted to Charles Bethune, being described as running "to the allowance for road between the townships of Lochiel and West Hawkesbury"—an evident error, as the lots were in East Hawkesbury and not in West Hawkesbury.

In 1832 a grant was made to George Mode of lots 34 and 35, in the 5th concession, and lot 36, in the 6th concession, which were described as running to the allowance for road between the townships of Hawkesbury East and Lochiel. These, however, abutted on the 18th concession of Lancaster, and almost wholly on its northern side, and not upon any line run by Fortune.

In 1837 a grant was made to Peter McLaurin, of lot 33 in the 5th concession, specified as running to the

allowance for road between the townships of Hawkesbury East and Lancaster. This is in a similar position to the lots granted to Alexander McDonald.

In 1855 a grant was made to Roderick McRae of the west half of lot 16 in the 8th concession of East Hawkesbury, described as running "to the allowance for road between the townships of East Hawkesbury and Lochiel."

These references appear to exhaust the cases of grants in Hawkesbury particularly referred to by Mr. Justice Maclennan in the Court of Appeal, except that of the grant to Anne McKay, of lot No. 1 in the 9th concession of Hawkesbury, made in 1829, erroneously assumed by the learned judge to have been made in 1797. This lot did not touch the boundary of the original Township of Lancaster at all, but was upon the southerly line of Hawkesbury, adjoining what is now the gore of Lochiel, where the original judgment of the court finds that there is in fact an allowance for road. One of the two grants in the Township of Lancaster, referred to by the learned judge, was of a lot in the gore. In the case of the other it is uncertain whether the allowance for road referred to was assumed to be on the east or on the west side of the line recognized as the boundary between the two townships.

It has been argued that, in speaking of the line of the Township of Lancaster, Fortune referred, or may have referred, to the line of a road allowance around the outside of the Township of Lancaster; but a consideration of his notes seem to me to leave no doubt that, in referring to the line of the township, he meant the mathematical line forming the boundary of the township itself, and not a road allowance. When he first struck that line going down from the north he specified the lot in Lancaster which he reached, and similarly for the other concesssion lines brought down

1904

TOWNSHIP OF EAST HAWKESBURY v. TOWNSHIP OF LOCHIEL.

Killam J.

from the north. The post which he found on the northern corner, as he called it, of the Township of Lancaster, having reference to these marks, was undoubtedly on the line of the township itself upon which the "common" lot abutted, and he carried that line down until he struck the line which he himself had surveyed as the eastern line of the Township of Hawkesbury. Evidently, the posts which he planted were on the eastern boundary of the township, and that placed where the rear line of the 8th concession was said to strike the eastern boundary of Lancaster was planted upon that line and not upon the outside of a road allowance. There is no indication of his having left a road allowance by marks upon the ground; his notes afford no evidence of any such allowance having been intended by him; they seem to me to be inconsistent with any such intention.

In February, 1789, before Fortune's survey of that year was made, a series of "rules and regulations for the conduct of the Land Office Department" was made by order in council.

Among these were the following provisions:

X.—The dimensions of every inland township shall be ten miles square and such as are situated upon a navigable river or water shall have a front of nine miles and be twelve miles in depth, and they shall be laid out and sub-divided respectively in the following manner viz:—(See the note) and the Surveyor General's office shall prepare accurate plans according to the above particulars, which shall be filed in the council office to be followed as a general model, subject to such deviations respecting the site of the town and direction of the roads, as local circumstances may render more eligible for the general convenience of the settlers. But in every such case it shall be the duty of the surveyor-general and his agents or deputy surveyors to report the reasons for such deviations to the Governor or Commander-in-Chief for the time being with all convenient speed.

NOTE—The detail for the sub-division of townships, above alluded to, referring to diagrams to be filled in the council office is omitted.

The copies of model plans produced with the regulations shew rectangular townships, divided in

different ways, and usually indicating reserves for different purposes.

Around these townships, in all cases, are double lines. It is to be observed, however, that none of these reserves were made in Hawkesbury, and that, when Lancaster was reached, the rectangular form was broken in upon. It is possible that these circumstances formed the subject of a special report, although none has been produced.

It does not seem to me that, from these instructions and the model plan, it should be inferred, in view of the other circumstances, that road allowances were intended to be left on the eastern and northern sides of Lancaster where the rectangle was broken.

Mr. Justice Moss (now Chief Justice) thought it clear that it was the invariable practice of the Department, and of surveyors making surveys under the direction of the Department, to leave an allowance for road between adjoining townships. But, as Mr. Justice Osler pointed out, the Legislature has itself made provision for dealing with cases in which no such allowance was made. While this may not afford reliable evidence of the existence of such cases, it serves at least to throw some doubt upon the invariability of the practice.

If the learned judges in Ontario had been unanimously of opinion that there was such a well established practice in this respect that a presumption of its having been followed arose, this court would probably have accepted that view. But where three out of five of the judges who have dealt with this case have not felt that the circumstances warranted the presumption, it seems necessary for this court to deal with the appeal upon the actual evidence.

In the year 1826 a plan was made which was thereafter used in the Crown Lands Department as an office

1904

TOWNSHIP OF EAST HAWKESBURY v. TOWNSHIP OF LOCHIEL.

Killam J.

plan of the Township of Hawkesbury. Around the eastern, southern and western sides, and between Hawkesbury and Lancaster, were drawn double lines apparently indicating the existence of road allowances. It has been suggested that there was in existence, between the date when Fortune's plan was returned to the Department and the making of this plan of 1826, another office plan shewing similar road allowances. This seems to me to be founded upon conjecture only. Upon Fortune's plan the names of parties were written upon a large number of lots as if to shew the names of patentees thereof. It seems to me not improbable that Fortune's original map was used for a considerable time in the office as the office plan. The road allowance apparently shewn on the plan of 1826 extends all the way along the eastern boundary of Lancaster cutting off from the boundary of Lancaster the lots which had been patented in 1802, as extending to the boundary line of Lancaster, along with all other lots along the boundary. If then any inference is to be drawn from this and similar plans of the existence of an intended boundary road along the east side of Lancaster, it would rather seem to be in favour of its being outside of all those lots and westward of the original eastern boundary of Lancaster, instead of being along the eastern side as declared by the judgment of the Court of Appeal, and as contended for on the part of the Township of Lochiel.

In the year 1833 some of the inhabitants of the Township of Hawkesbury petitioned the Government for the completion of the survey of the 7th and 8th concessions of the Township, only a portion of which had been laid out on the ground by Fortune. The result was the employment of Duncan McDonald, D.P. S., who was instructed

to survey the line between the 7th and 8th concessions from lot 9 to the boundary between the Townships of Lancaster and Hawkesbury, and the line from lot No. 1 to the said boundary between the 6th and 7th concessions.

McDonald was provided with a copy of a plan of the Township of Hawkesbury, and was recommended by the surveyor to pay "a strict adherence to all original monuments" and to make "an equal division of the unsurveyed spaces." McDonald then proceeded to survey the line between the 7th and 8th concessions, and that between the 6th and 7th concessions, leaving, as he stated in his notes, an allowance of one chain for a road between the townships of Lochiel and Hawkesbury.

The only patent shewn to have been issued after the date of that survey for any lot in the 7th or 8th concession, specifying a boundary upon an allowance for road between Hawkesbury and Lochiel, was that issued to Roderick McRae in March, 1855, for the west half of lot No. 16 in the 8th concession. The only other grant shewn to have been made after that date of any land in one of those concessions, was that of the east half of the same lot, made in 1895 to Finlay McAskill. The description in this last grant was not given by metes and bounds but only by the number of the lot.

Having regard to the decisions in *Tanner* v. *Bissell*, (1) and *Boley* v. *McLean* (2), it would seem that McDonald, being employed to survey only an old line, could not conclusively establish a road allowance along the boundary if none had been established by the original survey, although the adoption of his work might afford some evidence of an intention on the part of the Crown to dedicate as a highway portions left for the purpose upon such a survey.

(1) 21 U. C. Q. B. 553.

(2) 41 U. C. Q. B. 260, at p. 271.

1904

TOWNSHIP OF EAST HAWKESBURY v. TOWNSHIP OF LOCHIEL.

Killam J.

The conclusion which I reach is that no road allowance was left between the boundaries of the townships of Lancaster and Hawkesbury upon the survey of either, and that the evidence of the establishment of any such road allowance by the officers of the Crown, after those surveys, was too uncertain to warrant the judgment of the Court of Appeal. The burden was upon the Township of Lochiel to establish the existence of the road allowance and to offer evidence which would enable the court to come to some definite conclusion upon its location. It may be that, on account of the original placing of lots designated as "common" at the eastern end of the concessions of Lancaster, it was considered by Fortune, or by the Department afterward, that portions of the east lots could be used as a highway. But the plaintiff municipality has not sought to prove the existence of a highway on the Lancaster side of the boundary, and it does not appear that we would be justified, upon any surmise that may be suggested, in finding a road allowance upon that side.

As to the evidence afforded by the patents, it appears to me that the remark of Mr. Justice Ferguson was well justified, when he said, "they seem to me to shew only confusion on the subject."

In my opinion the appeal should be allowed and the original judgment restored, the plaintiff township to pay the costs both here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: *O'Brian & Hall,*

Solicitor for the respondent: *E. H. Tiffany.*

W. BRUCE MADDISON (DEFENDANT) ..... APPELLANT;

AND

HENRY R. EMMERSON (PLAINTIFF)...RESPONDENT.

1904
*Feb. 24.
*April 27.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Crown land—Adverse possession—Grant during—21 Jac. I c. 14 (Imp.)—Information for intrusion.

Though there has been adverse possession of Crown lands for more than twenty years the Act 21 Jac. I ch. 14 does not prevent the Crown from granting the same without first re-establishing title by information of intrusion.

Judgment appealed from (36 N. B. Rep. 260) reversed, Davies J. dissenting.

APPEAL from a decision of the Supreme Court of New Brunswick (1) refusing to set aside a verdict for for the plaintiff and order a new trial.

The defendant obtained a grant from the Crown of land of which the plaintiff had been in possession for more than twenty years, and the latter brought an action of ejectment and obtained the verdict sustained by the full court below. The only question raised on defendant's appeal was whether or not under 21 Jac. I. ch. 14 the grant of the defendant was valid, the plaintiff's contention being that, before it could be issued, it was necessary for the Crown to regain possession of the land by information of intrusion which has always been the jurisprudence in New Brunswick.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Kilam JJ.

(1) 36 N. B. Rep. 260.

1904

MADDISON v. EMMERSON.

The statute as given in the text books and reports is shorn of its title, preamble and second clause, which are the key to its purpose and meaning. The statute in full is as follows:

"An Act to admit the subject to plead the general issue in informations of intrusion brought on behalf of the King's Majesty and retain his possession till trial.

"Where the King out of his prerogative royal may enforce the subject in information of intrusion brought against him to a special pleading of his title." The King's most Excellent Majesty, out of his gracious disposition towards his loving subjects, and at their humble suit, being willing to remit a part of his ancient and regal power, is well pleased that it be enacted; and be it enacted by the King's most Excellent Majesty, the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same:—That whensoever the King, his heirs or successors and such from or under whom the King claimeth, and all others claiming under the same title under which the King claimeth, hath been or shall be out of possession by the space of twenty years or hath not or shall not have taken the profits of any lands, tenements, or hereditaments within the space of twenty years before any information of intrusion brought or to be brought, to recover the same: that in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially: and that in such cases the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, or adjudged for the King.

"And be it further enacted, that where an information of intrusion may fitly and aptly be brought on

the King's behalf that no *scire facias* shall be brought, whereunto the subject shall be forced to a special pleading, and be deprived of the grace intended by this Act." 17 Ed. II. stat. I. c. 13.

Powell K.C. for the appellant. Even if we assume, for the purposes of argument, that the respondent was in occupation of the land at the time the grant issued to the appellant, at common law the Crown could grant and the appellant could take the *locus in quo*. We submit that the rule, regarded either as existing at common law or by statute, that prevents a subject from alienating or his grantee from taking lands which at the time of the grant are adversely held by a third person, never applied to grants from the Crown of land of which the Crown had completed its title by obtaining possession in law. As to the means by which the King acquired, held and parted with his lands, see Encyc. Brit. (9 ed.) *vo.* "Doomsday Book." As to rights subsequently accrued to the Crown, they were established by being made matter of record. 4 Co. 54 b. Where the King's right did not appear by record but was dependent upon extraneous facts, inquest of office was resorted to, which "was devised by law as an authorative means to give the King his right by matter of record without which he in general can neither take nor part with anything." 1 Finch, L. 423; Broom & Hadley's Com. vol. 3 p. 386; Chitty's Prer. ch. xii, p. 246; *Scott* v. *Henderson* (1); *Doe d. Hayne* v. *Redfern* (2); *Doe d. Fitzgerald* v. *Finn* (3). Not only could the King acquire title to land by record alone, but he could also dispose of or alien his lands by record. Chitty's Prer. of the Crown 389; 3 Broom & Haldey 386;

(1) 3 N. S. Rep. 115. (2) 12 East 96 at p. 110.
(3) 1 U. C. Q. B. 70.

1904

MADDISON v. EMMERSON.

Finch L. 324; *Jackson* v. *Winslow* (1). An intruder cannot oust the King but by matter of record; Co. Litt. 277; Com. Dig. Prer. D. 71; *Wyngate* v. *Marke* (2); *Louisburg Land Company* v. *Tutty* (3); *Goodtitle d. Parker* v. *Baldwin* (4). The contention that the statute of James deprives the Crown of the right to grant its land and its grantee to take under its grant when the land had been for twenty years in the possession of an intruder, has received such scant consideration from the courts of New Brunswick and Nova Scotia that, if we except the judgment of Chief Justice Tuck, three or four pages at most of the reports contain all the judicial discussion of it. The judgments, the appellant submits, are really assumptions, ventured, so far as the judgments themselves shew, without any attempt to construe the statute itself. The English cases, with the exception of *Doe. d. Watt* v. *Morris* (5), never were considered by the judges, except by Chief Justice Teck, and even he did not have his attention called to either the case of the *Atty. Gen.* v. *The Corp. of London* (6) or *Goodtitle d. Parker* v. *Baldwin* (4).

The legislature never could have intended the word "possession" in the statute of James I, ch. 14, to have any other meaning than its loose popular meaning. It cannot be construed as giving to that word the significance of legal possession, for in such case the statute could not apply at all to an information of intrusion, which only lies where the King had the possession in law, and his method of recovering possession was, as has been shewn, either by ejectment or by *scire facias*. The statute merely effects procedure and confers upon the intruder, in cases coming within the statute, no legal estate whatever. If it does create a legal estate,

(1) 2 John. N. Y. 80.
(2) Cro. Eliz. 275.
(3) 16 N. S. Rep. 401.
(4) 11 East 488.
(5) 2 Bing. N. C. 189.
(6) 2 Mac. & G. 247.

it is a legal estate entirely contingent upon the filing of an information of intrusion and cannot confer any right in possession until that contingency happens. If the intruder is out of occupation or possession of the land he has no right against any person who takes possession and cannot bring an action of ejectment against him. *Goodtitle d. Parker* v. *Baldwin* (1); *Doe d. Carter* v. *Barnard* (2); *Brest* v. *Lever* (3); *Nagle* v. *Shea* (4); *Asher* v. *Whitlock* (5). See also "Law of Torts" by Clerk & Lindsell (2 ed.) 310. The weight of authority is that the presumption of title from possession in an action of ejectment may be rebutted by shewing that the title is in fact in a third person. To an action of ejectment, *jus tertii* is a good defence.

Anterior to 21 Jac. I. ch. 14, the King could grant, and his grantee took a good title in possession to, lands the title to which had once been perfected in him by possession without regard to the fact whether an intruder was in their occupation at the time of the grant or not. The statute of James relates solely to procedure and has made no change in the previous law whereby the King is placed under no disability to grant nor his grantee under any disability to take what title the King has to his lands when an intruder has been in the occupation of them for twenty years. The case of *Doe d. Watt* v. *Morris* (6), cannot apply here as an authority for it merely decides that, owing to limitations in the procedure open to the King (which limitations are by the provisions of the statute authorizing the sale in the particular case imposed upon his grantee), the intruder in that case could only be evicted from the granted land by an information of intrusion.

(1) 11 East 488.
(2) 13 Q. B. 945.
(3) 7 M. & W. 593.
(4) Ir. Rep. 8 C. L. 224.
(5) L. R. 1. Q. B. 1.
(6) 2 Bing. N. C. 189.

1904

MADDISON v. EMMERSON.

That case proceeds upon a mistaken view of the remedies open to the King, and the King is not limited to evict an intruder from his land. It does not confer upon the intruder with twenty years occupation possession in law or any other estate in the land of the King. It can only confer an estate contingent upon the filing of an information and the finding of title in the King in the suit and dependent for its creation upon the act of the Crown in bringing a suit of information of intrusion. Even if does permit the intruder, after twenty years occupation of the lands of the King, to retain possession until dispossessed by an information of intrusion, the disability is one of remedy alone and when the grantee obtains possession in any way he is entitled to retain it. Title may be set up as a defense to a possessory action. An action of ejectment will not lie at the instance of an intruder on Crown land against even a mere wrong doer, much less will it lie against the grantee of the Crown.

As to construction of statutes and authority of old decisions, we refer to *Nagle* v. *Ahern* (1); *Gwyn* v. *Hardwicke* (2); *Pochin* v. *Duncombe* (3); *Magistrates of Dunbar* v. *Duchess of Roxburghe* (4); *Morgan* v. *Crawshay* (5); *Tustees of Clyde Navigation* v. *Laird & Sons* (6); *Feather* v. *The Queen* (7); *Northeastern Railway Co.* v. *Lord Hastings* (8); *Lancashire and Yorkshire Rway. Co.* v. *Mayor etc. of Borough of Bury* (9); *Hamilton* v. *Baker* (10); *Canadian Pacific Railway Co.* v. *Robinson* (11); *Caldwell* v. *McLaren* (12).

The King's right to grant the land to the appellant and his right to take a title to it must stand or fall on

(1) 3 Ir. L. R. 45.
(2) 1 H. & N. 49.
(3) 1 H & N. 842, 856.
(4) 3 Cl. & F. 353-4.
(5) L. R. 5 H. L. 304.
(6) 8 App. Cas. 658.
(7) 6 B. & S. 257.
(8) [1900] A. C. 260.
(9) 14 App. Cas. 417.
(10) 14 App. Cas. 209.
(11) 14 Can. S.C.R. 105.
(12) 9 App. Cas. 392.

the principles of the common law. And by the common law, whether based on legal fiction, as is generally accepted, or on broad constutional principle, as Story intimates, the well settled rule is that the Crown can grant its land when in the adverse occupation, or if any person prefers to call it such possession, of an intruder, no matter how long that occupation or possession may have continued.

Pugsley K. C. and Friel for the respondent. It has always been the recognized law of New Brunswick since the earliest settlement of the province, that where there has been adverse possession of Crown land for upwards of twenty years it is necessary for the Crown to establish its title by inquest of office before it can issue a valid grant. *Doe d Ponsford* v *Vernon* (1); *Smith* v. *Morrow* (2); *Murray* v. *Duff* (3); *Scott* v. *Henderson* (4); *Smyth* v. *McDonald* (5). The law is understood to be settled by *Doe d. Watt* v. *Morris* (6).

As to our right to bring ejectment, we also rely upon the decisions in *Browne* v. *Dawson* (7); *Revett* v. *Brown* (8); *Cholmondeley* v. *Clinton* (9); *Doe d. Harding* v. *Cooke* (10).

The true reason for the passing of the Statute 21 Jac. I cap. 14 was not merely to change the law as to pleading, which would be a most immaterial thing, but it was to afford protection to the subject who had been in possession adversely to the Crown for upwards of twenty years The protection afforded him was that, before he should be disturbed in his possession, there should be an information of intrusion and the title should be tried, found or adjudged for the King.

(1) 2 Kerr 351.
(2) 1 Pugs. 200.
(3) 33 N. B. Rep. 351.
(4) 3 N. S. Rep 115.
(5) 5 N. S. Rep. 274.
(6) 2 Bing. N. C. 189.
(7) 12 A. & E. 624.
(8) 5 Bing. 7.
(9) 2 J. & W. 1 at p. 156.
(10) 7 Bing. 346.

1904

MADDISON v. EMMERSON.

While the previous portion of the section provides that in the case of an information for intrusion the defendant may plead the general issue and shall not be pressed to plead specially, yet this is not the essential part of the provision. The essential part is that "in such cases the defendant shall retain the possession he had at the time of such information exhibited, until the title be tried, found or adjudged for the King." The language of the section covers the case of other persons than the King claiming, and, although it is inartificially worded, the clear meaning is that, when there has been adverse possession against the Crown for upwards of twenty years, neither the King, nor any person claiming under him, shall be permitted to disturb the person in possession until after, upon an information of intrusion, the title has been found to be in the King. The statute was passed for benefit of the subject. It was to protect the subject who had been in possession of land for over twenty years, against being disturbed in that possession until title had been asserted on behalf of the King and had been tried and determined. If, being out of possession for upwards of twenty years the Crown could be induced, as it might often be, improvidently to make grants to others, the effect would necessarily be to do away with the salutary object of the statute.

DAVIES J. (dissenting).—This was an action of ejectment brought by the respondent to recover possession of a mill site and premises of which he and his predecessors in title had been in undisputed possession for over forty-five years. The appellant (defendant) claimed under a recent grant from the Crown, obtained on representations and under circumstances which, apart from his legal contentions, would not entitle him to consideration at the hands of the court if it was open to the court to consider them. As the appeal comes before

us it raises legal questions only, and the first one is whether the statute of 21 Jac. I, ch. 14, places any and what limitations upon the Crown in the assertion of its right as against intruders who have been over twenty years in undisputed possession of Crown lands; secondly, if it does, can the Crown ignore that statute and give a grant of the lands to a third party and in this way enable the grantee without trial, finding or adjudication, to oust the intruder from possession. And, lastly, whether this court will reverse a series of uniform decisions in the Province of Nova Scotia and New Brunswick in which courts of those provinces for fifty or sixty years past have followed a decision of the English Court of Common Pleas and held that in cases of such possession by intruders for over twenty years the Crown could not issue a legal grant of the lands to a third party but was obliged first to proceed by writ of intrusion to have its right to possession found and adjudged. The appeal therefore, if allowed, will not affect alone the interests of the immediate parties but will overturn what has been frequently and uniformly decided by the courts of those provinces to be law, and, may, as shown by Mr. Justice Hanington in his able judgment, be followed by most lamentable consequences in many parts of New Brunswick. With these, however, we are not to trouble ourselves but to rest content with expounding the law as we conceive it to be. The far reaching consequences, however, of such a decision as we are asked by the appellant to give has necessarily induced us to give to the appeal a great deal of close attention and research. The result has been, so far as I am concerned, to convince me that the judgment appealed from and the series of decisions which it followed alike in Nova Scotia and New Brunswick were based upon sound law.

1904

MADDISON v. EMMERSON.

Davies J.

On the first question, of the meaning and effect of the statute of James, we are not left to colonial authorities only. The case of *Doe d. Watt* v. *Morris* (1), decided by the English Court of Common Pleas as far back as the year 1835, is an authoritative and reasoned judgment (though perhaps not binding on us) on the very point. The unanimous judgment of the court was delivered by Tindal, C. J. and as this decision is the only English one upon the statute I cite from it as follows in order to show what was really there decided.

Referring to the general and acknowledged principle of the common law that the King can never be put out of possession by the wrongful entry of a subject, the Chief Justice goes on to say:

> But it is to the statute 21 Jac. I. c. 14, that reference must be more particularly made, in order to determine the exact position and rights of the Crown as to the inclosures which are the subject of this action, at the time of making this contract. And by that statute it is enacted, "that wherever the King hath been or shall be out of possession by the space of twenty years, or shall not have taken the profits of lands, &c, within the space of twenty years before any information of intrusion brought to recover the same, in every such case the defendant may plead the general issue, and shall not be pressed to plead specially; and that in such cases the defendant shall retain the possession he had at the time of the information exhibited, until the title be tried, found, or adjudged for the King."
>
> Now, the inclosures in question having been made and continued for more than twenty years before the contract, and during the whole of that period the occupiers of the same having been in actual, though wrongful, possession, and no part of the profits thereof having been taken by the Crown within the last twenty years, it follows necessarily from the enactment of the statute, that if the Crown at the time of making the contract has been desirous to regain the *possession in fact, it must have brought an information of intrusion;* and that if such information had been brought, and the defendant had pleaded the general issue, the defendant would have been entitled to retain the possession which he then had against the Crown, "until the title was tried, found, or adjudged for the King."

(1) 2 Bing. N. C. 189.

It was contended by Mr. Powell for the appellant that the Chief Justice's judgment, an extract from which I have just given, does not necessarily determine the substantial question whether the Crown could oust from possession by other means than by information for intrusion an intruder who had been for twenty years or more in actual possession of Crown lands. I should myself have had no doubt that the affirmative answer to the question must be drawn from the Chief Justice's reasoning. But if there was any doubt upon that point it seems to me to be removed by the concluding part of his judgment where he defines what the court did hold. He says:

> We hold it unnecessary, therefore, to enter upon the discussion of the effect and operation of the statute of limitations upon the present action of ejectment, as we ground our judgment on the points of law before particularly mentioned; *that the intruders, after twenty years' adverse possession, were protected even against the Crown itself, until a judgment in intrusion;* that the commissioners were not empowered by the statute *to sell any property of the Crown so circumstanced;* and that there is nothing in this certificate of sale to shew that they intended so to do, even if they had the power.

Nothing could, in my judgment, be clearer or more definite on the very point on which this appeal turns, and I feel that I could not yield to the argument pressed by the appellant without over-ruling this decision in *Doe d. Watt* v. *Morris* (1). In the part of his judgment previously quoted the Chief Justice had said:

> If the Crown at the time of making the contract (which in the case at bar was issuing the grant to appellant) had been *desirous to regain the possession in fact it must have brought an information of intrusion,*

and if brought, then, as he says, the

> defendant would have been entitled to retain the possession which he then had against the Crown "until the title was tried, found, or adjudged for the king."

(1) 2 Bing. N. C. 189.

1904

MADDISON v. EMMERSON.

Davies J.

To my mind, nothing could be clearer than this and if it is the law the Crown could neither issue an effective grant or enter upon possession by its officers until it had successfully asserted its right on an information by intrusion.

Since that decision was given in 1835, no case can be found in England where it has been questioned or adversely commented on. The case is cited with approval in all the editions of Shelford's Real Property Statutes down to the latest in 1900. The learned author says, page 142 of the edition of 1874:

> Although the King can never be put out of possession in point of law by the wrongful entry of a subject yet there may be an adverse possession *in fact* against the Crown. Therefore after such an adverse possession by a subject for twenty years the Crown *could only recover land by information of intrusion.* Consequently ejectment would not lie at the suit of the grantee of the Crown notwithstanding the rights of the Crown are not barred by the statutes of limitation.

If ejectment would not lie at the suit of the grantee of the Crown in such a case neither could he enter into possession as he did in this case and retain it as against the intruder having twenty years' possession, because such peaceable entry in order to be effective and change the legal possession can only be made by *one legally entitled to possession.* And as against an intruder having had twenty years' possession he is not entitled to such legal possession until it has been adjudged to and found for the Crown after and on the proper proceedings for intrusion. I cannot accept for one moment Mr. Powell's argument that the statutory right to retain possession until the Crown's right to regain it had been "found and adjudged" is a mere contingency beginning with the filing of an information and dependent for its creation upon the act of the Crown in bringing a suit of information of intrusion. Such a limited and narrow interpretation of the Statute of James is not only opposed to all the decided cases but

is, in my judgment, directly opposed alike to the letter and the spirit of the statute. It would appear to me almost absurd to hold that the statutory right to remain in possession given to the subject who for twenty years had enjoyed it in fact was conditional upon the Crown bringing on information of intrusion and could be avoided by the Crown sending one of its officers to enter and take possession without form of law. Such a mode of repealing or avoiding in effect an Act of Parliament, passed for the benefit and protection of the subject, should not in my opinion be resorted to.

The redressing of injuries received by the Crown from the subject are, as is stated in the 3rd volume of Blackstone's Commentaries (marginal paging 257),

> by such usual common law actions as are consistent with the royal prerogative and dignity and as he cannot be disseized or dispossessed of any real property which is once vested in him he can maintain no action which supposes a dispossession of the plaintiff such as an assize *or an ejectment.*

The notes to Lewis' edition of these commentaries say that this reasoning would not apply to proceedings in ejectment where the King would be, in fiction, only lessor of the plaintiff.

But while Cole on Ejectment, page 62, mentions expressly an information of intrusion as the method by which the Crown may recover lands, nowhere is it stated that the Crown can bring ejectment, nor was the research of the appellant's counsel able to produce any precedents for such a practice. It would seem to me therefore that the Crown's proper, if not only, remedy to recover possession of lands held by an intruder for over twenty years would be by information of intrusion. In Blackstone's Commentaries again at page 259 of same volume it is stated

> that it is part of the liberties of England and greatly for the safety of the subject that the King may not enter upon and seize any man's possession upon bare surmises.

1904

MADDISON v. EMMERSON.

Davies J.

These principles and practice affecting the assertion of the Crown's rights were far more important and vital in the days of King James I. than they are to-day. But applying them to the construction of the statute in question they confirm me in the opinion which I think prevailed with the Court of Common Pleas when delivering their judgment in *Doe d. Watt* v. *Morris* (1), that the statute intended to assure to the *bonâ fide* occupant for over twenty years of part of the Crown demesnes security of possession unless and until the Crown's title had been found and adjudged after trial of an information of intrusion.

The Statute of James it is argued was strictly one relating to pleading and practice. It is quite true that that statute does not take away the estate or rights of the Crown or give any statutory title to the intruder. But it did more than merely regulate the practice or procedure because it guaranteed and assured to the intruder the integrity of his actual possession until the legal proceedings had ended in an adjudication of title in the King. It properly defined and regulated the methods by which the Crown rights could be maintained and established and it limited that method to a mode of procedure which would enable the Crown to weigh and determine any equitable rights which the intruder might bring forward, guaranteeing him meanwhile in peaceable possession.

It is not therefore a question whether the Crown was to lose or the intruder to gain an estate, but simply whether under the statute of James the twenty years occupant could be turned out of his possession until the completion of the proceedings prescribed by that statute. If the argument of the appellant is acceded to that even if the Crown is limited in the assertion of its rights to the statutory procedure pre-

(1) 2 Bing. N. C. 189.

scribed its grantee is not so limited the statute would virtually be repealed and what seems to me to be one of its substantive provisions, namely, the guarantee of the intruder's possession, annulled.

The question now before us has been frequently the subject of judicial discussion and decision in the Provinces of Nova Scotia and New Brunswick.

It first arose incidentally in Nova Scotia in 1843, in the case of *Scott* v. *Henderson* (1). The question in that case was whether the Crown could give a grant at all of lands which were at the time in the actual possession of an intruder. The court was equally divided in opinion on the point. Chief Justice Haliburton and one of his associates held that any such grant would be void. But the case of *Doe d. Watt* v. *Morris* (2) was cited with approval by one or more of the judges who, while divided in opinion as to the particular point before them, did not seem to have any doubt on the question now before us or as to the meaning of Ch. J. Tindall's decision, or the effect of twenty years adverse possession.

Afterwards, in 1863, the question came squarely before the Supreme Court of Nova Scotia in the case of *Smyth* v. *McDonald* (3), and was unanimously determined in the same sense as *Doe d. Watt* v. *Morris* (2). Sir William Young, the Chief Justice, and Dodd and Wilkins JJ. each delivered reasoned judgments on the point, and, so far as colonial judgments can settle any law, this question was supposed to be finally determined, and the decision of *Smyth* v. *McDonald* (3) has been accepted in that province as the law ever since.

In New Brunswick the same construction has always been placed upon the statute of James I. In the year

(1) 3 N. S. Rep. 115. (2) 2 Bing. N. C. 189.
(3) 5 N. S. Rep. 274.

1904

MADDISON v. EMMERSON.

Davies J.

1843, in *Doe d. Ponsford* v. *Vernon* (1), the unanimous judgment of the court, then comprising Chipman C. J., Botsford, Carter and Parker JJ., was delivered by Ch. J. Chipman, who said:

> The Crown * * having been so out of possession for twenty years anterior to the grant to the defendant in 1839, this latter grant by the operation of the statute 21 Jac. I. ch. 14, as expounded in the case of *Doe d. Watt* v. *Morris* (2) would not be valid without the Crown having first established its title by an information of intrusion.

The same question arose in the case of *Smith* v. *Morrow* (3), before a court consisting of Chief Justice Ritchie, afterwards Chief Justice of this court, and Allan, Weldon, Fisher and Wetmore JJ. and the court then held in the same way and to the same effect while at the same time most properly determining that

> the possession necessary to prevent the Crown from granting or to prevent a grant actually issued from taking effect should be defined actual, continuous and unequivocal.

Afterwards, in *Murray* v. *Duff* (4), in 1895, the Supreme Court again in a reasoned judgment reaffirmed the position it had continuously maintained as to the construction of the statute. The present Chief Justice Tuck and Mr. Justice Barker reviewed all the cases on the subject, and the decision of the court there it was supposed for ever settled the question so far as New Brunswick was concerned.

The case of *Doe d. Fitzgerald* v. *Finn* (5), is cited by the appellant as being at variance with *Watt* v. *Morris* (2), and with the decisions following it of the courts of Nova Scotia and New Brunswick. But while there is no doubt that Chief Justice Robinson took occasion in the course of his judgment in that case vigorously to criticise the judgment of the Court of Common Pleas in *Watt* v. *Morris* (2), as to the meaning

(1) 2 Kerr, 351.
(2) 2 Bing. N. C. 189.
(3) 1 Pugs. 200.
(4) 33 N. B. Rep. 351.
(5) 1 U. C. Q. B. 70.

1904

MADDISON v. EMMERSON.

Davies J.

and effect of the statute 21 Jac. I., c. 14, his remarks were merely *obiter* as he based his judgment upon other and different grounds That case of *Doe d Fitzgerald* v. *Finn* (1) was decided not upon the construction of the statute of James but upon that of the provincial statute, know as the Heir and Deyisee Act, and of the proviso in the Ontario statute of limitations declaring that time should not run against a grantee of the Crown *until he had received notice of the occupancy of the squatter claiming by possession.* While there was no want of vigour in Chief Justice Robinson's observations upon the English decison of *Doe d. Watts* v. *Morris* (2), neither was there the slightest doubt in his mind as to what that case really decided.

The Chief Justice, in that case, after quoting the proviso in the Ontario statute, goes on to say:

Under this proviso the grantee of the Crown would not lose his estate by a trespasser continuing upon it more than twenty years *unless he could be shewn to be aware of such occupation.* Can we then suppose that the legislature imagined that the Crown was to lose its estate by reason of an occupation under circumstances exactly similar? I think it reasonable to hold *that the legislature have in this proviso recognized it as a principle* that there cannot reasonably be said to be any dispossession of waste or ungranted lands of which no one claiming title has ever yet taken possession.

But no such proviso was ever introduced into the legislation of New Brunswick, and I venture to think, after a careful perusal of the judgments of the court of that Province that no legislature could be found there to adopt the principle which Ch. J. Robinson found embedded in the legislation of Ontario and upon which he decided the case now in review.

But the appellant contends that as he, in the absence of the respondent, entered and took actual possession, the latter could not even with proof of forty and odd years undisputed possession maintain an action of

(1) 1 U. C. Q. B. 70. (2) 2 Bing. N. C. 189.

1904

MADDISON v. EMMERSON.

Davies J.

ejectment against him or any other person who was able to get into possession, and for this he cites the case of *Goodtitle d. Parker* v. *Baldwin* (1) and other authorities. I do not agree to any such proposition. If it was law it would in many cases effectually repeal the Statute of Limitations. The cases cited by the respondent are authorities for the well known law that a defendant in ejectment can defeat the plaintiff's action by *proving a jus tertii* even although he does not claim under such third person *but not by asking it to be assumed.* That was the point decided in *Doe d. Parker* v. *Baldwin* (1) and it is on that point the case is cited in the text books. There the ejectment was for part of the Forest of Dean. The statute of Charles II. had declared the title of that forest to be in the Crown *and to be inalienable* and Lord Tenterden held that the statute of limitations then in force, of Geo. III., did not repeal this Statute of Charles II. That was not a case to which the Crown or its grantee was a party and of course the statute of James was not cited or invoked. It did not go further than hold that the presumption of title from possession may be rebutted in an action of ejectment by evidence shewing affirmatively that the right to possession is in a third party. If the appellant's contention on this point was maintained the startling result would be that as all lands in British Provinces were originally vested in the King no recovery in ejectment could ever be maintained against a wrong-doer by any one under a possessory title short of sixty years. Such a decision would most effectually operate practically to repeal the statute and would be directly contrary to a host of decided cases. See Cole on Ejectment, p. 298; *Doe d. Harding* v. *Cooke* (3); *Holmes* v. *Newlands* (4).

(1) 11 East 488. (2) 7 Bing. 346.
(3) 11 A. & E. 44.

The statute of limitations in force when *Parker* v. *Baldwin* (1) was decided only barred the remedy but did not extinguish the title. The later statute of 3 & 4 Wm. IV., of which the New Brunswick statute is practically a copy, expressly in its 34th section *extinguishes* the title. *Jones* v. *Jones* (2).

It does not transfer the extinguished title to the possessor it is true, but it creates a statutory right or title in the possessor which he can invoke as against all wrong-doers As is said in the notes in Smith's Leading Cases (1895) 10 ed. pp. 700-1

> So that if he (the former owner) enter after that period (the statutory limitation) he is a mere wrong-doer as against any person who happens to be in possession

citing *Holmes* v. *Newlands* (3); and again

> and this section seems to have the collateral effect of giving the tortious possessor a title against all the world after the lapse of the prescribed period.

In *Doe* v. *Sumner* (4), Parke, B. said that the effect of the statute is

> to make a parliamentary conveyance of the land to the person in possesssion after

the period of limitations has elapsed. And in *Scott* v. *Nixon* (5), Sugden, L.C. compelled an unwilling purchaser to take a title depending upon parol evidence of possession under the statute.

These remarks of course are applicable as between the claimant by possession and wrong-doers which the appellant would of course be unless his grant gave him a right to possession and they do not affect the Crown's rights of property which can only be extinguished by sixty years possession. But while it takes sixty years of possession to *extinguish* under the statute of limitations the title of the Crown, it only

(1) 11 East 488.
(2) 16 M. & W. 699.
(3) 11 A. & E. 44.
(4) 14 M. & W. 39.
(5) 3 Dr. & W. 388.

1904

MADDISON v. EMMERSON.

Davies J.

takes twenty years of such possession under the statute of James to stay the Crown from ousting an intruder on its lands until its title has been formally found and adjudged in the manner that statute prescribes.

Mr. Powell finally contended that even if his Crown grant was not good to enable him to maintain ejectment, still, that as a fact he had got possession and cannot be ousted. But in this I do not agree. The owner of land, it is true, who is *entitled to the legal possession* acquires that possession if he enters peaceably and is not obliged to resort to legal proceedings. But that assumes everything that is in dispute here. The plaintiff's suit is to eject appellant from a possession said to be unlawful. If my construction of the statute of James is correct, if the Crown could not give him a grant under which he would be legally entitled to enter and oust the intruder by ejectment, he certainly could not defeat the statute by walking upon the land in the owner's absence and asserting rights which the law only allows *to owners legally entitled to possession.* Every plaintiff in ejectment must show a right of possession as well as of property and therefore the defendant need not plead the statute of limitations. Of course if the statute of James did not interfere with the Crown's right to possession even to the extent of providing that it could not be asserted as against one for twenty years in the possession in fact of the *locus*, then of course the Crown could grant and the grantee could bring ejectment or enter and take possession if he could do so peaceably. But that argument assumes everything in dispute.

There is one point more which I think the respondent can successfully invoke in this case, and that is that even if the decisions of the British Court of Common Pleas and the Supreme Courts of New Brunswick and Nova Scotia upon the meaning and object of the

1904

MADDISON v. EMMERSON.

Davies J.

Statute of James were not such as this court would have approved of had the question been one *res integra* still they are conclusive as showing at least that the true construction of the statute is *very doubtful* and in all such cases this court will hesitate long, I take it, before overruling such a series of provincial decisions as we have here, based upon an English decision which for over half a century has stood unquestioned and uncriticised in England, and which has down to this day been approved and adopted by some of the leading text writers of Great Britain. For my own part, even if I disagree with the conclusions of of these various courts, I would without hesitation adopt the rule followed by Lord Westbury, Lord Campbell, Lord Herschell and other great law lords in the House of Lords and refuse to introduce the precedent of disregarding a uniform interpretation of an old statute upon a question materially affecting property and constantly recurring, and which interpretation even though I was inclined to quarrel with it had been adhered to for so many years without interruption. *Morgan* v. *Crawshay* (1); *Gorham* v. *Bishop of Exeter* (2); and *Lancashire and Yorkshire Rway. Co.* v. *Mayor etc. of the Borough of Bury* (3) in 1889.

The judgment of the majority of the court was delivered by

NESBITT J.—This is an appeal from the judgment of the Supreme Court of New Brunswick refusing the motion of the defendant below that the court set aside the verdict and finding of Mr. Justice Landry on the trial of the cause and pronounce a verdict for the defendant therein, and amend and give the postea and enter a verdict for the defendant and failing that to

(1) L. R. 5 H. L. 304 at p. 319. (2) 15 Q. B. 52 at p. 73.
(3) 14 App. Cas. 417.

1904

MADDISON v. EMMERSON.

Nesbitt J.

enter a non-suit and failing that that a new trial be granted.

The facts of the case are as follows:

This was an action of ejectment brought in the Supreme Court of the Province of New Brunswick by the plaintiff below against the defendant below for the recovery of the possession of a small lot of land, containing about ten acres, situate in the County of Westmoreland, in the Province of New Brunswick.

The defendant below claimed the land as grantee from the Crown. The plaintiff below claimed the land as against the defendant below by virtue of the possession of those through whom he claimed. About fifty-seven years before the issuing of the grant by the Crown to the defendant, one Somers entered upon the lot in question and erected a mill thereon. From the erection of this mill down to the year 1892, Somers and those claiming under him remained in actual occupation of the land but without any right from the Crown. In 1886 the land was mortgaged to the plaintiff who in 1892 sold the property under a power of sale contained in the mortgage. About the time of the sale the holder of the equity of redemption left the property. The plaintiff claims to have entered into possession after the sale, but he did not remain in continuous occupation of the land and was not in occupation of it at the time of the grant from the Crown to the appellant. After the land was granted to the appellant, he, the appellant, entered into and remained in peaceable possession of the same, and this action was brought by the respondent to recover the possession. At the trial the respondent relied upon the common law and contended that, the respondent having been in adverse possession of the *locus in quo*, the Crown could not grant it, and he also relied upon the statute 21 James I. ch. 14, and contended

that the Crown could not make, under the circumstances of the case, a grant of the land and that the appellant could not take any title thereto without the title having first been tried in a suit by information of intrusion and found and adjudged to be in the Crown. The appellant claimed on the other hand, that the Crown could, at common law and under the statute, make a valid grant of the land, and that he under the grant made to him, was entitled to the land and to the possession thereof.

The case for the plaintiff, in the first instance, was founded wholly upon the claim of a presumption of title arising from long continued possession. The plaintiff called as a witness a Mr. Baker, an official of the Crown Lands Department of the province. On cross-examination, in answer to the question,

> The lot was never granted, as a matter of fact until to the defendant?

this witness said:

> No grant was ever issued till the Madison grant, that I know of.

The plaintiff himself testified that, when he first learned of the grant to the plaintiff, he went to the Crown Land Office.
Being asked,

> Q. Didn't you know by that provision that it takes sixty years to deprive the Crown of its title?

he said

> A. Every student at law learns that.
> Q. Then if you knew that you knew at that particular time you hadn't a good title, that the title was in the Crown?
> A. No I didn't, I didn't know anything about it. I never knew until that time that the grant had not issued.

At the time referred to the plaintiff was Commissioner of Public Works and a member of the Provincial Government of New Brunswick, and it is safe

1904

MADDISON v. EMMERSON.

Nesbitt J.

to infer that all the records of the Crown Lands Department would be open to his full examination. This evidence is amply sufficient to rebut any possible presumption of a lost grant from the Crown, and also, as it seems to me, to afford proof that the records of the Department shewed no trace of any grant from the Crown prior to that made to the defendant, in 1895. If, then, *primâ facie* proof of the title of the Crown at the date of the making of that grant should be required it was sufficiently furnished.

It does not seem necessary to turn back to the old books for authority that the mere presence of an intruder upon the lands of the Crown imposes no bar upon the power of the Crown to make a grant.

No such limitation has been expressly contended for by counsel for the respondent. The expressions of opinion in its favour on the part of a former Chief Justice of Nova Scotia, in *Scott* v. *Henderson*, (1), are not now accepted in that province, the Supreme Court of which has decided, in the case of the *Louisburg Land Co.* v. *Tutty* (2), that the Crown could grant, notwithstanding the adverse occupation of a third party which has continued for a period of less than twenty years.

In *Farmer* v. *Livingstone* (3) this Court, on an appeal from Manitoba, held the plaintiff entitled to recover in ejectment upon a grant from the Crown made while the defendant was in actual occupation of the land. And in a subsequent case between the same parties, *Farmer* v. *Livingstone* (4), this Court also decided that the respondent's occupation did not even give him a *locus standi* to question the validity of the patent. See also *Webb* v. *Marsh*, (5);

(1) 3 N. S. Rep. 115.
(2) 16 N. S. Rep. 401.
(3) 5 Can. S. C. R. 221.
(4) 8 Can. S. C. R. 140.
(5) 22 Can. S. C. R. 437.

The statute in question is as follows :

An Act to admit the subject to plead the general issue in Information of Intrusion brought on behalf of the King's Majesty and retain his possession till trial.

Where the King out of his prerogative royal may enforce the subject in Information of Intrusion brought against him to a special pleading of his title. *The King's most Excellent Majesty, out of his gracious disposition towards his loving subjects, and at their humble suit, being willing to remit a part of his ancient and regal power, is well pleased that it be enacted; and be it enacted by the King's most Excellent Majesty, the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same:—That whensoever the King, His Heirs or Successors, and such from or under whom the King claimeth, and all others claiming under the same title under which the King claimeth, hath been or shall be out of possession by the space of twenty years or hath not or shall not have taken the profits of any lands, tenements or hereditaments within the space of twenty years before any information of Intrusion brought or to be brought, to recover the same: that in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially; and that in such cases the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, or adjudged for the King.*

The early books touching upon the Statute of James are Viner in his Abridgement, Comyn in his Digest and Bacon in his Abridgement, and they only refer to the statute as a matter of practice. Viner refers to it in vol. 17, page 217, under the heading "Statutes relating to Intrusions;" Comyn refers to it vol. 7, page 81, under the heading of "Pleadings", and Bacon in title "Prerogative" E, page 102, under the heading "Judicial Proceedings." And a note to Dyer, page 238, cited by Robinson C.J. in *Doe d. Fitzgerald* v. *Finn* (1), says :

The whole effect of the statute is, the subject is allowed to plead the general issue and retain possession till trial.

The first case upon the statute, so far as the reports show, is *Goodtitle d. Parker* v. *Baldwin* (2), a case

(1) 1 U. C. Q. B. 70.

(2) 11 East 488.

1904

MADDISON v. EMMERSON.

Nesbitt J.

which has apparently escaped the notice of the different courts and counsel who have considered the statute. The land in this case formed part of the forest of Dean. One of the pieces had been in the possession of the lessor of the plaintiff, his father and mother, for upwards of sixty years, and all of them had been in their possession for upwards of forty years, without any interference on the part of the Crown. The defendant, in some way which does not appear, became possessed of the lands, and the lessor of the plaintiff brought ejectment to remove him from the possession. Bayley J. at the trial left it to the jury to presume that the possession had been with the license of the Crown, as being the only way to account legally for their respective and adverse possessions, and the jury found for the defendant. Wigley, counsel for the plaintiff, on motion for a new trial relied on, among other points, the statute of 21 Jac. I., ch. 1. Ellenborough C.J. delivered judgment for the court in favour of the defendant and refused the motion for a new trial. He made no special reference to the Act, but said, among other things,

that the plaintiff must recover against the defendant by the strength of his own title and not by the weakness of the defendant's title.

The judgment of the court, since the point was taken, would indicate that the court was of opinion against the statute having any application in favour of the plaintiff and is an express decision in favour of the defendant in this case.

The next case (1835) is that of *Doe d. Watt* v. *Morris* (1). The head note is as follows :

Held, that the conveyance of a manor by the commissioners of woods and forests on the part of the Crown, did not entitle the purchaser to maintain ejectment against the possessor of land inclosed from the waste of the manor, more than twenty years before the conveyance, without leave of the Crown.

(1) 2 Bing. N. C. 189.

I cite the head-note as shewing what the learned reporter conceived to be the point actually decided, and because such an entirely different view has been taken by various courts of what that case did actually decide.

What was actually decided was that the Commissioners had not purported to sell the lands and that the statute could not be read as authorizing the Commissioners to sell a right of recovery or any land the Crown was not in possession of. In fact Chief Justice Tindal would seem to imply in the most unmistakable language that, if the grant had been from the Crown direct of the very land, it would have been treated as an assignment of the prerogative right to bring an action to obtain possession, and there is no hint that the title of the Crown was gone or that, if an action was not necessary to obtain possession, the Crown could not have taken possession peaceably.

The next reported case is *Attorney-General* v. *Parsons* (1) in 1836. It grew out of the case of *Doe d. Watt* v. *Morris*. (2). The lessor of the plaintiff having failed in the ejectment suit, an information of intrusion was exhibited in the name of the Attorney-General, to eject the intruder. Part of the head-note is

> the title of the Crown to lands of which it has been out of possession for twenty years may be tried in the information of intrusion itself and need not be first found by inquest of office, the only effect of the statute 21 Jac. I., ch. 14, being to throw the onus of proving title in the first instance on the Crown.

According to the report in Meeson & Welsby the defendant's cousel claimed that the statute enabled the defendant, where the King had been out of possession for twenty years, to retain the possession from the expiration of the twenty years until the title was tried, found or adjudged for the King, and, therefore, an

(1) 2 M. & W. 23. (2) Bing. N. C. 189.

1904

MADDISON v. EMMERSON.

Nesbitt J.

office was necessary. Lord Abinger, in reply, stated that,

whereas at common law the defendant was put to show his title on the record, the statute says he may in such case throw the *onus probandi* on the Crown.

Abinger C. B., in giving judgment, said:

It means only that the onus is thrown on the Crown to prove its title in the first instance. The defendant shall not be bound to plead his title specially where he has had twenty years possession without disturbance; in that case the Crown stands in the same situation as a subject.

Alderson B. said:

where the defendant pleads not guilty or *non intrusit* though the Crown prove the intrusion, he is entitled to hold the possession until the Crown also proves title.

The case of *The Attorney-General* v. *Parsons* is also repored in the Law Journal, (1), where the judgment of the court is given as follows:

The object of the statute is simply to provide that, after a possession of twenty years, the defendant shall not be bound to set out his title by a special plea, which otherwise he would have been bound to do. The proof of title in that case is thrown upon the Crown, and even though the King prove an intrusion, yet the defendant shall hold possession unless the title of the Crown be proved. There is no need of any distinct proceedings.

While it is true that in this case the point before the court was whether an inquest of office should be held or not, yet the language of the judges is inconsistent with their entertaining the idea that the statute went further than merely prescribing procedure. It is more than inconsistent, it is impliedly an absolute repudiation of the claim put forward for the defendant that the King is disseised by the statute. What is the point of the defendant's contention that the King's title should first be established by office found? It is this, that if the King was disseised an information of

(1) 6 L. J. Ex. 9.

intrusion would not lie, as possession in the King is the essential condition of the action, and as the statute had in the counsel's view disseised the King it was necessary that the King should re-establish his title and reclothe himself with possession by office found before the information of intrusion could be legally exhibited. The reply of the court must be taken in connection with the contention. When the court says in reply to the argument that an inquest of office must first be brought,

> that the object of the statute is simply to provide that after a possession of twenty years the defendant shall not be bound to set out his title, etc.

it necessarily, by implication, negatives the claim that the statute disseizes the King. In the case of *Attorney-General* v. *The Corporation of London* (1), in 1850 the question of there being a substantive right conferred by the statute came up and was decided by Lord Cottenham. The Corporation of London in its answer set up, as a specific ground for resisting discovery, that to compel the discovery would be to violate the spirit and intention of the statute 21 Jac. I. ch. 14 (of which it claimed the benefit), and a subversion of the common law right and principle that the claimant of any estate of freehold shall recover by the strength of his own title and shall have no right to a discovery of the title by which such estate is held. Lord Cottenham said, on page 258 :

> Now it is said that the statute of King James, as pleaded in the answer, gives a party against whom the Crown is litigating an advantage different from that which belongs to every other defendant. I do not at all so understand it. The object of the statute was to put a party who was contesting with the Crown in the same situation as a party who was contesting with any other plaintiff; but here in equity the Crown and subject always were on the same footing and they are on the same footing now there was no evil, therefore, to be remedied.

(1) 2 Mac. & G. 247.

1904

MADDISON v. EMMERSON.

Nesbitt J.

At law, however arising from technical reasoning, there was a great injury accruing to a defendant, in litigation with the Crown. The Crown's title was taken to be proved unless a contrary title was set up and pleaded. That was a privilege which the Crown maintained against the defendant at law; but no such privilege has ever been asserted here, nor am I at all aware of there being any different rule, as far as discovery is concerned, applicable to a suit between the Crown and a subject and a suit between ordinary parties.

In Williams & Yates "Law of Ejectment" (1894), at p. 7, I find:

The Crown may recover possession of lands by an information of intrusion exhibited by the Attorney General

citing Manning's Practice, page 189, and Cole's Ejectment, page 162, and stating that:

The defendant to an information of intrusion cannot plead the general issue but must specially plead his own title unless the Crown has been out of possession for more than twenty years and then the onus is on the Crown to prove its title.

I find in Shelford on Real Property Statutes (1) the rule to be that

ejectment would not lie at the suit of the grantee of the Crown although the rights of the Crown are not varied by the statute of limitations.

We are of course in this case not troubled by this consideration since the grantee of Crown is in possession and the intruder on the Crown's land seeks to recover in ejectment against such grantee.

In Ontario, in 1844, the case of *Doe d. Fitzgerald* v. *Finn* (2), settled the construction of the statute for that province. The conclusions reached in this case are as follows: The Statute of James is simply a regulation of procedure. Before the statute the King could make an effective grant of the land of which he had acquired possession without regard to the fact that an intruder was in possession at the time of the grant. The statute did not change the law in this respect, and the grantee of the Crown takes the King's title

(1) 8 ed. p. 142.

(2) 1 U. C. Q. B. 70.

including the possession and may evict the intruder by an action of ejectment. This judgment has been acted on and recognized as law in *Attorney General* v. *Stanley* (1); *Reg.* v. *Sinnott*, (2).

The respondent relied in the court below on the judgment in *Doe d. Watt* v. *Morris* (3) in 1835; the opinion of Bliss J. in *Scott* v. *Henderson*, (4) in 1843; the judgment of the court in *Smyth* v. *McDonald*, (5) in 1863; the judgment of the New Brunswick court in *Doe d. Ponsford* v. *Vernon*, (6) in 1843; the judgment of the New Brunswick court in *Smith* v. *Morrow*, (7) in 1872; and the opinion of Chief Justice Tuck in *Murray* v. *Duff* (8) in 1895.

Turning to the New Brunswick cases, the first is *Doe d. Ponsford* v. *Vernon*, (6). So far as the report shews, the statute was not discussed by counsel on either side. The court of its own motion referred to *Doe d. Watt* v. *Morris* (3). The facts of the case are peculiar:—In 1784 the Crown granted Lot No. 33 to Egbert and others. Sometime after this grant and before the year 1786 the Crown granted Lot No. 39 in the rear of Lot No. 33, to Brundage and Coombs. The description in the grant of No. 33 was very loose. Followed literally, it would stop short of No. 39, and be about fifty acres too small. In 1786 the Crown granted to Shaw a piece of land adjoining Lot No. 33 and by the description Lot No. 33 was recognized as extending back to Lot No. 39. In 1787 the Crown granted another lot adjoining to Beaman and the description in this grant also recognized Lot No. 33 as extending back to No 39. In 1839 the Crown granted "Lot A." to the defendant, describing it as lying

(1) 9 U. C. Q. B. 84.
(2) 27 U. C. Q. B. 539.
(3) 2 Bing. N. C. 189.
(4) 3 N. S. Rep. 115.
(5) 5 N. S. Rep. 274.
(6) 2 Kerr 351.
(7) 1 Pugs 200.
(8) 33 N. B. Rep. 351.

1904

MADDISON v. EMMERSON.

Nesbitt J.

between lots No. 33 and No. 39. The jury found that a lot No. 33 extended back to Lot No. 39, and that the *locus in quo* was included in the prior grant. The following extract contains all of the judgment which treats of the Statute of James:

> The case may be considered in another point of view. The Crown must be deemed at least out of possession to the extent of the Egbert grant as recognized in the Shaw and Beaman grants, and having been so out of possession for twenty years anterior to the grant to the defendant in 1839, this later grant by the operation of the statute 21 Jac. I. ch. 14 as expounded in *Doe d. Watts* v. *Morris*, (1) could not be valid without the Crown first having established its title by an information of intrusion.

In considering this dictum it must be remembered that, as far as appears from the report, the point involved was not argued before the court below; that the opposing authorities were neither cited to, nor considered by, the court and that the dictum was not a statement by the court of its own opinion but was a casual observation as to the holding in *Doe d. Watt* v. *Morris* (1).

The next New Brunswick case is *Smith* v. *Morrow* (2), an action of trespass in which the plaintiff was an intruder, who claimed to have twenty years possession of the land before the Crown granted it to the defendant. The action was for trespass for the defendant cutting on the land after he, the defendant, got the grant. The plaintiff, on the trial, requested Weldon J. to leave the question of his possession to the jury, which the judge refused to do. The verdict having been found for the defendant, the plaintiff moved for a new trial.

Allen J. delivered the judgment of the court. After stating the facts of the case, and the plaintiff's contention that the Crown could not make a grant without office found, he proceeded as follows:

(1) 2 Bing. N. C. 189. (2) 1 Pugs. 200.

To prevent the Crown from granting, or to prevent a grant actually issued from taking effect, the possession should be defined, actual, continuous and unequivocal, and wholly opposed to mere isolated acts of trespass on the Crown's estate without visible limits or effect. To hold that mere acts of locating on the wilderness lands of the Crown, and this too without clearly apparent bounds, would be sufficient to prevent the Crown from granting without office found, would, in my opinion, be most unreasonable and disastrous. The majority of the court think there was evidence of acts of possession by the plaintiff and those under whom he claims, outside of the Kimball grant, for the period of twenty years, which ought to have been submitted to the jury.

It was taken for granted by the court and the counsel for the defendant that the Crown was incapacitated from granting land which, for twenty years, had been in the occupation of an intruder. The statute was not discussed at all, and the only question before the court was whether there was evidence of there being acts of possession which should have been left to the jury.

The last New Brunswick case is *Murray* v. *Duff* (1). This case was one of trespass also. The decision of the court did not go on the effect of the statute of James, and the Chief Justice was the only judge who expressed an opinion upon it. He based his judgment chiefly on *Doe d. Watt* v. *Morris* (2), and he summed up his views of the decision in that case in these words:

Before leaving *Doe d. Watt* v. *Morris* (2) I desire to say that in my opinion it is in that case distinctly held that, after twenty years possession against the Crown, the effect of 21 Jac. I. ch. 14, was to disable the King from granting the estate until the title had been found by office; that the right of the Crown in such case was nothing more than the right to file an information of intrusion, a right that could not be assigned or, at all events, only by words expressly granting it. In other words the court decided, under the circumstances stated in the special case, that the right of maintaining an action of ejectment is barred by the statute of limitations, 21 Jac. I. ch. 14.

(1) 33 N. B. Rep. 351. (2) 2 Bing. N. C. 189.

1904

MADDISON v. EMMERSON.

Nesbitt J.

The Chief Justice's view, I think, was erroneous as it was not held by Chief Justice Tyndal that the effect of the statute was to disable the Crown from granting the estate, but that, to evict an intruder after the Crown had been out of possession for twenty years, the Crown must file an information of intrusion.

Turning to the Nova Scotia cases, the case of *Scott* v. *Henderson* (1) was not a case under the statute of James, although the statute was considered in it. Halliburton C J., and Haliburton J. were of the opinion that the statute contained nothing which would deprive the King of the right of granting his lands if he had the right to do so before the passing of the Act. Hill J. expressed no opinion on the effect of the statute upon the King's power to grant land. Bliss J., on page 143, expressed the opinion that the statute had broken in upon the common law principle and recognized an adverse possession against the Crown after twenty years, in which case he claimed the Crown could not now grant without first proceeding against the intruder.

The case of *Smyth* v. *McDonald* (2) did really decide squarely that the statute disables the Crown from granting. The facts of this case brought it within the statute of James. Young C.J., at page 280 of the report, said:

> *Doe d. Watt* v. *Morris* (3), if not precisely in point, is nearly so, and the defendants having twenty years possession between themselves and their ancestors were protected by the statute.

Bliss J. simply concurred in the opinion that the judgment of the court should be for the defendant who was the intruder. Dodd and Wilkins JJ. disposed of the question in a very few lines, holding that the grantee of the Crown, the then plaintiff, could not take the

(1) 3 N. S. Rep. 115. (2) 5 N. S. Rep. 274.
(3) 2 Bing. N. C. 189.

land by the grant, as the King was out of possession and could not grant it.

It is clear that title cannot be acquired against the Crown in a less period than sixty years, and that, until such title is acquired, the intruder has only a right to claim that he must be evicted by an information of intrusion, and I cannot see that the effect of our holding that a wrong construction has been put upon the statute of James by the courts of New Brunswick would have the effect of doing more than saying to an intruder upon Crown property, you must be in possession for sixty years before the title of the Crown is extinguished. The intruder's possession is not acquisitive but merely extinctive, and the Crown's title is not extinguished by a less period of possession than sixty years.

The chief ground urged was the disturbance of title. I think the cases establish that, where the construction of a statute is involved, the plain words of the statute must be given affect to. See particularly the case of *Hamilton* v. *Baker* (1). In 1859, *The Glantanner* (2) was decided by Dr. Lushington. In 1865, he approved of this case and made it the basis of the decision in *The Mary Ann* (3). In 1868, Sir Robert Pillimore approved of *The Mary Ann* (3) in *The Feronia* (4). In 1877, the Court of Appeal accepted without comment and acted upon the preceding case, the court consisting of James, Brett and Amphlett L.JJ.; *In re Rio Grande Do Sul Steamship Co.* (5). In 1883, Sir Robert Phillimore, when the case of *The Mary Ann* (3) was questioned before him, expressly approved of it and referred to the fact that it had been treated as settled law in the then last edition of Maude and Pollock on "Merchant Shipping."

(1) 14 App. Cas. 209.
(2) 1 Swa. 415.
(3) L. R. 1 Ad. & Ecc. 8.
(4) L. R. 2 Ad. & Ecc. 65.
(5) 5 Ch. D. 283.

1904

MADDISON v. EMMERSON.

Nesbitt J.

In 1886, Sir James Hannen, in the case of *The Ringdove* (1), thought that the reasoning of Dr. Lushington was not altogether satisfactory to his mind, but he followed the case. In 1889, the case of *Hamilton* v. *Baker* (2) came before the House of Lords and Lord Halsbury, L.C., Lord Watson and Lord McNaghten unanimously overruled the cases of *The Glentanner* (3) and *The Mary Ann* (4) and did so, notwithstanding the fact that the practice of the Admiralty Court had followed the decisions from the time they were given, a period of thirty years.

The ground was taken before the House that the results of overruling the old decisions would be disastrous, and whether right or wrong it was too late for even the House of Lords to interfere. Lord Macnaghten said :

> I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for much a length of time and which has been sanctioned by such high authority, but if it is really founded upon an erroneous construction of an Act of Parliament there is no principle which precludes your Lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the Legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time.

See also *Caldwell* v. *McLaren* (5) ; *Lancashire & Yorkshire Railway Co.* v. *Mayor, etc., of Borough of Bury* (6) ; *North Eastern Railway Co* v. *Lord Hastings* (7) ; *Trustees of Clyde Navigation* v. *Laird & Sons* (8) ; *Gwyn* v. *Hardwicke* (9).

In the present case Barker J. said :

> It is, I think, to be regretted that so important a question, and one upon which there has been such a diversity of opinion among judges, should not have received more consideration than it apparently has

(1) 11 P. D. 120.
(2) 14 App. Cas. 209.
(3) 1 Swa. 415.
(4) 1 Ad. & Ecc. 8.
(5) 9 App. Cas. 392 at p. 409.
(6) 14 App. Cas. 417.
(7) [1900) A. C. 260.
(8) 8 App. Cas. 658.
(9) 1 H. & N. 49 at p. 53.

1904

MADDISON v. EMMERSON.

Nesbitt J.

in this province. * * * I must adhere to what I said in *Murray* v. *Duff*, (1) that, after so long a lapse of time, the question should be considered as settled in this province, at all events until a court of appeal shall decide otherwise.

Gregory J. said;

I think, too, that it would be very doubtful, if the case was presented now for the first time, if I would have taken the view that has been adopted by the court in the past, and which seems now to be accepted as the law, until some high court shall say that there was error in the former judgments.

Landry and McLeod JJ. also intimated doubts of the correctness of the conclusion. Hanington J. alone supported it upon principle.

The law upon the point in question should be the same for all the portions of Canada in which the law of property is based upon that of England. It should require a case of an extraordinary character to induce this court to feel itself precluded by local decisions from applying to a particular part of the Dominion a construction of the law which seems to it properly applicable to all of such portions.

In this country, where intruders may take possession of most valuable Crown properties and remain in possession for many years enjoying the fruits of their intrusion without any knowledge on the part of the Crown, I think it would be most dangerous to introduce any limitation upon the sixty year term. It is to be assumed that, in cases in Nova Scotia and New Brunswick where intruders have settled upon land of the Crown and made improvements, and have not acquired a title by a sixty years' possession, the Crown will take into consideration all the circumstances before granting a title to the land to a third party. If further relief is necessary it is for the legislature to supply.

I think that, in this case, the Crown could grant the land and, the grantee having obtained possession, the

(1) 33 N. B. Rep. 351.

1904

MADDISON v. EMMERSON.

Nesbitt J.

plaintiff cannot maintain ejectment against him, and that the verdict should be set aside and a verdict entered for the defendant with costs in this court and in the court below.

Appeal allowed with costs.

Solicitors for the appellant: *Powell, Bennett & Harrison.*

Solicitor for the respondent: *James Friel.*

1904

*March. 10.

*April 27.

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

AND

GEORGE MACARTHUR (SUPPLIANT)...RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Public work—Lands injuriously affected—Closing highway—Inconvenient substitute.

The owner of land is not entitled to compensation where, by construction of a public work, he is deprived of a mode of reaching an adjoining district and obliged to use a substituted route which is less convenient.

The fact that the substituted route subjects the owner at times to delay does not give him a claim to be compensated as it arises from the subsequent use of the work and not its construction and is an inconvenience common to the public generally.

The general depreciation of property because of the vicinage of a public work does not give rise to a claim by any particular owner.

Where there is a remedy by indictment mere inconvenience to an individual or loss of trade or business is not the subject of compensation.

Judgment of the Exchequer Court (8 Ex. C. R. 245) reversed.

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*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

1904

THE KING v. MACARTHUR

APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the suppliant.

In 1897 the government of Canada proceeded to change the route of the Cardinal Canal, between the village of Cardinal and the St. Lawrence, from the south to the north side of the village with the result that both ends of the village were bounded by the new canal and the only bridge was in the centre. The suppliant's property being at one end he claimed damages by reason of depreciation in value and also because he could only get to the adjoining district by means of the drawbridge which was a longer, less convenient and, on account of a railway running over it, a dangerous route. The Exchequer Court awarded him $1,200 as compensation and the Crown appealed.

Chrysler K. C. for the appellant. By the closing of the street, the suppliant suffers in common with all the residents of the village but there is no injury peculiar to himself or his property and it is only for such injury that he can recover. *Attorney General* v. *Conservators of the River Thames* (2); *Lyon* v. *Fishmongers Co.* (3); *Powell* v. *Toronto, H. & B. Railway Co* (4).

The cases in England decided under the Railway Clauses Act 1845 are not in *in pari materiâ* as that Act provides for greater compensation that our Expropriation Act. The Lands Clauses Act more nearly resembles ours and the decisions on the latter are strongly against the suppliant. See *Cowper Essex* v. *Local Board of Acton* (5).

The learned Counsel cited also *Re Birely and Toronto H. & B. Railway Co.* (6); *Town of Toronto Junction* v. *Christie* (7); *East Freemantle Corporation* v. *Annois* (8).

(1) 8 Ex. C. R. 245.
(2) 1 H. & M. 1.
(3) 1 App. Cas. 662.
(4) 25 Ont. App. R. 209.
(5) 14 App. Cas. 153.
(6) 28 O. R. 468.
(7) 25 Can. S. C. R 551.
(8) [1902] A. C. 213.

1904

THE KING v. MACARTHUR.

Maclennan K. C. and *Maclennan* for the respondent: The Municipality could not have closed the highway without compensation to the suppliant and consequently the government could not. *In re Publishers' Syndicate; Paton's Case* (1); *Falle* v. *Town of Tilsonburg* (2).

The suppliant would have a right of action irrespective of the statute if the work had been done by a private person and that gives him the some right now. *Caledonian Railway Co.* v. *Walker's Trustees* (3); *Metropolitan Board of Works* v. *McCarthy* (4).

The cut-off of suppliant's land is not too remote to entitle him to compensation. *Caledonian Railway Co.* v. *Walker's Trustees* (3); *Beckett* v. *Midland Railway Co.* (5); *McQuade* v. *The King* (6).

The judgment of the Court was delivered by:—

NESBITT J.—I do not think that there is such an irreconcilability between the more recent authorities as a first perusal of them would suggest. The earlier causes proceeded upon the principle stated by Lord Cranworth in *Ricket* v. *The Directors, &c. of the Metropolitan Railway Co.* (7), at page 198, where he says:

> Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundation of buildings on it, obstructing its light, or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature.

(1) 5 Ont. L. R. 392 at p. 402.
(2) 23 U. C. C. P. 167.
(3) 7 App. Cas. 260.
(4) L. R. 7 H. L. 243.
(5) L. R. 3 C. P. 82.
(6) 7 Ex. C. R. 318.
(7) L. R. 2 H. L. 175.

This rule was considered too narrow in the case of the *Caledonia Railway Co.* v. *Walker's Trustees* (1), at page 296.

I think that the real test is that suggested by Lord Cairns in *McCarthy's Case* (2):

> The proper test is to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the works had not been authorised by Act of Parliament. I do not pause to consider whether or not, if the question was now to be decided for the first time, it is not a test somewhat narrow. I accept that test as being the test which has been laid down and which has formed the foundation for the decision of so many cases before the present.

Such definition of the right to compensation which was suggested by Mr. Thesiger, in his argument in the case of the *Metropolitan Board of Works* v. *McCarthy* (2), was accepted by the Lord Chancellor (Lord Cairns) and Lord Chelmsford and Lord Hatherley as one which may reconcile the cases which have come before the courts upon this delicate point of law. That definition was as follows:

> The principle to be deduced from a consideration of all the cases is this, that where by the construction of works there is a physical interference with any right, public or private, which an owner is entitled to use in connection with his property, he is entitled to compensation if, by reason of such interference, his own property is injured. The word "physical" is here used in order to distinguish the case from cases of that class where the interference is not of a physical, but rather of a mental, nature, or of an inferential kind, such as those of a road rendered less convenient or agreeable, or a view interfered with, or the profits of a trade, by the creation of a new highway or street, diminished in the old one.

I think a great deal of the confusion has arisen under the cases by seizing upon language which has been used without confining such language to the actual decision in the case, and to the special facts upon which that decision is based, making it neces-

(1) 7 App. Cas. 259.
(2) L. R. 7 H. L. 243.

1904

THE KING v. MACARTHUR.

Nesbitt J.

sary in nearly all of the cases to draw a sketch of the locality, as described, in order to see just what has been decided. I cannot do better to illustrate this than to refer to *Ricket's Case* (1) which was so carefully analysed by Lord Selborne (Lord Chancellor) in *Walker's Case* (2), at page 281.

Three cases were relied upon by the learned judge in the court below as establishing that an interference with a public right will give rise to a cause of action, and where that is taken, sustain a claim to compensation under the statute. These cases were *Chamberlain* v. *West End of London & Crystal Palace Rway. Co.* (3); *McCarthy's Case* (4), and the *Caledonian Railway Co.* v. *Walker's Trustees* (2).

A critical examination of *Chamberlain's Case* (3) will shew that the road immediately in front of the claimant's property was changed so that the claimants had to go down a set of stairs to reach the deviation road, and it was expressly found that the real estate, as real estate, had been somewhat depreciated in value.

In *McCarthy's Case* (4), the decision, as I understand, went upon the ground that the claimant had two highways, one a metal highway, and the other a water highway, and as put by Lord Hatherley, no one would suggest that if the water highway had lain on one side of his property and the metal highway on the other, and if the water highway had been obstructed *opposite to his premises* he would not have had a cause of action apart from the statute, and it could make no difference that the metal highway and the water highway were immediately contiguous to each other.

In the *Walker's Trustees Case* (2), Lord Watson, at page 303, when speaking of the rule laid down by the Lord Chancellor (Earl Cairns) in the *McCarthy*

(1) L R 2 H. L. 175.
(2) 7 App. Cas. 259.
(3) 2 B. & S. 617.
(4) L. R. 7 H. L. 243.

Case (1), and adopted by all the law lords in that case, said as follows:

The rule thus formulated does not apply with precision to the law of Scotland, which does not, in cases like the present, recognize that distinction between the remedies by action and indictment upon which the test is founded. But that which satisfies the test, that which gives a right of action in England, has been defined in the case of McCarthy as well as in previous decisions. When an access to private property by a public highway is interfered with, the owner can have no action of damages for any personal inconvenience which he may suffer in common with the rest of the lieges. But should the value of the property, irrespective of any particular uses which may be made of it, *be so dependent upon the existence of that access as to be substantially* diminished by its construction, then I conceive that the owner has, in respect of any works causing such obstruction, a right of action, if these works are unauthorized by Act of Parliament, and a title to compensation under the Railway Acts if they are constructed under statutory powers.

In this case all the evidence shows is that the suppliant, in common with all others, is cut off from one access to Prescott, by what is known as the old highway, but all other methods of access or egress to or from the village remain the same, and the Government, under the Expropriation Act, section 3, subsec. f., substituted another road in lieu thereof, so that the suppliant still has access to Prescott, although by not so convenient a road. This is an inconvenience which he suffers in common with all the other persons desiring to use that portion of the highway which is cut off. I do not think that any case can be found which, under the English law, would hold that for such an obstruction the plaintiff could himself maintain an action. I think the remedy being by indictment, it is absolutely clear, from all the authorities, that mere inconvenience of a person, or loss of trade or business, is not the subject of compensation.

It was urged that because the substituted road was constructed with a swing bridge, which, owing to the

(1) L. R. 7 H. L. 243.

1904

THE KING v. MACARTHUR.

Nesbitt J.

traffic in the canal, sometimes caused delay, that this gave rise to a claim, but I think that is answered by the circumstances, first, that this arises from the subsequent use of the canal. not from its construction, and secondly, that it is an inconvenience which the suppliant may suffer more often than others, yet it is an inconvenience common to the whole public.

The evidence makes it quite plain that the reason the witnesses said that the property was depreciated in value is because it is less convenient as it is a somewhat longer road, and parties are held by the opening of the bridge, and also because railway tracks are upon the bridge, which of course is not an item which can be considered in this case.

I do not find that any of the English authorities extend the rule to cover cases where there may be said to be a general depreciation of property because of the vicinage of a public work. And *Walker's Trustees Case* (1), which goes further than any case upon the subject, is, as I have pointed out, put upon the special grounds of the dependence of the property upon the existence of the access, so that the cutting of it off diminished its value irrespectively of any use to which it might be put. To extend the rule, which has been widely laid down in cases where damage is occasioned to a person by any public works which have been constructed by an Act of Parliament for the purposes of public improvement, so as to embrace cases where the person injured is being injured as one of the public, and not to confine it, as it has been confined, to persons whose land has been injuriously affected, as land itself would be in this country, would be to unduly hamper the prosecution of public works and the consequent development of the country.

It was never intended that where the execution of works, authorized by Acts of Parliament, sentimentally affected values in the neighbourhood, all such property

(1) 7 App. Cas. 259.

owners could have a claim for damages. In most of our large cities values are continually changing by reason of necessary public improvements made, and if, although no lands are taken, everybody owning lands in the locality could, by reason of the changed character of the neighbourhood or interference with certain convenient highways, claim compensation by reason of a supposed falling of the previous market value of property in the neighbourhood, it would render practically impossible the obtaining of such improvements. I think the property in this case is not so dependent upon the existence of the access which was so cut off as to constitute an injurious affection within the authority of the statute. I do not think that there is substantially much difference between the various Expropriation Acts which were referred to. The real question is whether or not the claimant could have maintained a cause of action at common law for damages occasioned by the obstruction. I see no real distinction between the effect which the closing up of the nine mile road south of the canal, and the opening up of the new road across the swing bridge, had upon the value of the suppliant's land, and its effect upon all the lands in the village of Cardinal, between the two canals and the point just mentioned. The suppliant's land suffered no special damage distinguishable from that which all these special lands suffered. *Mayor of Montreal* v *Drummond* (1); *Bell* v. *Corporation of Quebec* (2); *North Shore Railway Co.* v. *Pion* (3).

I would allow the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Chrysler & Bethune.*

Solicitors for the respondent: *Maclennan, Cline & Maclennan.*

(1) 1 App. Cas. 384 at p. 406. (2) 5 App. Cas. 84.
(3) 14 App. Cas. 612 at p. 624.

1904

*Mar. 16-18.
*April. 27

THE MIDLAND NAVIGATION COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE DOMINION ELEVATOR COMPANY (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Shipping—Time limit for loading—Loading at port—Custom—Obligation of charterer.

A ship, by the terms of the charter, was to load grain at Fort William before noon of December 5th.

Held, per Taschereau C.J. and Davies J., Girouard and Nesbitt JJ. dissenting, that to load at Fort William meant to load at the elevator there; that the obligation of the ship-owner was to have the vessel placed under the elevator in time to be loaded before the expiration of the time limit; and where, finding several vessels ahead of him, the captain saw that he could not be loaded by the time fixed and left to save insurance, the obligation was not fulfilled and the owner could not recover damages.

Per Killam J. The contract would have been fulfilled if the vessel had arrived at Fort William in time to load under the conditions which might be supposed to exist on arrival.

Judgment appealed from (6 Ont. L. R. 432) affirmed.

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

The question for decision on this appeal is sufficiently shown by the above head-note and the facts are set out in the judgment of Mr. Justice Davies.

Borden K.C. and *Hodgins K.C.* for the appellants. The undertaking to load within a fixed time is an absolute engagement, for non-performance of which the charterer is liable no matter what are the impediments he encounters. Scrutton on Charter Parties, 4 ed. p. 242, art. 131. *Postlethwaite* v. *Freeland* (2); *Hudson* v. *Ede* (3); *The Jeaderen* (4).

*PRESENT:—Sir Elzéar Taschereau, C. J. and Girouard, Davies, Nesbitt and Killam JJ.

(1) 6 Ont. L. R. 432.
(2) 5 App. Cas. 599.
(3) L. R. 2 Q. B. 566.
(4) [1892] P. D. 351.

The ship owner complied with the terms of the contract by sending the ship to Fort William. He was not bound to put her under the elevator. *Nelson* v. *Dahl* (1); *Tharsis Sulphur & Copper Co.* v. *Morel Brothers & Co.* (2).

The word "load" in the charter does not mean that the ship is to complete loading within the time but only that the owner must do all in his power to have her in a position to receive cargo. *Harris* v. *Best, Ryley & Co.* (3); *Grant & Co.* v. *Coverdale, Todd & Co.* (4); *Stanton* v *Austin* (5).

Aylesworth K.C. and *Moss* for the respondents. The custom of the port and the conditions so late in the year must be incorporated in the contract. *Hudson* v. *Ede* (6)

Considering the conditions the ship did not arrive ready to load at a reasonable time before the date fixed. *Ford* v. *Cotesworth* (7); *Hick* v. *Raymond & Reid* (8); Scrutton on Charter parties, 4 ed. p. 244.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed for the reasons stated by Mr. Justice Davies.

GIROUARD J. (dissenting).—I would allow the appeal. I concur in the opinion of Mr. Justice Nesbitt.

DAVIES J.—This is an action brought by the appellants, owners of the steamer Midland Queen, against the respondents, the charterers of such steamer, to recover $4,590 for loss of freight through alleged failure to load the steamer within the time specified

(1) 12 Ch. D. 568.
(2) [1891] 2 Q. B. 647.
(3) 68 L. T. 76.
(4) 9 App. Cas. 470.
(5) L. R. 7 C. P. 651.
(6) L. R. 2 Q. B. 566.
(7) L. R. 5 Q. B. 544.
(8) [1893] A. C. 22.

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Davies J.

in the charter with a cargo of grain from the elevators in Fort William. The respondents counterclaimed for $10,000 on the ground that it was the appellants who were in default as they had not complied with what the respondents claimed was their contractual duty under the charterparty of placing their steamer in a position to be loaded at the elevator within the time limit of the charter.

The learned trial judge found that the steamer had complied with her owners' contractual obligation when the vessel was at the pier in Fort William ready to load although she was unable to reach the elevators where she alone could take in her cargo. He held that the stipulation as to time was in terms unconditional, and that the steamer having reached Fort William and notified the respondents of its readiness to receive the cargo it had done all it was bound to do and the unconditional contract of the charterer at once attached. He accordingly found for the ship-owners for the full amount of his lost freight and dismissed the charterer's counterclaim.

On appeal to the Court of Appeal for Ontario the judgment was reversed mainly on the ground stated in Chief Justice Moss's reasons for judgment that the ship-owners had not complied with their contractual obligation to bring their steamer to the elevators at Fort William which must be held to be the understood place between the parties where, according to custom and usage at Fort William, the vessel was to load. That court accordingly (Mr. Justice Maclennan dissenting) dismissed the plaintiffs' claim and allowed the charterers $50 as and for nominal damages under their counterclaim. From this latter judgment the ship-owners appeal to this court.

The point on which our decision must turn is a narrow one and not absolutely free from doubt, but

after a careful examination of the numerous cases cited and much consideration of the able arguments presented at the bar, I am of the opinion that the judgment of the Court of Appeal is correct and that this appeal must be dismissed.

The contract of charter is contained in three short telegrams which passed between the agents of the parties, as to which there is, so far as the main question is concerned, no important dispute. In order that these telegrams may be understood I may premise that Playfair was the manager of the appellant company; that Read, one of the Grand Trunk Railway officials, was acting in the matter of obtaining a charter for the steamer as the agent of Playfair's company; and that Crowe, who was not connected with either the appellant or respondent company, was the secretary-treasurer of another elevator company dealing in wheat and respondents contended acted in this matter as agent for respondents. Mr. Crowe's position, however, was only important in a subsidiary view of the case which I do not find it necessary to discuss. The telegrams read as follows:

TELEGRAM—READ TO CROWE. (PART 12.)

MONTREAL, November 23.

Playfair confirms charter *Queen*, Fort William to Goderich, loading about December 2nd, weather, ice, permitting four and a half cents bush., confirm.

A. F. READ.

TELEGRAM—CROWE TO READ. (PART 13.)

Time 12.36 p.m. From Winnipeg, 23, 11, 1901.

We confirm *Midland Queen*, four and half, Goderich, load Fort William, on or before noon, fifth December.

G. R. CROWE.

LETTER—READ TO CROWE. (PART 14.)

MONTREAL, November 23.

Playfair wires confirming charter to you of steamer *Queen*, to load at Fort William before noon December 5th, to Goderich, at four and a half cents per bushel. Please say who she is to be loaded account of and to whom captain will apply for grain.

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Davies J.

The elevators at Fort William were owned and controlled by the C. P. R. Co., over which neither of the parties to this contract had any control.

The steamer Midland Queen left Midland for Fort William on the afternoon of Saturday, November 30th, and arrived there on the afternoon of Tuesday, December 3rd, being the last boat to arrive seeking a cargo that season. That left ample time to load provided the steamer had the right of way but unfortunately some eight vessels were ahead of her. She was tied up to the pier and although there is some dispute about the facts it must be held for the purposes of this appeal that her arrival was reported by her captain to the superintendent of the elevators there and to Mr. Reese, the respondents' agent on the same afternoon she arrived. The captain immediately telegraphed to his owners and informed them that there were eight boats ahead of him and that it was impossible to load before Saturday or Sunday. The steamer remained in the procession of vessels leading to the elevators until 10 o'clock on the 5th December when, the vessels ahead of her being loaded, she was ordered under the shoots or spouts of the elevators to receive her cargo. The respondents had her cargo ready in the elevators to load on the 4th December, but how long before that date is not in evidence. As it was manifest that the steamer could not then be loaded before noon of the 5th, the time limit of the contract, the captain, acting under orders from his owners whose insurance expired at noon of same day (unless the vessel had then sailed on her voyage), refused to go under the elevators and sailed for home without her cargo, leaving port in time to save her insurance.

The Court of Appeal for Ontario held, I think, rightly, that, by the true construction of the contract of charter, the vessel was to be fully loaded by the time specified,

noon on the 5th December, and not merely started loading, and that if she had in other respects complied with her contract she was not bound to wait for her load after that time. It was strongly pressed by Mr. Aylesworth that if the ship abandoned her contract on the time limit being reached and the charterer showed himself at that time ready and able to go on with the loading of a cargo which the vessel refused to receive, the ship owner could not recover his full freight but only the real and substantial damage he could show he actually sustained by any delay beyond the hour, and that at any rate he was bound to go on receiving cargo until the last minute of time. These questions, however, which go altogether to the quantum of damages recoverable, on the view I take of the case, are unnecessary to be considered. In the final analysis the questions upon which the case must turn are simply whether, to initiate liability of the charterer to load under the terms of the charter-party, the ship had performed her part of the contract when she had reached and reported herself at the port of Fort William in a reasonable time to permit of her being loaded before noon of the the 5th, and whether the named place to load in the contract must be read and considered as *the place of loading which is by the usage and custom of the port intended by the name and at which alone loading could take place.* Mr. Borden freely conceded that Fort William, mentioned in the contract as the place of loading, did not mean the harbour of that name as defined and delimited by statute or as understood geographically. He agreed that the name of the place or port mentioned in the charter party must be taken in its commercial sense which may well differ from its strict legal or geographical meaning. As Mr. Carver states it on page 644 of his book on Carriage by Sea (ed 1900):—

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Davies J.

The word "port" in the charter party must be construed by reference to the meaning commonly given to it by merchants and ship-owners. The extent of the particular port, as understood by them, is not necessarily, or ordinarily, determined by its legal definition for fiscal or like purposes or even by geographical considerations. Its extent in a commercial sense is rather shown by such considerations as the safety afforded for shipping, the convenience for loading and unloading, the usages of the place with regard to anchoring, loading and discharging, and the area over which those matters are regulated by the authorities having jurisdiction in the port.

I conceive this must necessarily be the proper rule of construction and once it is adopted, once the name of the port or harbour of loading is agreed to be a conventional one signifying not a legal place or a geographical one but one as understood by merchants and shippers determinable by considerations respecting places of loading and unloading, it leads, in my opinion, logically to the conclusion stated by Lord Esher, then Brett L.J., in the rules he formulated for the construction of charter-parties in the well known case of *Nelson* v. *Dahl* (1). Those rules are fairly summarised by the editors of the 1901 edition of Abbott on Shipping, at page 392. The first one is stated as follows:

> Lay days begin to run where a port is named in the charter-party when the ship is *at the usual place of discharge* in that port or if there is more than one usual place of discharge at that place of discharge which the charter designates.

The same rule is of course applicable to loading. But the specific language used by Lord Esher is clearer and certainly more definite. He says, page 582, speaking of a charter-party which names a port generally at which to load:

> He (the ship-owner) cannot place his ship at the disposition of the charterer so as to initiate the liability of the latter as to the loading until the ship is at the named place *or the place which is by custom considered to be intended by the name; as if a larger port be named the usual place in it at which loading ships lie.*

(1) 12 Ch. D. 568 at p. 582.

And again at page 584, in speaking of unloading the ship and the respective rights of the ship-owner and charterer, he says:

> But in the absence of his (the ship-owner's) right to place the ship only as "near to the named place as she can safely get" (and of course this refers to the ship-owner's *contractual* right as in the charter-party His Lordship was then considering) *the ship-owner's right to have the charterer's liability to unload, initiate, does not commence until the ship is in the named place.*

In other words, as I understand it, the named place if a larger port be expressed having within it a usual or customary place of loading the latter will be held to be the meaning of the contract and he must go there with his ship before he can initiate the liability of the charterer to load and he cannot excuse himself by the presence of physical difficulties such as other ships having priority of passage preventing him reaching the place, or by prohibitory orders of the port or dock authorities. The case of *Dahl* v. *Nelson, Donkin & Co.* went by way of appeal to the House of Lords (1) and the decision of the Court of Appeal was affirmed. I cite this decision in the House of Lords for the proposition that, if a ship agrees to go to a certain dock or other similar place, she does not fulfil her engagement by merely going to the gates of the docks, and the fact that she is refused admission to the docks because they are full is no excuse for the ship nor is any duty cast upon the charterer of procuring her admission.

In giving judgment, at page 42, Lord Blackburn says:

> The plaintiffs contended in the court below that by such a charter party as this the merchant undertakes to procure the ship admission into the docks. Neither the Master of the Rolls nor the judges in the Court of Appeal took this view of the charter party, and it was not much urged at your Lordship's Bar. I think it is clear that it is untenable. The legal effect of the contract, in my opinion, as far as regards the shipowner is, that he binds himself that his ship shall (unless prevented by some of the excepted perils) proceed to the dis-

(1) 6 App. Cas. 38.

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Davies J.

charging place agreed on in the charter party. That is, in this case, the *Surrey Commercial Docks* (which must, I think, mean inside the docks), with an alternative (as stated in the charter party) "or so near thereto as she may safely get and lie always afloat."

And on page 58 Lord Watson says:

The appellants maintained that there can be no impossibility within the meaning of the contract unless the vessel is stopped by an impediment which is both physical and permanent; but I greatly doubt whether, in any fair construction of the charter party, it is necessary that the obstruction should be of a purely physical character; and I also doubt whether there be any foundation in fact for the appellant's contention. The exclusion of the *Euxine* from the Surrey Docks in August, 1877, was owing to a rule made by the statutory authorities entrusted with the admiuistration and control of the dock. It is not suggested that the rule was in excess of their powers, or that it was not capable of being legally enforced. And I am opinion that an order emanating from the proper authority, which, if disregarded, would lead either to the dock gates being shut against the vessel or to her being turned summarily out of the dock if she did get into it, does in reality constitute a physical obstacle.

The decision in *Davies* v. *McVeagh* (1), as explained in *Tharsis Sulphur & Copper Co.* v. *Morel Brothers & Co.* (2), is not in conflict with this decision, and, if in conflict, must be considered as overruled.

If my construction of this contract is correct, if the ship-owner's obligation was to bring his vessel to the customary or usual place of loading at Fort William in such a reasonable time as would permit of her being loaded before the expiration of the time limit and if he failed to do so, then the reciprocal obligation on the part of the charterer never arose or attached. The evidence in this case establishes, and it was not contended otherwise, that the elevators by usage and custom are the only places in Fort William where grain can be laden aboard a vessel. There is no other place, way or method in that port at which or by which ships can be loaded. They are the only places,

(1) 4 Ex D. 265.

(2) [1891] 2 Q. B. 647.

therefore, at which the charterer undertook to do his part, and his contractual obligation does not arise unless and until the ship is ready for him there. The fact that she is prevented from getting there by the prior presence of other ships or by the action of the harbour or dock authorities does not matter. The reason which might prevent him from fulfilling his contractual duty of having his ship ready at a particular place to receive her cargo cannot impose upon the charterer an obligation which only could arise under the contract when the ship owner had the ship ready for him at that place. Here at Fort William are no series of docks or piers; here are no different methods of loading steamers; here is only one place at which and one method by which vessels can be loaded and these are at the elevators and by means of the shoots or spouts. "Loading at Fort William" can therefore have one and only one meaning and that is loading at the elevators at Fort William. These facts were well known to all the parties to the contract and there cannot, in my judgment, be any doubt of their intentions. Then, if this conclusion is correct, *cadit quaestio;* the Midland Queen, by fastening herself to the quay or pier in the long procession of boats leading to the elevators, did not fulfil her part of the charter party any more than did the vessel in the case of *Dahl* v. *Nelson, Donkin & Co.* (1) which contracted to go to the "Surrey Commercial Docks", fulfil hers by going to the entrance or mouth of the docks.

A good deal was said about the fact that the time specified in the contract being a definite one many of the cases cited having reference to lay days, etc., were inapplicable or distinguishable, and I think that is so. But the presence or absence of a time limit cannot affect the interpretation to be given to the contract so

(1) 6 App. Cas. 38.

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Davies J.

far as the place where the ship owner is bound to have his vessel ready for cargo is concerned. Once that is conceded to be the elevators and it is shown he had not his vessel there all doubt ceases and the question of time limit becomes irrelevant. The definite time mentioned throws no greater risk or duty upon the charterer in this view than upon the ship. The loading was a mutually reciprocal act to be performed by both parties. One provided the grain in the elevator ready to pour down the shoots when the hold of the vessel was placed below them, but the ship owner had to put his vessel there to receive the grain in such reasonable time as would enable her to be loaded if the grain was there already for her, and so we come back to the question with which I started, whether under the contract as construed with respect to the proved custom and usage of loading vessels at Fort William the ship was obliged to be ready to receive her cargo at the elevators a reasonable time before the expiration of the time limit so as to enable the loading to be finished in time. If so there has not been any default on the charterers' part. He had as proved the cargo all ready to load as soon as the ship was ready to receive. He is not responsible for the delay in the arrival of the steamer at the port, nor for the obstacles which after her arrival prevented her reaching the spot where alone she could load and where custom and usage determined the time and manner of her loading. Other important questions arising out of the alleged lateness of the steamer's arrival at the port and as to the question of damages which, if entitled at all to receive, she should recover, and questions as to the effect of the elevator regulations upon his contract, become unnecessary to decide and I do not touch upon them.

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Nesbitt J.

I agree with the decision of the Court of Appeal that the defendants are entitled to nominal damages on their counterclaim, and I therefore think that this appeal should be dismissed with costs.

NESBITT J. (dissenting).—This case appears to me, under the authorities, to be within a very narrow compass. I agree that the parties must be taken to have contracted with reference to the port at which the loading was to be done and its customs. I think it clear that, apart from the fixed time for loading, a reasonable time would be allowed, as in the case relied on by my brother Killam, (1) but there the point is expressly made that

there was no engagement by the freighters to load the vessel within any particular time.

Had there been such an engagement there must have been a breach of it and the freighter would have had himself to blame for contracting to perform what was impossible The fixed time would have been inconsistent with the circumstances. However, here the parties did not and could not know but that when the boat arrived she could go to the spot for loading, and the shipowner took his chances of perils of the sea, etc., and contracted she would be at Fort William in time to load, and the freighter took his chances of the interference of the elevator authorities through their rules and agreed to the fixed time for loading, an agreement which cannot possibly be given effect to unless you read into the contract words limiting the freighter's liability such as "provided the C.P.R. can give you your turn in time" or "provided the wheat you are taking is not in any elevator already engaged in loading other boats" contingencies the freighter must provide against. See Scrutton's Charter Parties,

(1) *Harris* v. *Dreesman*, 23 L. J. Ex. 210.

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Nesbitt J.

(4 ed.), p. 242; Anson on Contracts, (7 ed.), p. 323; Abbott on Shipping, (14 ed.), 372; *Good & Co.* v. *Isaacs* (1), per Kay, L. J., at page 562, where he distinguishes that case on the ground that it is not one *where the charter stipulated for a fixed time.* It seems to me clear that when the vessel arrived at Fort William she completed her part of the contract as it was impossible for her to know the spot of loading until she arrived there and received orders from the shipper after he received information from the C.P.R. This seems to me to entirely dispose of the suggestion that the vessel must go under the elevator spout in order to fulfil her contract and to be ready to take her share in the loading. There must be some definite point where, as a matter of law, the boat, at the time she leaves Midland, must be bound to go in order to fulfil her contract. That point cannot be a shifting one. It cannot be that it would fulfil her contract to report at elevator A., when her load, as a fact, was at elevator B. or C., a third of a mile or a mile away There must be some definite spot so that the vessel can legally tender herself at a definite point and say, "I have fulfilled my contract and am here ready to take my cargo," and where a court could say that she had arrived. Suppose there were fifteen or twenty elevators at Fort William, as there probably will be in the next few years, at any one of which the C.P.R. would be entitled to say to the Dominion Elevator Company, we propose having you take your load at number one or number fifteen, as the case might be, can it be suggested that a shipowner must go to each one of the twenty and tender before he can be said to have completed his right to claim loading by the shipper? This seems to be so unless the contract is held to be fulfilled by his arrival at the port of Fort William, and information to the

(1) [1892] 2 Q. B. 555.

defendant company that he is there ready to receive his orders to go whatever spot they may designate.

The Chief Justice in the Court of Appeal evidently was of opinion that the contract had to be changed by reading into it the term "at the usual place". That is not the contract and the court has no right to make a new one for the parties, and, even if so read, which "usual place" is meant?

Then, as to whether the plaintiff was bound to arrive in such time that the ship would have precedence over other ships, that she would be certain to receive her cargo before noon, I think such a construction would entirely destroy the effect of the time limit. The cases seem to be quite plain that that would be the rule where there was not a definite time for loading the cargo, but the authorities all seem to establish that, as I have pointed out above, where there is such a definite time fixed, that is an absolute contract to have the loading finished within such time, and the shipper takes the risk of any causes that he might have provided against.

I think that if the ship-owner had failed to report at Fort William at an hour which would have enabled the loading to take place, that he, in the same way, would have been responsible under the contract, although the delay might have taken place from stress of weather or anything happening to the ship, if the shipowner did not see fit to provide for such exceptions. He was bound to perform his unconditional contract to get to Fort William in time to report a sufficient length of time beforehand to enable the vessel to be loaded, and so, in the same way, the shipper, under such a specified time limit, was bound to have his grain ready to load notwithstanding it was rendered impossible by circumstances over which he had no control. I agree with the judgment of Mr.

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Nesbitt J.

Justice Maclennan on both these points. I do not think that the Dominion Elevator Act is applicable. I think the appeal should be allowed and the judgment of the trial judge restored with the variation that there is to be a reference to ascertain the difference between the expense of the return trip from Fort William to the home port, and what would have been the expense had the freight been earned by the vessel going to Goderich and thence to the home port.

KILLAM J.—This action was brought by a ship-owning company upon a contract, claimed to have been made by telegraphic communication between a Mr. Crowe, of Winnipeg, Manitoba, acting on behalf of the defendant company, and a Mr. Read, of Montreal, representing the plaintiff company, for the supplying of a cargo of grain to be carried from Fort William to Goderich by the steamer Midland Queen.

The transaction was initiated by an offer of the vessel by Read to Crowe for her last trip in the season of the year 1901. As satisfactory arrangements were not made between them Crowe turned the offer over to the defendant company and became the medium through whom the alleged contract was made. There was some contention on the part of the defence that any contract which was made was between the defendant company, through its own officials, and Crowe, as representing the plaintiff company. But it appears to me that the view taken by the courts in Ontario was correct, that in the communications Crowe was authorised to act and did act as the agent of the defendant company and formed a binding contract on its behalf with the plaintiff company.

The respective rights and liabilities of charterer and ship-owner, under a contract of this kind, were well

expressed by Brett, L.J., in *Nelson* v. *Dahl* (1). At pages 581, *et seq.*, he is reported as saying:

The first right of the ship-owner is the right of placing his ship at the disposition of the charterer so as to initiate the liability of the latter, whatever it may be, to take his part as to loading. In every case it seems to me that it is a condition precedent to such right of the ship-owner to place his ship at the disposition of the charterer for such purpose that the ship should be at the place named in the charterparty as the place whence the carrying voyage is to begin, and that the ship should be ready to load, so far as the ship's part of the operation of loading is concerned. The place so named may give a description of a larger space, in several parts of which a ship may load, as a port or dock; or it may be the description of a limited space in which the ship must be in order to load, as a particular quay, or a particular quay berth, or a particular part of a port or dock. * * * The further right of the ship-owner as to the loading is, of course, his right to insist on the liability of the charterer, whatever that may be, which attaches when and after the ship is duly placed at his disposition. The liability of the ship-owner as to the commencement of the loading depends on the particular form by which he has bound himself to place his ship at the disposition of the charterer for that purpose. He must do so "with all convenient speed," or "with all possible despatch," or "immediately, unless prevented by enumerated accidents," or "within a reasonable time," according to his agreement in each case. * * * * * * *

The primary right of the charterer as to the loading under a charterparty in ordinary terms seems to me to be that he cannot be under any liability as to loading until the ship is at the place named in the charterparty as the place whence the carrying voyage is to begin, and the ship is ready to load, and he, the charterer, has notice of both these facts; when these conditions are fulfilled the liability of the charterer begins. The extent of that liability depends on the form as to it of the charterparty. If there be no undertaking that he will load the ship at all events within a specified time, he will be bound to use reasonable diligence to do his part towards the loading according to the terms or meaning of the charterparty; that is to say, "with all possible despatch" or "with usual despatch" or "with the customary despatch of the port," or "within a reasonable time." But whenever in the charterparty it is agreed that a specified number of days shall be allowed for loading, and that it shall be lawful for the freighter to detain the vessel for that purpose a further specified time on payment of a daily sum, this constitutes a stipula-

(1) 12 Ch. D. 568.

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Killam J.

tion on the part of the freighter that he will not detain the ship for the purpose of loading beyond those two specified periods. This is the principle laid down in *Ford* v. *Cotesworth* (1). If the ship in such case is detained beyond the specified lay days, the charterer must pay demurrage or damages in the nature of demurrage, though the delay in loading has occurred from causes wholly beyond the charterer's control.

These statements of the law are fully supported by the cases to which the learned Lord Justice referred. See *Randall* v. *Lynch* (2); *Brereton* v. *Chapman* (3); *Kell* v. *Anderson* (4); *Brown* v. *Johnson* (5); *Tapscott* v. *Balfour* (6).

The principle on which the decisions were based, where the time for loading or discharging was expressly limited, was that the expression of the term implied the duty to give up the ship on its expiration. See *Randall* v. *Lynch* (2). But, as pointed out by Lord Blackburn in the House of Lords, upon appeal from the judgment in *Nelson* v. *Dahl, sub nom. Dahl* v. *Nelson, Donkin & others* (7), cases of that kind, deciding when lay days commence, have no direct bearing on a case like the present.

As stated in Abbott on Shipping (14 ed.) at p. 373.

> If a charterparty makes no express provision for the time to be allowed the merchant for loading or discharging, the law will imply that the parties intended that a reasonable time should be allowed for these operations. Questions have arisen as to whether reasonable time is to be measured by reference to the circumstances which ordinarily exist or to the actual circumstances at the time of the performance of the obligation. It is now settled that the latter is the true measure, provided that the delay complained of is attributable to causes beyond the control of the party on whom the obligation rests.

See, also, Scrutton on Charter Parties (5th ed.) p. 520; *Burmester* v. *Hodgson* (8); *Rodgers* v. *Forresters* (9);

(1) L. R. 4 Q. B. 127; 5 Q. B. 544.
(2) 2 Camp. 352; 12 East 179.
(3) 7 Bing. 559.
(4) 10 M. & W. 498.
(5) 10 M. & W. 331.
(6) L. R. 8 C. P. 46.
(7) 6 App. Cas. 38, at p. 43.
(8) 2 Camp. 488.
(9) 2 Camp. 483.

Ford v. *Cotesworth* (1); *Postlethwaite* v. *Freeland* (2); *Hulthen* v. *Stewart & Co.* (3).

In *Randall* v. *Lynch* (4), the charter party provided for discharge of the ship at the London opcks and that forty days should be allowed for unloading, loading and again unloading, to commence at the port of beginning of the voyage and to continue in London from the day ot reporting at the Customs House, with a further allowance of ten days demurrage at a stipulated price per day. On account of the crowded state of the docks the discharge was not completed until after the expiration of both the lay days and the demurrage days. It was held by Lord Ellenborough that the charterer was liable for the detention, and this view was upheld by the court *en banc.*

The case of *Rogers* v. *Forresters* (5) came on for trial subsequently before the same learned judge, when it was found that the charterparty provided merely that the freighter should be allowed the usual and customary time to unload the ship at the port of discharge. The ship entered the docks on the 25th of August and was reported the following day. On the 31st August the cargo was bonded by the defendant and he was ready to receive it if it could then be unloaded, but on account of the crowded state of the docks at the time much delay ensued. If the duty had been immediately paid, instead of the cargo being bonded, the discharge might have been made much sooner. Lord Ellenborough considered that, as it was shown that the usual and customary time to unload such a cargo was when the ship obtained a berth, by rotation, and the cargo could be discharged into the bonded warehouse, and as, though the cargo might have been landed if the duties had been immediately paid, the

(1) L. R. 4 Q. B. 127; 5 Q. B. 544.

(2) 5 App. Cas. 599.

(3) [1902] 2 K. B. 199; [1903] A. C. 389.

(4) 4 Camp. 352.

(5) 2 Camp. 415.

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Killam J.

bonding system was usual and customary, the charterer was not in fault, but that he had unloaded the ship in the usual and customary time for that purpose at the port of discharge.

This view was supported in *Ford* v. *Cotesworth* (1), and *Postlethwaite* v. *Freeeland* (2).

In the present case we have not the advantage of a formal charterparty in terms of recognized meaning. There are merely fragmentary telegrams from which to infer the various terms of the contract. In dealing with such a case we should act, I think, upon the principles stated by Lord Watson in *Dahl* v. *Nelson, Donkin and others* (3), at p. 59:

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

Here, the ship was to load at Fort William on or before noon on the 5th of December. I agree with the construction placed upon the word "load" in the courts below, that the loading was to be completed, and not merely commenced, by the hour named.

On behalf of the plaintiff company it is argued that, on account of the limit of time stipulated for, the only

(1) L. R. 4 Q. B. 127; 5 Q. B. 544.
(2) 5 App. Cas. 599.
(3) 6 App. Cas. 38.

liability of the ship owner was to have the ship at the port of Fort William and notice thereof given to the representatives of the defendant company at that place. It is quite incorrect to speak of this as a case of an engagement to load "within" a fixed time. The end, but not the beginning, of the period is fixed. It is evident that something more must be implied in such a contract. It must be admitted that the ship should have arrived in sufficient time to enable the shipper to load her by the stipulated hour. And the real question is whether the shipper was to be ready, at all events and under any circumstances which might be found to exist at the time, to load the ship immediately upon notice of her arrival, and within the time which would be necessarily occupied by the act of loading only; or whether the ship should have arrived in time to reach the particular loading place where she could receive her cargo and be there loaded, notwithstanding delays due to the crowded state of the dock.

Where a contract requires a ship to go to a particular port for loading, the ship must proceed to the usual place of loading in that port, though, in general, not necessarily to the particular berth or spot where the loading is to be actually carried on. *Brereton* v. *Chapman* (1); *Kell* v. *Anderson* (2); *Nelson* v. *Dahl* (3).

The view taken by the Court of Appeal was that, having reference to the state of affairs and the ordinary course of business at Fort William, the ship would not be at the place of loading to which it was the duty of the ship owner to take her until she arrived at the very elevator and under the very spout or spouts from which the grain was to be placed in her. It does not appear to me that, having regard to the authorities upon contracts of this kind, this duty was thrown

(1) 7 Bing. 559.
(2) 10 M. & W. 498.
(3) 12 Ch. D. 568 at p. 582.

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Killam J.

absolutely upon the ship-owner. The ship arrrived at the port of Fort William on the afternoon of the 3rd December. She proceeded to the only dock or wharf in the port and was there tied up. It appears to me that she had then reached the place of loading, within the meaning of the authorities, as distinguishable from the particular berth or spot at which she was to load. But, on the other hand, I do not think that the ship owner's duty was fulfilled by placing the ship in that position in sufficient time only to enable the shipper to have her taken at once, irrespective of the circumstances found to exist, to the particular spot for loading and have her filled on or before noon of the 5th December. If there had been but one elevator or one berth or spot in the port at which the ship could be loaded, probably the view taken by the Court of Appeal would be the correct one; but there were three elevators, to any one of which the ship might be assigned for loading.

The only practicable method of loading the ship, and the only one in the contemplation of the parties, was by discharging the grain through spouts from the elevators. The number and positions of the elevators were in the knowledge of both parties when the contract was made. It was usual, at the time of year, to find the dock crowded with vessels, and both shippers and shipowners striving to get out as many cargoes as possible before the close of the season. This, also, was within the knowledge of the parties. The elevators at the port were owned and controlled by the Canadian Pacific Railway Company. Under the regulations of that company, each ship seeking to be loaded at one of the elevators was obliged to take its turn in order of arrival at the dock No exception to this rule was admitted, except in the case of vessels known as "liners", to which class the plaintiff's vessel did not

belong. This rule, also, was well known to both the parties. It appears to me that, under such circumstances, it is unreasonable to imply that the shippers agreed, or intended to agree, or would have agreed, to have the ship loaded immediately upon her arrival, irrespective of the number of ships awaiting cargoes.

It does not appears that, when the telegrams constituting the contract were exchanged, the officers of the defendant company were aware of the exact position of the Midland Queen, or at what time it was possible for her to be at Fort William in readiness to receive the cargo contracted for. In one of the preliminary telegrams from Mr. Read to Mr. Crowe, Read offered the ship to be "loading about December 2nd". In a letter of the same date, written by the manager of the plaintiff company from Midland, Ontario, to Mr. Crowe, it was stated that the ship had left Midland on the previous day and was going right back there, and that if all should go well the ship should be at Fort William to load about the 1st of the month. This letter is not clearly shewn to have been communicated to the defendant company before the alleged breach of contract on the 5th December, and certainly its contents were not within defendant company's knowledge when the telegrams passed. However, even that letter did not say where the ship was going at the time, and it appears from it that, in the view of the plaintiff company's manager, it was expected that she could reach Fort William by the 1st December. Thus, there was nothing in the circumstances to lead the defendant company to believe, when the telegrams passed, that the situation of the ship was such that she could not reach Fort William sufficiently soon to allow of a reasonable time for any delay due to the crowded state of the dock. The offer of her to be "loading

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Killam J.

about December 2nd" was calculated to suggest the contrary.

The decision which appears to come nearest to the present case was that in *Harris* v. *Dreesman*. (1) In that case, it was shewn that the master of a vessel had agreed to proceed to a particular colliery and take on board a cargo of coal. Before the charterparty was signed both parties knew that the colliery was not at work, an accident having happened to a steam-engine, and both were told that the engine would be repaired in a short time, and that the vessel would be loaded in her turn within a few days after the colliery got to work again, which was expected to be in the middle of the next week. Work was not resumed at the colliery as soon as the colliery agents had estimated would be the case. The result was delay in the loading of the ship. The shipper had no control over the colliery. It was held that the shipper was entitled to a reasonable allowance of time for the steam-engine to be repaired and the colliery got to work, and that, if the vessel was loaded within a reasonable time thereafter, the shippers were not liable, but that they would be liable for any greater delay than could be reasonably expected for the repair of the engine and the starting of work at the colliery.

When the Midland Queen arrived at Fort William eight vessels were in advance of her awaiting cargoes. These were loaded with expedition, each vessel moving up towards the elevators as one made room for her. The result was that the vessel immediately in advance of the Midland Queen completed her loading at the elevator nearest the mouth of the port on the morning of the 5th December, too late to admit of any considerable cargo being placed upon the Midland Queen before noon of that day. The Midland Queen was then at a

(1) 23 L. J. Ex. 210.

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Killam J.

distance of about 100 feet from the nearest elevator, in which, however, there was only a small quantity of grain left. At the next elevator another ship was receiving her cargo, and room would shortly have been made there for the Midland Queen after taking in the grain that was left in the first elevator. This state of affairs was not unusual at that time of year. It was a state of affairs that should reasonably have been contemplated by the parties. There does not seem to have been any delay on the part of any one, plaintiff, defendant or railway company, from the time of the arrival of the Midland Queen at Fort William until room was made for her at the first elevator. The defendant company sought to induce the officials of the railway company to load the Midland Queen in advance of her turn, but was unable to do so.

Upon some evidence given by Mr. Crowe as to the understood practice in the grain trade, it was contended that the shipper had the option, under the contract, to load at Fort William or to send the ship to a certain elevator at Port Arthur, which was another port near by, to be loaded; and it was argued that it was the duty of the shipper to do this if a load could not be furnished at Fort William in sufficient time to insure the fulfilment of the contract. No reliance seems to have been placed upon this evidence in the courts below, as sufficiently indicating a practice binding upon the parties. The action of the master of the ship and the defendant company and their Fort William agent seems to indicate that none of them contemplated this course as being open, except by fresh agreement. It appears to me that this element should not be taken into consideration in this case.

In my opinion, it was a condition precedent to the liability of the defendant company to procure the Midland Queen to be loaded on or before noon of the

1904

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Killam J.

5th December, that she should arrive at Fort William in reasonable time to allow this to be done, having reference to the state of affairs which the parties should reasonably have expected to exist upon her arrival. The circumstances that did exist in the present case were only such as were usual at that season, and such as the parties must naturally have comtemplated as likely to exist. In *Postlethwaite* v. *Freeland* (1), Lord Selborne L.C. said:

> Difficult questions may someties arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence, ought (I think) to be taken into consideration.

As the ship was in default in not arriving in reasonable time to obtain her load by the stipulated hour of the 5th December, and again in departing unloaded without sufficient excuse, it appears to me that the Court of Appeal was justified in reversing the judgment for the plaintiff company, and in holding it liable for breach of contract. Upon the grounds stated in the Court of Appeal, I agree that substantial damages should not have been allowed. I would dismiss the appeals with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McMurrich, Hodgins & McMurrich.*

Solicitors for the respondents: *Barwick, Aylesworth, Wright & Moss.*

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(1) 5 App. Cas. 599.

THE ATTORNEY-GENERAL FOR QUEBEC (INTERVENANT)..... } APPELLANT;

1904
*March 30.
*April 27.

AND

THE CITY OF HULL (PLAINTIFF)..... APPELLANT;

AND

JANET LOUISA SCOTT AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

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

Title to lands—Grant from Crown—Description—Navigable waters—Floatable streams—Inlet of navigable river—Implied reservation—Crown domain—Public law—Construction of deed—Evidence—Estoppel—Waiver.

By the law of the Province of Quebec, as well as by the law of England, no waters can be deemed navigable unless they are actually capable of being navigated.

An arm or inlet of a navigable river cannot be assumed to be either navigable or floatable, in consequence of its connection with the navigable stream, unless it be itself navigable or floatable as a matter of fact.

The land in dispute forms part of the bed of a stream, called the Brewery Creek, which was originally a narrow inlet from the Ottawa River (dry during the summer time in certain parts), the waters of which passed over certain lots shown on the survey of the Township of Hull and granted by description according to that survey to the defendants' *auteur*, in 1806, without any reservation by the Crown of those portions over which the waters of the creek flowed. Under that grant, the grantee and his representatives have, ever since, without interference on the part of the Crown, had possession of the lands on both sides fo the creek and of the creek itself. The erection, during recent years, of public works in the Ottawa River has caused its waters to overflow into the creek to a considerable extent at all seasons

*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

1904

ATTORNEY-GENERAL AND CITY OF HULL v. SCOTT.

of the year. In 1902, the City of Hull obtained a grant by letters patent from the Province of Quebec of a portion of the bed of the creek, as constituting part of the Crown domain, and brought the present action, *au pétitoire*, for a declaration of title, the Attorney-General intervening for the province as warrantor.

Held, affirming the judgment appealed from, (see Q. R. 24 S. C. 59) :—

1. That, as the Brewery Creek was neither navigable nor floatable in its natural state, the subsequent overflow of the waters of the Ottawa River into it could not have the effect of altering the natural character of the creek.
2. That, as there was no reservation of the lands covered with water in the original grant by the Crown, in 1806, the bed of the creek passed to the grantee as part of the property therein described, whether the waters of the creek were floatable or not.
3. That the uninterrupted possession of the bed of the creek by the grantee and his representatives from the time of the grant with the assent of the Crown was evidence of the intention of the Crown to make an unqualified conveyance of all the lands and lands covered with water situated within the limits designated in the grant of 1806.

APPEALS by the plaintiff and the intervenant from a judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Ottawa, (Curran J.) (1) by which the action and the intervention were dismissed with costs.

The action was brought by the City of Hull to recover possession from the defendants of a portion of the bed of Brewery Creek, an arm or inlet of the Ottawa River, claimed under grant from the Crown in the right of the Province of Quebec, dated on the 2nd of April, 1902. The Attorney-General for the Province of Quebec intervened in the suit for the purpose of maintaining that this grant to the city had been validly made the lands granted forming part of the public domain as being a portion of the bed of a navigable or floatable stream.

The defendants claimed the bed of the creek under title from the late Philemon Wright to whom letters

(1) Q. R. 24 S. C. 59.

patent issued on the 3rd of January, 1806, granting to him, together with other lands, the lands on both sides of the creek, described by metes and bounds according to the original survey of the Township of Hull, reserving therefrom merely the mines of gold and silver therein and power to make and use roads, ways and passages over said lands and to take stop, divert, and use all such rivers, streams, ponds and bodies of water as might be necessary for working and improving said mines, the said defendants and their *auteurs* having been in possession of the property in dispute as owners, under such title, ever since the date of the last mentioned grant.

The creek in question, as it existed at the time of the grant, in 1806 and for many years afterwards, was a narrow inlet from the Ottawa River which ran dry, in many parts, during the summer, but during recent years the erection of dams and other improvements in the Ottawa River has caused an overflow of its waters into the creek to a considerable extent at all seasons of the year. By the judgment of the Superior Court, (Curran J.) (1) the plaintiff's action and the intervention of the Attorney-General were both dismissed with costs. The present appeals are asserted against the judgments of the Court of King's Bench, appeal side, on appeals taken respectively, by the plaintiff and the intervenant, unanimously affirming the judgments rendered in the trial court.

Cannon K. C. Assistant-Attorney-General for the Province of Quebec, for the intervenant, appellant. The creek in question retains the character of the navigable stream of which it forms a part. Consequently, its bed never passed to Philemon Wright or his representatives in the absence of specific conveyance by apt words in the grant of 1806. The bed of

(1) Q. R. 24 S. C. 59.

1902

ATTORNEY GENERAL AND CITY OF HULL v. SCOTT

the creek continued to form part of the Crown domain up to the date of the grant in 1902. The Crown was, at that date, still seized of the bed of Brewery Creek, in the right of the Province of Quebec, (art. 400 C.C.,) and the grant then made was valid and effectual to pass the title to the City of Hull. The adverse possession of the defendants and their *auteurs* cannot avail against the Crown. Art. 2213 C.C. The Crown was not a party to any of the deeds, suits or proceedings heretofore made or taken in regard to the titles under which the defendants claim; therefore, there can be neither *chose jugée*, waiver nor estoppel to operate as against the Crown. Art. 1241 C.C.; Pothier "Obligations" No. 895; Fuzier-Herman, Code Civ. Ann. art. 1351, nos. 1164-1173.

The Ottawa River has been declared navigable on many occasions, notably in the recent case of *Hurdman* v. *Thompson* (1) which affected that stream at the very point where its waters flow into Brewery Creek. We refer to the authorities cited in that case and also to 1 Daviel, "Cours d'Eau" (ed. 1845) nos. 40, 41; 3 Proudhon, "Domaine Public" no. 758; 1 Gaudry, "Domaine" p. 119; Troplong "Vente" No. 332; Pothier "Vente" No. 251; Duranton "Vente" No. 235; Dalloz Rep. *vo.* Vente, Nos. 720, 723; Lafontaine, "Questions Seigneuriales", 358*b*, No. 307.

Crown grants must be construed strictly and against the grantees; 6 Encyc. Laws of England, *vo.* "Grant," pp. 88, 89; 1 Stephen's Commentaries (13 ed.) p. 358.

Foran K.C., for the plaintiff, appellant, referred to 21 Am. & Eng. Encycl. of Law (2 ed.) *vo.* "Navigable Waters;" 6 Dalloz, Rep Supp. *vo.* "Eaux." Nos. 52, 60; Merlin, *vo.* "Rivière, sec. I No. III.; 1 Garnier, "Régime des Eaux," No. 65; 2 Daviel, No. 554; 3 Proudhon, pp. 53-60; Fuzier-Herman, Code Civ. Ann.

(1) Q. R. 4 Q. B. 409.

art. 538, nos. 167, 168; id. Supp. art. 538, nos. 243 *et seq.*, 258 *et seq.*; 22 Pand. Fr. "Cours d'Eau," nos. 37, 38, 39; 18 Fuzier-Herman, Rep. *vo.* "Domaine Public et de l'Etat," nos. 136, 324; 3 Aubry & Rau, p. 76 note.

It should not be forgotten that this Brewery Creek is not a despicable stream of water, and that it would put to shame many historical rivers. Several scientific witnesses tell us that its waters would develop over 860 horse-power besides supplying about 700,000 gallons of water daily to the 14,000 inhabitants of Hull City. Its width varies from 130 feet to 600 feet; its surface velocity is 155 feet per minute. Men and horses have been drowned in it. Several bridges, each several hundred feet long, span its bosom. Except for these bridges citizens dwelling on opposite banks could not communicate with each other unless they used boats.

In England, no stream is navigable which does not feel the effects of the tide. There, the Ottawa, the St. Maurice, the Ohio, the Missouri, would not be deemed navigable. This expains such decisions as *Earl of Ilchester* v. *Raishleigh* (1). The decision in *The Queen* v. *Robertson* (2), (at p. 119) has little weight, because the stream in question there was, undoubtedly, neither navigable nor floatable and its bed belonged to the riparian proprietors. There, also, the grant was of an immense stretch of territory, while, in this case, the metes and bounds of the land granted as lot three in the third range of Hull are particularly described. The remarks of Cockburn C.J. in *Marshall* v. *Ulleswater Steam Navigation Co.* (3) quoted at page 119 of the *Robertson Case* (2), refer to private streams, and not to public, navigable waters. The remarks of Strong C.J. at pages 517, 519 and 521 of the *Fisheries Case* (4), refer to non-navigable waters; and the ques-

(1) 61 L. T. 477.
(2) 6 Can. S. C. R. 52.
(3) 3 B. & S. 732; 6 B. & S. 570.
(4) 26 Can. S. C. R. 444.

1904

ATTORNEY GENERAL AND CITY OF HULL v. SCOTT.

tion treated at pages 562 and 563 by Girouard J. is whether or not the Dominion or the province is the owner of the beds of our rivers. This also was the question raised in *The Queen* v. *Moss* (1), and there is not one word in the judgment of the Privy Council in the *Fisheries Case* (3) which is at all germane to the issues here.

The long possession invoked by the respondents can have no effect as against the Crown.

Our codifiers refer to none but French authorities under art. 2213 C. C. In fact our writers call the imprescriptibility of Crown lands a privilege enjoyed by the lands and governed, of course, by the same law as governs the ownership of the latter. Against the decision of *Chad* v. *Tilsed* (3), we would quote *L'Etat* v. *Cie. des Forges d'Audincaut*, a decision of the Court of Appeal at Besançon, reported in Dalloz, Rec. Per. (1890), part 2, p. 29; Fuzier-Herman, Code Civ. Ann. Supp. art. 538, no. 258.

As to the use of the word "rivers," in the grant of 1806, where a reserve for the purpose of working gold or silver mines is expressed, we answer that associated words take their colour from each other, that is, the more general is restricted to a sense analagous to the less general. See Merlin, Rep. *vo.* "Majorat" sec. v.; *Barthel* v. *Scotten* (4). The use of the word in such a vague and general manner cannot be held to refer to navigable and floatable streams, but should be confined to such bodies of inland waters as are neither floatable nor navigable. Moreover, if Brewery Creek is included, the Gatineau River likewise formed part of that grant, for we find that the waters of that mighty stream, which flows diagonally through the township, divides

(1) 26 Can. S. C. R. 322.
(2) 26 Can. S. C. R. 444.
(3) 2 Brod. & B. 403.
(4) 24 Can. S. C. R. 367.

many of the lots, leaving a part on either shore—lot one in the fourth range, for instance. It may, moreover, be remarked, that the word "rivers" is not to be found in the granting clauses of the letters-patent of 1806.

Aylen K.C. for the respondents. "Brigham" or "Brewery Creek," the subject of dispute appears to have been, when the Township of Hull was erected and the grant made to the late Philemon Wright, in 1806, a very small stream. Starting from the Ottawa River on lot 3 in the third range of the Township of Hull, it flowed through lot 3 in the third range and again reached the Ottawa River at lot one (1) in the fourth range. Before the dams and improvements were constructed, some 25 years ago, in the Ottawa River east of the mouth of the creek, there was in this creek, in ordinary high water, about six inches, or somewhat more, of water. At the mouth of the creek, in those days, there was a bed of boulders which were higher than the ordinary high water, but which were flooded to a considerable extent in extreme high water. A stone bridge on the road leading from Hull to Aylmer crossed this creek a short distance north of the north shore of the Ottawa River, and the boulders seem to have extended south of this bridge pretty much over all the eastern portion of lot 316 of ward one, and the western portion of lot 323 of ward two, as shown on the official plan of the City of Hull, filed of record. Previous to the construction of the improvements in the Ottawa River, that part of the creek north of this bridge was supplied with water by two or three small rivulets which flowed through the boulders, to which reference has just been made. The evidence shews that, until the erection of the improvements in question in the Ottawa River this area, so covered with

1904

ATTORNEY GENERAL AND CITY OF HULL v. SCOTT.

boulders and through which the rivulets flowed, could be crossed on foot without difficulty in ordinary high water. The rivulets were not of sufficient extent to prevent a person crossing this area on foot. The evidence further establishes that before the time of such improvements, on more than one occasion within the memory of the witnesses that were examined, this creek was entirely dry, and that any part of that portion claimed by the present action could be crossed on foot without difficulty. The evidence also shews that, before the construction of the improvements, the creek was chiefly used by farmers for the purpose of watering their horses while going to and coming from market and that, after the spring freshets had passed, a man could jump in most places across the creek where so used.

Some 25 years ago, extensive improvements were made in the Ottawa River in connection with the mills at "Chaudiere Falls" and the lumbermen and riparian proprietors, east of Brewery Creek, extended dams from the north shore of the Ottawa River to the south shore and by this means raised the level of the water in the Ottawa River, and, as a consequence, in Brewery Creek, to the extent of between 4 and 4½ feet. The result of such improvements, as far as Brewery Creek is concerned, is that there is presently, in ordinary stages of the water, about 4 feet 6 inches of water more than there was before the improvements in question were made. This increase of water has, of course, greatly widened the bed of the creek immediately north of the bridge on the Aylmer Road and, to secure water to operate an axe factory, the creek was dammed at Brewery Bridge (close to the *locus* in dispute) with stop-logs to regulate the depth of water on the south side of Brewery Bridge and between Brewery Bridge and the Ottawa River. By this means suffi-

cient water-power was maintained for the operation of the axe factory on the property purchased by the City of Hull. This channel has been, during the last 25 years, greatly enlarged and deepened enabling a larger volume of water to enter Brewery Creek. It will be necessary to bear in mind this change in the depth of water in Brewery Creek secured in the manner above explained.

It must be conceded that, in 1806, His late Majesty, George III, had as much right to grant the bed of Brewery Creek to the late Philemon Wright, as His Majesty, Edward VII., had to grant similar properties, in 1902, to the City of Hull. The respondents further submit that the bed of Brewery Creek was granted in more express terms to the late Philemon Wright in 1806, than the Province of Quebec assumed to grant it to the City of Hull, in 1902.

The decision of Mr. Justice Malhiot in *Thompson* v. *Hurdman* (1) at pages 246 and 248, properly construed, is in favour of the contention of the respondents. In the present case, moreover, it has been found as a fact by the judgments under appeal that the Crown had acquiesced for nearly a century in the construction given to the grant of 1806 by the late Philemon Wright, his heirs and those holding from and through them, and in their possession in conformity therewith during such period. In addition to this acquiescence the numerous unconditional and unrestricted admissions of the Crown contained in the public records and in subsequent grants further establish that such interpretation of the grant of 1806 was correct.

This little creek flowing from the navigable river and returning to it again can not be properly referred to as an arm or branch of the river. To be properly

(1) Q. R. 4 S. C. 219.

1904

ATTORNEY GENERAL AND CITY OF HULL v. SCOTT.

described as an arm or branch of a navigable river such a stream must in the first place be included within the extreme banks of the river as generally recognized, and it must, in the second place, be of considerable dimensions and either navigable or floatable itself, as a matter fact. *Glover* v. *Powell* (1); *The King* v. *Montague* (2) per Bayley J. at page 602; *Mayor of Lynn* v. *Turner* (3) per Mansfield C. J.; *Rowe* v. *Granite Bridge Corporation* (4) per Shaw, C. J. at page 347; 2 Am. & Eng. Encycl. of Law, p. 827, *vo.* "Arm of the Sea"; 21 Am. & Eng. Encycl. p 428, *vo* "Navigable Waters." See also Dalloz *vo.* "Eaux" No. 61; *Bell* v. *The Corporation of Quebec* (5), per Dorion C. J. at pages 108 and 109; and at pages 91-94 of the report in the Privy Council (6).

The title to the bed of the creek actually passed to the late Philemon Wright under the grant of 1806, even if the said creek were proved to have been then navigable or regarded as part of a public river. No more express grant could possibly be made of it than that contained in the description of lot 3 and the other terms of the grant of 1806, which must be construed according to the usual meaning of the words therein contained, and, no reservation being made, the grantor must be presumed to grant all that he could grant within the area described. *Lord* v. *Commissioners for the City of Sydney* (7) at pages 497, 498 and 499; *The Queen* v. *Robertson* (8), at pages 95, 96, 97, 98, 127, 128; Broom's Legal Maxims (7 ed.) p. 401.

It is submitted that where rivers are navigable in parts and non-navigable in parts, only those portions thereof which are actually and profitably navigable should be regarded and treated as navigable rivers,

(1) 10 N. J. Eq. 211.
(2) 4 B. & C 598.
(3) 1 Cowp. 86.
(4) 21 Pick. 344.
(5) 7 Q. L R. 103.
(6) 5 App Cas. 84.
(7) 12 Moo. P. C. 473.
(8) 6 Can. S. C. R. 52.

especially as regards the riparian owners. *The Queen* v. *Robertson* (1), per Strong J. at page 130; *United States* v. *The Rio Grande Dam & Irrigation Co.* (2). Even in navigable parts of rivers and lakes, the riparian rights of a person owning lands bounded by such rivers or lakes, extend to the point of practical navigation. *Illinois Central Railway Co.* v. *The State of Illinois* (3), at pages 436 and 445–447.

At any rate, the right to use the water flowing over the bed of Brewery Creek passed to the late Philemon Wright as an accessory of the lands over which it flowed. The rights of the riparian proprietor either to the use of the water or of the land over which it flows cannot depend on the place from which the water comes. Art. 414 C. C.; remarks by Cockburn C.J. as cited in *Robertson Case* (1), at page 119; *The Fisheries Case* (4); *The Queen* v. *Moss* (5).

The City of Hull, in 1901, instituted an action against respondents' immediate *auteur*, Nancy Louisa Wright, claiming one-half of Brewery Creek within the area in question in this case, under a title which was traced back to the grant of 1806. Three courts decided against the City of Hull in that case and ordered a *bornage* according to the respective rights of the City of Hull and respondents' *auteur* and, this being a real action, the judgments referred to are conclusive and binding upon the Crown as well as the City of Hull, and constitute *res judicata* both as to what constitutes Brewery Creek and as to the extent of the rights of the parties therein. Art. 1241 C. C.; Pothier "Obligations," Nos. 894, 895 and 896; Dalloz, Supp art. 1351; Nos. 9180, 9184, 9185. The City of Hull in electing to prosecute that suit, after it obtained

(1) 6 Can. S. C. R. 52.
(2) 174 U. S. R. 690.
(3) 146 U. S. R. 387.
(4) 26 Can. S. C. R. 444; [1898] A. C. 700.
(5) 26 Can. S. C. R. 322.

1904

ATTORNEY GENERAL AND CITY OF HULL v. SCOTT.

the grant of 1902, is now barred and estopped from invoking the benefit of the grant of 1902.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—It could not but be conceded by the appellants that if, as found by the two courts below, Brewery Creek, the watercourse in question, is neither navigable nor floatable, they are out of court. For, in that case, it unquestionably formed part of the grant to Philemon Wright, in 1806, and, consequently, the letters patent of 1902 conveyed no title to the City of Hull. *The Massawippi Valley Railway Co.* v. *Reed* (1).

Now the evidence is overwhelmingly in support of the findings appealed from. No one, before the appellants, has ever seriously contended that such a small stream, across which a child could throw a stone, and which, before the works that have been erected in the Ottawa River in the interest of the lumber trade, could have been crossed on foot and was even dry in certain places during part of the summer, is, as a matter of fact, a navigable or floatable river.

The appellants' alternative contention, rejected by all the judges in the courts below, that though not navigable in fact this creek, being an arm of the Ottawa River itself a navigable river, it is therefore to be considered, in law, as being a navigable stream, cannot prevail. By the law of the Province of Quebec, as well as by the law of England, a river is not deemed to be navigable unless it is actually capable of navigation. *The King* v. *Montague* (2); *Mayor of Lynn* v. *Turner* (3); *Bell* v. *City of Quebec*, (4) affirmed in the Privy Council (5); *Rowe* v. *Granite Bridge Corporation*

(1) 33 Can. S. C. R. 457.
(2) 4 B. & C. 598.
(3) 1 Cowp. 86.
(4) 7 Q. L. R. 103.
(5) 5 App. Cas. 84.

(1) ; *Adams* v. *Pease* (2) ; *Glover* v. *Powell* (3) ; *Hubbard* v. *Hubbard* (4) ; *Healy* v. *Joliette and Chicago Railroad Co.* (5) ; *The Robert W. Parsons* (6).

This is a question of public law (7) and the opinions of the modern text writers, upon whom the appellants rely on this part of their case, are based upon ordinances and decrees of the executive authority which are not in force in the Province of Quebec. Daviel, Vol. 1, Nos. 40-41 ; Plocque, Législ. des Eaux, Vol. 2, No. 7 ; S. V. 1850, 2,617 ; Guyot, Rep. v. Rivière.

I would further be of opinion, with the Superior Court and the majority of the Court of Appeal, that whether this creek is floatable or not the letters patent of 1806 included the bed of it as part of the land within the limits of the lot granted to Wright. To read out of these letters patent the bed of this creek is to find therein a reservation thereof which the Crown did not make and must be held not to have intended to make by the very fact that it did not make it, and left Wright and his representatives in possession for nearly one hundred years, under the authority of these letters patent. The grant to Wright without reservation, is an express grant of every inch contained in the lots granted, covered with water or not. If it had been intended to exclude out of it this Brewery Creek, the land granted would have been described as bounded by the banks of the said creek on each side of it, For, if it is floatable, its banks are part of the public domain ; art. 400 C. C.

The appellants' quotations from Troplong and Pothier in support of the proposition that

dans la mesure de la contenance il ne faut pas confondre les chemins publics et les rivières navigables qui traversent ou bordent le

(1) 21 Pick. 344.
(2) 2 Conn. 481.
(3) 10 N. J. Eq. 211 at p. 223.
(4) 8 N. Y. 196.
(5) 116 U. S. R. 191.
(6) 191 U. S. R. 17.
(7) Domat. dr. public, liv. 1er., tit. 3. secs. 1 *et seq.* ; art. 399 C.C.

1904

ATTORNEY GENERAL AND CITY OF HULL v. SCOTT.

The Chief Justice.

fonds vendu, ni les bords de la mer qui viennent les joindre ; car toutes ces choses fai-ant partie du domaine public, sont évidemment placées en dehors des stipulations des parties à moins de conventions contraires,

have no application whatever. Of course if A sells to B say 100 acres of land to be taken out of a larger extent of territory belonging to A, B is intitled to 100 acres of land that previously belonged to A and A must be held to have sold only what belonged to him. That is all that these commentators say. But they do not say, and could not have said, that if A sells to B all the land he owns within described limits, every inch of the land that belongs to A within these limits does not pass to B.

I would dismiss the two appeals with costs.

Appeals dismissed with costs.

Solicitors for the appellant, the Attorney-General for Quebec : *L. J. Cannon.*

Solicitors for the appellant, The City of Hull : *Foran & Champagne.*

Solicitors for the respondents : *Aylen & Duclos.*

THE CITY OF HULL (PLAINTIFF).....APPELLANT;

AND

JANET LOUISA SCOTT AND OTHERS (DEFENDANTS) .....
AND
MORLEY P. WALTERS AND OTHERS (MIS EN CAUSE) ..... } RESPONDENTS.

1904
*March 30.
April 27.

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

Appeal—Jurisdiction — Petitory action — Bornage — Surveyor's report— Costs—Order as to location of boundary line—Execution of judgment.

Where, in an action *au pétitoire* and *en bornage*, the question as to title has been finally settled, a subsequent order defining the manner in which the boundary line between the respective properties shall be established is not appealable to the Supreme Court of Canada. *Cully* v. *Ferdais* (30 Can. S. C. R. 330) followed.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, pronounced on the 25th of November, 1903, affirming the judgment of the Superior Court, District of Ottawa (Archibald J.) by which a motion, on behalf of the respondents, to have a surveyor's report as to a boundary line varied in part and homologated was allowed, and a motion, on behalf of the appellant, to have the report rejected in part and a different boundary line established was dismissed.

The action *au petitoire* was instituted, in 1901, by the appellant for a declaration of its title to lands adjoining and lying in the bed of Brewery Creek, in the City of Hull, and for a *bornage* between said lands and the adjoining lands of the late Nancy Louisa

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

1904

CITY OF HULL v. SCOTT AND WALTERS.

Wright, (respondents' *auteur*) and also for an injunction to restrain the *mis en cause* from the construction of certain buildings and improvements upon the *locus in quo*. An interim injunction was granted, as prayed, by Lavergne J. and, on the commencement of other constructions at the point in dispute by the city, an injunction was also applied for by the respondents. Upon the hearing on the merits the interim injunction was dissolved and the respondents' application for an injunction maintained for costs only, the judgment on the merits deciding the question of the title in favour of the respondents. This judgment also ordered a *bornage* according to the lines defined and recognized by the said judgments, the question of costs being reserved. The Court of Review, at Montreal, affirmed these judgments and, on further appeal, the Supreme Court of Canada on 26th May, 1902, affirmed the decisions of the said courts with an addition to the *motifs* as well as to the *dispositif* of the judgment of the Superior Court (Archibald J.) of the 30th of November, 1901, to the effect that the present respondents, who were also defendants in that action, had, furthermore, "acquired the ownership of lot No. 95, (including the *locus in quo*) by the thirty years prescription."

Subsequently, a provincial land surveyor, appointed by the court, made a survey *in situ* of the properties in dispute and reported his proceedings to the court suggesting a boundary line. Thereupon, the respondents moved to reject portions of the surveyor's report as being inconsistent with his instructions for the location of the boundary and the findings in the judgments in respect to the title and, also, to have the report varied and the boundary line located in accordance with the judgments. The present appellant also moved to reject the line suggested in the report and to

have another boundary line adopted. On a re-inscription before Mr Justice Archibald, for the hearing of these motions and upon the issues as to costs which had been reserved, the appellant's motion was dismissed, the respondents' motion was maintained and it was ordered that the boundary line should be located as set out in detail in the judgment pursuant to the former judgments. This latter judgment also adjudicated finally as to the costs in respect to the injunctions and the principal action. On appeal, the judgment of Mr. Justice Archibald was affirmed by the Court of King's Bench and the City of Hull now asserts the present appeal.

Aylen K.C. for the motion. The chief question at issue is in respect to the adjudication as to costs and, consequently, no appeal can lie. *Moir* v. *Village of Huntington* (1); *Schloman* v. *Dowker* (2); *McKay* v. *Township of Hinchinbrooke* (3). The other question at issue is simply as to the location of the boundary which had been finally settled by the judgments on the principal action, affirmed by this court on 26th May, 1902. There cannot be any appeal from the present judgment which is merely an order in execution of the former judgment of the court. *Cully* v. *Ferdais* (4).

Foran K.C. contra. The present appeal calls in question the title to all the land lying upon either side of the proposed location of the boundary line which may be claimed or held by either party. There can not be *chose jugée* on this point by the former judgment; it was not *in simili materiâ* and could not and did not make any final disposition as to the boundary line; that has been done now for the first

(1) 19 Can. S. C. R. 363.
(2) 30 Can. S. C. R. 323.
(3) 24 Can. S. C. R. 55.
(4) 30 Can. S. C. R. 330.

1904

CITY OF HULL v. SCOTT AND WALTERS.

time by the judgment appealed from. In the case of *Cully* v. *Ferdais* (1) the question was as to a servitude only, a right of way which had to be localized, therefore, that case does not apply. We rely upon the decisions in *Chamberland* v. *Fortier* (2); *McGoey* v. *Leamy* (3); and *Stuart* v. *Mott* (4). We also refer to 20 Laurent, no. 29; 3 Garconnais (1 ed.) p. 239, no. 13, and 8 Aubry & Rau, 369.

The judgment of the court was delivered by:

TASCHEREAU C.J.—(*Oral.*) For the reasons given in the case of *Cully* v. *Ferdais* (1) the motion to quash is granted with costs and the appeal is quashed with costs.

Appeal quashed with costs.

Solicitors for the appellant: *Foran & Champagne.*

Solicitors for the respondents: *Aylen & Duclos.*

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(1) 30 Can. S. C. R. 330.
(2) 23 Can. S. C. R. 371.
(3) 27 Can. S. C. R. 193.
(4) 23 Can. S. C. R. 384.

In re HENRY VANCINI.

1904

*April 27.
*May 4.

ON APPEAL FROM MR. JUSTICE KILLAM, IN CHAMBERS.

Criminal law—Jurisdiction of magistrate—Criminal Code sec. 785—*Constitutional law—Constitution of criminal courts.*

By sec. 785 of the Criminal Code any person charged before a police magistrate in Ontario with an offence which might be tried at the general sessions of the peace, may, with his own consent, be tried by the magistrate and sentenced, if convicted, to the same punishment as if tried at the general sessions. By an amendment in 1900 (63 Vict. ch. 46) the provisions of said section were extended to police and stipendiary magistrates of cities and towns in other parts of Canada.

Held, that though there are no courts of general sessions except in Ontario, the amending Act is not, therefore, inoperative but gives to a magistrate in any other province the jurisdiction created for Ontario by sec. 785.

Though the organization of courts of criminal jurisdiction is within the exclusive powers of the provincial legislatures, the Parliament of Canada may impose upon existing courts or individuals the duty of administering the criminal law and its action to that end need not be supplemented by provincial legislation.

APPEAL from a decision of Mr. Justice Killam in Chambers refusing a writ of habeas corpus.

The appellant Vancini was charged with the crime of theft before the Police Magistrate at Fredericton, N.B., and having elected to be tried summarily he pleaded guilty and was sentenced to imprisonment in the penitentiary. Application was made to a judge of the Supreme Court of New Brunswick for a writ of habeas corpus on the two main grounds: 1. That as by sec. 785 of the Criminal Code, as amended by 63 Vict. ch. 46 a summary trial can only be had for an offence triable at a court of general sessions of the peace

*PRESENT :—Sir Elzéar Taschereau C.J., and Sedgewick, Girouard, Davies and Nesbitt JJ.

1904

In re VANCINI.

such section is inoperative, there being no such court in New Brunswick. 2. That the Dominion Parliament cannot give jurisdiction to a provincial court to try criminal offences the power to constitute a court of criminal jurisdiction being given only to the legislature.

The application for the writ was referred to the full Court in New Brunswick by which it was refused (1). A similar application was then made to Mr. Justice Killam of the Supreme Court of Canada, in chambers, who also refused the writ, and this appeal was taken from his decision.

On March 21st, *Crockett*, for the appellant, applied to have a day fixed for the hearing, but the Supreme Court of Canada ordered the case to stand until notice of hearing was served on the Attorney-General for New Brunswick and the Attorney-General for Canada. Notices having been served as ordered, the hearing took place on the 27th of April, 1904.

Crockett for the appellant, referred to the facts of the case as stated above and in the judgment now reported and relied upon the provisions of the British North America Act, 1867, sec. 91 par. 27; sec. 92 par. 14; sec. 101; secs. 539, 540 of the "Criminal Code" and the decisions in *Ex parte Wright* (2); *Ex parte Flanagan* (3); *Peirce* v. *Hopper* (4); *James* v. *The Southwestern Railway Co.* (5); and *In re County Courts of British Columbia* (6).

Newcombe K.C. Deputy Minister of Justice, for the Attorney-General for Canada. The question at issue in the case of *The County Courts of British Columbia* (6) affected merely the powers of the provincial legis-

(1) 36 N. B. Rep. 436.
(2) 34. N. B. Rep. 127.
(3) 34 N. B. Rep. 577.
(4) 1 Strange 248 at p. 260.
(5) L. R. 7 Ex. 287 at p. 296.
(6) 21 Can. S. C. R. 446.

latures respecting the constitution, maintenance and organization of provincial courts and for defining their territorial jurisdiction. In that case it was decided that the "Speedy Trials Act" was not a statute conferring jurisdiction but an exercise of the power of Parliament regarding criminal procedure. See remarks by Strong J. at page 454 of the report. The Criminal Code Amendment Act, 1900, consequently, is not inoperative but gives to magistrates in cities and towns in all the other provinces of Canada the same jurisdiction as that created for Ontario by sec. 785, imposing a duty for the administration of the criminal law without any need of supplementary provincial legislation. We also refer to *Reg* v. *Toland* (1) at page 509; *Valin* v. *Langlois* (2); Lefroy's Legislative Power in Canada, p. 510; and *In re Liquor License Act*, 1883 (3).

The judgment of the court was delivered by

SEDGEWICK J.—This is an appeal to the court from an order of Mr. Justice Killam refusing an application for an order nisi for a writ of habeas corpus.

The prisoner was charged before the Police Magistrate of the City of Fredericton, on the 18th January, last, with the theft of two binocular glasses, of the value of $50.00, one revolver value $15.00, toget her with several articles of jewelry, the property of one Captain Kemmis-Betty, an officer of the Royal Regiment of Canadian Infantry, stationed at Fredericton. He consented to be tried by the Police Magistrate, pleaded guilty and was sentenced to three years imprisonment in Dorchester Penitentiary, with hard labour. He was placed in custody in the said penitentiary on the 21st January and is now detained there under his

(1) 22 O. R. 505. (2) 5 App. Cas. 115.
(3) Cout. Dig. 797, 1587.

1904

In re VANCINI.

Sedgewick J.

sentence. An application was made before Mr. Justice Landry, of the Supreme Court of New Brunswick, for his discharge under the Habeas Corpus Act. That learned judge referred the question to the Supreme Court of New Brunswick which court dismissed the application. Subsequently application was made to Mr. Justice Killam of this court, as above stated.

Two contentions were made before us by counsel for the prisoner to shew that he was illegally sentenced. 1. Because the prisoner was not charged before the magistrate with an offence for which he might be tried by a Court of General Sessions of the Peace, which was a condition precedent to the exercise of the jurisdiction purporting to be conferred by section 785 of the Criminal Code of Canada, under which the said, magistrate acted. 2. Because section 785 of the Code, as amended by the Act of 1900, chpater 46 is *ultra vires* of the Parliament of Canada, and there was no good or sufficient legislation of the Province of New Brunswick to make its provisions operative or effective in that province.

We are of opinion that neither of these contentions can be sustained. As to the first ground, by section 782 the expression "magistrate" in the Province of New Brunswick, means and includes any police magistrate acting within the local limits of his jurisdiction. Then, section 785 provides that if any person is charged in the Province of Ontario before a police magistrate with having committed any offence for which he might be tried at a Court of General Sessions of the Peace, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment that he would have been liable to if he had been tried before the Court of General Sessions of the Peace. Section 783 provides that whenever any

person is charged before a magistrate with having committed theft, the magistrate may hear and determine, subject to the further provisions of the Act, the charge in a summary way.

By the amending Act of 1900, a sub-section was added to section 785 as follows:

2. This section shall apply also to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada and to recorders where they exercise judicial functions.

We are of opinion that that gives the magistrate in provinces and territories, other than in the Province of Ontario, the same jurisdiction to try the crime of theft as a Court of General Sessions in Ontario has to try the offence in that province.

The contention that inasmuch as there is no Court of General Sessions of the Peace in New Brunswick the amending Act is inoperative and that it can only relate to a province where such a court exists would entirely frustrate the object of Parliament. I do not know anywhere in Canada, outside of Ontario, where there is a Court of General Sessions of the Peace or any similar court, except in the cities of Montreal and Quebec, in the Province of Quebec, and if it had been the intention to limit the operation of the amendment to the places mentioned, the only amendment necessary would be to have changed the first line of section 785 by substituting for the words "in the Province of Ontario" the words "in the Provinces of Ontario and Quebec."

In addition to this, it does not appear whether the prisoner was convicted under section 785 or section 789, which section applies to the whole of Canada, and which, as much as section 785, gives ample authority to the magistrate to make the conviction complained of. As to the second point in our view

1904

In re VANCINI.

Sedgewick J.

the Dominion Parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion, whether they be officials of provincial courts, other officials, or private citizens; and there is nothing in the British North America Act to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing provincial courts, or to give them new powers, as to matters which do not come within the subjects assigned exclusively to the legislatures of the provinces, or to deprive them of jurisdiction over such matters. (Lefroy on the Legislatative Powers in Canada, page 510.)

This statement of the law is mainly founded upon the celebrated decision of this court in *Valin* v. *Langlois* (1) where it was held that the Dominion Controverted Elections Act (1874) was not *ultra vires* of the Dominion Parliament, and whether or not the Act established a Dominion court, the Dominion Parliament had a perfect right to give to the courts of the respective provinces and the judges thereof the power thereby created, and did not, in utilizing judicial officers and establishing courts to discharge the duties assigned to them by that Act, in any particular invade the rights of the local legislatures; and the majority of the court, Ritchie C.J. and Taschereau and Gwynne JJ, held that that Act established a Dominion court as authorized by section 101 of the British North America Act.

The question is most fully treated by Mr. Justice Taschereau, now Chief Justice of this court, and it is unnecessary now to do more than refer to that opinion. The judgment of this court, in that case, was affirmed by the Judicial Committee of the Privy Council upon the grounds stated (2).

This court again affirmed the same principle in *Attorney-General* v. *Flint* (3), which, however, related to a jurisdiction imposed by the Parliament of Canada

(1) 3 Can. S. C. R. 1. (2) 5 App. Cas. 115.
(3) 16 Can. S. C. R. 707.

1904

In re VANCINI.

Sedgewick J.

upon the imperially created Court of Vice-Admiralty, in Nova Scotia.

Where once the Parliament of Canada has given jurisdiction to a provincial court whether superior or inferior, or to a judicial officer, to perform judicial functions in the adjudicating of matters over which the Parliament of Canada has exclusive jurisdiction, no provincial legislation, in our opinion, is necessary in order to enable effect to be given to such parliamentary enactments.

On these grounds, we think the application for a writ of habeas corpus in the present case should be refused.

Appeal dismissed.

JOSIAH WOOD (PLAINTIFF)..... .....APPELLANT;

AND

HENRY S. LEBLANC (DEFENDANT).....RESPONDENT.

1904

*Feb. 16,18.

*May 4.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Title to land — Colourable title — Possession — Statute of limitations — Evidence.

The possession of a part of land claimed under colour of title is constructive possession of the whole which may ripen into an indefeasible title if open, exclusive and continuous for the whole statutory period.

Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other parties lumbered on the land continuously or at intervals, during any portion of such period.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

1904

WOOD v. LEBLANC.

APPEAL from a decision of the Supreme Court of New Brunswick (1) maintaining the verdict for the plaintiff and refusing a new trial.

This was an action brought by the appellant as plaintiff in the Supreme Court of New Brunswick for the recovery of the possession of a quantity of saw logs claimed by the appellant to be his property upon the ground that they were cut upon certain lands of the plaintiff situate in the Parish of Sackville, in the County of Westmoreland, known as the Dickie lot.

To this the defendant pleaded—

1. That he did not take the logs.

2. That the logs were the property of Sylvain P. LeBlanc.

3 That neither the lands nor the logs were the property of the plaintiff.

Upon these pleas issue was joined. and the case was tried at the Westmoreland circuit in July, 1902, and resulted in a verdict for the defendant.

The plaintiff moved before the Supreme Court of New Brunswick to set aside such verdict and for a new trial, and that court after consideration refused the motion, whereby the verdict was confirmed, against which last mentioned decision this appeal is taken.

The action, although nominally a personal one, involved the trial of the title as between the parties to the lands where the logs were cut. These lands formed part of the lot situate in the Parish of Sackville known as the Dickie lot, which lot is part of a large tract of wilderness land known as the "Sackville Rights."

Both parties gave evidence of possession by those through whom they claimed, that on plaintiff's part beginning in 1851 and that for defendant going back ten years earlier. The plaintiff, however, claimed

(1) 36 N. B. Rep. 47.

title through a deed from a squatter followed by running lines and enclosing the land.

Powell K. C. and *Teed K. C.* for the appellant This being an action of replevin the bunden of proof is on the defendant.

The defendant's possession at the best consisted of isolated acts over a small portion of the lot and was not continuous. This could never give him title to any part of it. *Sherren* v. *Pearson* (1).

The plaintiff, on the other hand, had an exclusive and continuous possession of nearly all the lot for over twenty years and the conveyances made from time to time had confirmed his title. *Bentley* v. *Peppard* (2).

Pugsley K. C. and *Friel* (*Masters K. C.* with them) for the respondent. Defendant having pleaded *non cepit* the plaintiff must prove the wrongful taking. *Graham* v. *Wetmore* (3).

Plaintiff having gone into possession under a deed from one who had no title and which did not convey by metes and bounds his subsequent running of lines added nothing to the strength of his position. *Harris* v. *Mudie* (4).

THE CHIEF JUSTICE. In form the appellant's action is in replevin for alleged unlawful taking of logs by the respondent upon a lot of land called the Dickie lot, but in substance the controversy is as to the title to the said lot Neither the appellant nor those through whom he claims nor the respondent have any documentary title to this lot. The question is one of possession, and of course, as such, a question of fact and peculiarly within the province of the jury. Now, there was ample evidence to warrant the findings of the

(1) 14 Can. S. C. R. 581.
(2) 33 Can. S. C. R. 444.
(3) 9 N. B. Rep. 373.
(4) 7 Ont. App. R. 414.

1904

WOOD v. LEBLANC.

The Chief Justice.

jury in favour of the respondent. And with these findings, approved of as they were by the learned judge who presided at the trial and by the court *in banco* unanimously, we would not be justified in interfering.

I agree in the reasoning of the Chief Justice of New Brunswick.

I would dismiss the appeal with costs.

SEDGEWICK J.—Concurred.

DAVIES J.—This was an action of replevin brought by the appellant against respondent to obtain possession of certain logs alleged by plaintiff to have been cut upon lands claimed as his and described in his declaration by metes and bounds.

The defendant, in addition to pleading *non cepit*, by his fourth plea denied that the lands and premises or the logs or any of them were the property of the plaintiff.

The logs after having been cut, hauled and made into merchantable timber by defendant must then be presumed to have been his property and will be so held against all the world but the real owner or some one legally entitled under him to their possession. The onus in this case lay upon the plaintiff to prove that he was such real owner, and the main question for our decision is whether or not he has satisfied such onus. The defendant in his pleadings and at the trial raised other issues claiming himself to be the owner of the lands from which the logs were cut. It may well be that the evidence does not support such a claim, but even if it must be held unproved, that does not help the plaintiff who only can recover if and when he has proved a legal title, either by conveyance or possession to the lands in dispute. If he failed to prove such

title he cannot recover however weak defendant's title may be to the lands in dispute. Neither party pretended to have a good documentary title. Both claimed to have acquired title by possession.

Chief Justice Tuck in delivering judgment states the facts as follows:

The action is one of replevin. It was tried at Dorchester, in the County of Westmoreland, in July, 1902, before Mr. Justice McLeod, and after many days' trial resulted in a verdict for the defendant. Although in form the action is for alleged unlawful taking of logs, the property of the plaintiff, yet, in substance, the trial was concerning the title to land where the logs were cut. This land is situate at Sackville, in the County of Westmoreland, and forms a part of what is known as "Sackville Rights." The lot immediately in question in this action consists of seven hundred acres, and is known as the "Dickie" lot. It is claimed, on the part of the plaintiff, that the land in dispute is part of a large tract of land which probably more than fifty years since was run out by John Dickie and continued in Mr. Dickie's possession until 1867. He sold certain lots or shares in it, and in that year he conveyed the remainder to David H. Calhoun, who there owned a mill property. It is also claimed on behalf of the plaintiff that, during Dickie's ownership and control, he exercised the usual acts of ownership over the property without interference. That so long as David H. Calhoun owned the property, he continued to operate upon it for logs in the usual way. That in 1881 David H. Calhoun conveyed this property, with other timber lands and his mill property, to his sons, Thomas B. Calhoun and Clement Calhoun. That they went into possession and cut logs in the usual way. In 1885 the whole property became vested in the plaintiff. That since the last named time the title has remained in him and lumbering operations have been carried on, under his control or on his behalf, down to the present time.

In the fall of 1901 the defendant cut logs on the Dickie lot, being the land in question. Those are the logs to get possession of which the writ of replevin was issued, and this action is defended by LeBlanc, who claimed title to the property in question.

On the other hand the defendant says that there is ample proof upon which a jury could find, that there were acts of possession on the part of the French settlers, as they are called, running back from a period of sixty years. That they had this land in occupation since 1842, and down to 1867 they were not interfered with in their occupation. That it is not pretended there was an act of ownership by Dickie further back than 1851.

1904

WOOD v. LEBLANC.

Davies J.

The plaintiff and those through whom he claimed had at different times cut trees and carried on lumbering operations on different parts of this tract of land which plaintiff claimed. It was not pretended by the plaintiff's counsel that they had proved anything more than a title by constructive possession under the Statute of Limitations. There was no *continuous occupation* by the plaintiff or his predecessors in title of the general tract of land said to be within the boundaries of his deeds much less of the special 700 acres here in dispute, or any part of it. Nor, as I understand, was it contended that there was any such possession as, in the absence of the deeds under colour of which plaintiff claimed, would have extinguished the true owner's title and given a title to the plaintiff by possession. What was contended for was that those through whom plaintiff claimed were first in possession and that from their possession such as it was a seisin in fee might or should be presumed. To my mind it is perfectly clear under the evidence that there was not such possession as under the statute extinguished the true owner's title and gave a statutory one to the plaintiff unless indeed it is held that the existence of the deeds give to the isolated and intermittent acts of possession relied on, such as surveys and lumbering in the winter months, cutting out roads to haul the lumber and so forth, a legal effect alike as to the *continuity* and to *extent* entirely different from the effect which would be given to such acts in the absence of the deeds. The plaintiff in his factum submits that "the question to be decided really is *who was first in possession?*" He argues that "if Dickie was first in possession of the land the law would presume him to be seised in fee and that the case should then be governed as if the plaintiff and those through whom he claims were in possession under the best of

documentary titles." Such an argument assumes two conditions as premises. First, that constructive possession as distinguished from actual possession is good enough to enable the possessor to claim the presumption of a "legal seisin," and secondly, that such possession need not be continuous but may be gathered from intermittent and isolated acts. I agree that seisin in fee may and will be presumed from evidence of the *actual possession* of a house, field, close, farm or messuage. But I cannot find any authority for extending the application of any such presumption to large tracts of wilderness lands which may be held in *constructive possession*, nor do I think it can on principle be so held. It is the *actual possession* which justifies the presumption. The very basis from which it arises is absent in the case of constructive possession only. *When* and *while* actual possession is in a man seisin will be presumed to the extent of his actual possession or occupation. But the moment he ceases actually to possess or occupy, that moment the presumption ceases, and it does not arise at all with respect to lands of which there is no actual possession or occupation or *beyond the bounds of such actual possession or occupation.* To my mind, therefore, the question is not whether those through whom the plaintiff or defendant claimed first trespassed upon and temporarily occupied the disputed lands or a part of them, but the onus of proof being upon the plaintiff whether with respect to the lands off which the trees in question were cut (or the block of such lands contained within the colourable title deeds) he has shewn such open, notorious, continuous, exclusive possession or occupation of any part of such lands as would constructively apply to all of them, and operate to extinguish the title of the true owner and give plaintiff a statutory one. The nature of the possession necessary

1904

WOOD v. LEBLANC.

Davies J.

to do this in the absence of colourable title was fully considered by this court in the case of *Sherrén* v. *Pearson* (1). It was there decided that isolated acts of trespass committed on wild lands from year to year will not, combined, operate to give the trespasser a title under the statute.

In the carefully reasoned opinions of the judges in that case statements on the point are made which do not seem to leave the matter open to any doubt. Chief Justice Ritchie formally approved of the law as laid down in *Doe d. DesBarres* v. *White* (2), and at page 585 goes on to say:

> To enable the (trespasser) to recover he must show an actual possession, an occupation exclusive, continuous, open or visible, and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose.

And in another place he says,

> the trespasser to gain title must as it were "keep his flag flying over the land he claims."

Strong J. and Fournier J. concurred. Taschereau J., (now the Chief Justice of this court, said (pp. 594-5):

> The fact that the wrongdoer or trespasser supposes he has a claim or title to the land does not alter the character of his acts. His unfounded belief cannot diminish or destroy the legal claims of the true owners or deprive them of their right to treat him as a wrongdoer in entering on their land. The effect to be given to repeated entries upon the land, or acts of user or possession, depend largely upon the nature of the property. What might be sufficient evidence in the case of cultivated lands to go to a jury would not constitute any evidence in those of wilderness lands. If the property is of a nature that cannot easily be protected against intrusion, mere acts of user by trespassers will not establish a right.
>
> Owners of wilderness or wooded lands lying alongside or in rear of other cultivated fields are not bound to fence them or to hire men to protect them from spoliation. The spoiler, however, does not by managing without discovery even for successive years to carry away valuable timber, necessarily acquire, in addition, title to the land. The law does not so reward spoliation.

(1) 14 Can. S. C. R. 581. (2) 3 (N. B. Rep.) 595.

Henry J. said, (page 592):

Numerous acts of trespass only amount to so many acts of disseisin; when a man trespasses on the land the true owner ceases to have full possession for the time being; but the moment the trespass is at an end the trespasser's disseisin is at an end and the complete possession is again in the actual owner. It is therefore required that the party should not only take possession, not only disseise the owner, but that he should *continue that disseisin so as to amount to an ouster*, and that *ouster maintained for the statutory period.* That can only be done by some act of possession not merely by a temporary disseisin, and it must be over every inch of land of which the party claims possession.

Now, in my judgment, the possession necessary under a colourable title to *oust* the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed *but only when and while there is that part occupation.* And before it can be extended it must exist and is only extended by construction while it exists. It may be that a person with colourable title engaged in lumbering on land would be held *while so engaged and in actual occupation of part* to be in the constructive possession of all not actually adversely occupied even if that embraced some thousands of acres within the bounds of his deed. But it is clear to my mind that if and when such person withdraws from the possession of the part by ceasing to carry on the acts which gave him possession there he necessarily ceases to have constructive possession of the rest. His possession in other words must be an actual continuous possession, at least of part.

When the lumbering ceased in the spring of the year and actual occupation of any part of the lands ceased, then as a necessary consequence all construc-

1904

WOOD v. LEBLANC.

Davies J.

tive possession ceased with it. As was said by Mr. Justice Burton in *Kay* v. *Wilson* (1):

> But in both cases (that is one entering with and one without colour of title) an actual, visible occupation or possession of some portion of the land is necessary for the full period of twenty years,

and, I add to that, a continuous possession.

The character and nature of the possession, the *extent* of which is sought to be broadened and lengthened by construction so as to cover lands not in actual possession, must not, however, be equivocal. It must possess those characteristics which have been determined to be essential to a possession claimed by a squatter as against the true owner, that is it must be open, exclusive, continuous, so notorious that the claimant may be said to "have his flag flying over it." Can the intermittent and isolated acts of cutting down trees in winter constitute alone such a possession?

In the case at bar it is not and could not be contended for a moment that there was any actual, visible, *continuous and* exclusive possession of any part of the lands within the boundaries of plaintiff's deeds by himself and those through whom he claims. On the contrary the defendant and those settlers under whom and with whose authority he cut the trees on the land had obtained and, since the building of the brush fence in 1869, or 1870, had retained the possession of the land enclosed by the fence. It may well be true that each party cut trees at times off these lands. Chief Justice Tuck who delivered the leading judgment of the Supreme Court of New Brunswick said with respect to the findings of the jury:

> It is not necessary that I should refer in detail to the questions put by the learned judge and the answers of the jury. They found that prior to 1850 or 1851, the old settlers were in possession of the whole of the tract of land known and spoken of in this suit as the big block, and they exercised ownership over it, claiming and treating it as their

(1) 2 Ont. App. R. 133 at p. 136.

land, and what they did were not individual acts of trespass; that the settlers of the Gould settlement prior to the survey made by John Dickie had possession of, and exercised ownership over that portion of what is called the Dickie lot in this suit to the northeast of the Calhoun Portage road, so called, and within the line where the brush fence spoken of in this suit now is, claiming and treating it as their lands; that John Dickie, David H. Calhoun, Thomas B. Calhoun and Clement Calhoun did not, nor did any of them, go into possession of the lot down to the time the property was sold and conveyed to the plaintiff; that the plaintiff after the lot was sold and conveyed to him did not go into possession of the whole of the lot, and exercise ownership and use the whole of the lot as his own; that the brush fence was put around the big block, so called, by the Gould settlers about 1869 or 1870; that when Dickie made the survey of that lot there were old roads used by the settlers, around that portion of the land on the Dickie land northeast of the Calhoun Portage road, which is claimed by the defendant to be comprised in the big block, and six of the jurors say that when the brush fence was put around it followed old roads then in existence around the big block.

The evidence is very voluminous, somewhat difficult in parts to understand and very conflicting. It was submitted to a jury by Mr. Justice McLeod in a charge as to which no exception is taken. The learned judge submitted some twenty-eight questions to the jury and all were substantially answered in defendant's favour. The trial judge concurred with the rest of the court in refusing to disturb the verdict. Amongst other important statements made in the considered judgment of the trial judge, Mr. Justice McLeod, is the following:

The jury found, first that the Bonhomme Gould settlers, (of whom defendant was one) had had possession long prior to 51 and exclusive possession and exercised acts of possession, and found the lines were the old lines that ran around it at the time, and in about 1869 or 1870 a brush fence was put around and which they found followed the old lines, *and also found neither Dickie or Calhoun or plaintiff ever had exclusive possession.*

There was evidence on which they could find Bonhomme Gould had possession. In the case of *Estabrooks* v. *Breau* there was the same of evidence, although they themselves might not come to the

1904

WOOD v. LEBLANC.

Davies J.

conclusion, yet there was evidence to warrant the jury in finding as they did, and I think under that charge we could not disturb the verdict.

On the other hand the jury *also found neither the plaintiff nor Calhoun nor Dickie ever had entire possession, and I think there was ample evidence to warrant that finding.* So we find both branches in favour of the defendant and therefore I think the verdict should not be disturbed.

For my own part, I do not say that the evidence given was sufficient to give a statutory possessory title to either of the parties. The issues of fact are not which of the parties was first in possession. It is simply whether or not the plaintiff has complied with the onus which lay upon him of proving a good title to possession in himself.

The case is one between two conflicting claims neither of which may be perfectly good. A similar case *Estabrooks* v. *Breau* (1) was tried in the courts of New Brunswick in 1874 respecting a portion of this very land. The defendants' title there was the same as that of defendant here. The court there held that

as between parties without title each seeking to make a title for himself the court will not interfere with the finding of a jury unless clearly and unequivocally wrong.

I agree with that decision and see no ground upon which this court should interfere with such a verdict as that rendered here approved of by the trial judge and supported by the unanimous judgment of the Supreme Court of New Brunswick.

I would summarise the main reasons I have advanced as follows: The onus of proving title under the pleadings lies on the plaintiff and unless he satisfies that he must fail. He did not pretend to have a good legal documentary title but one gained by constructive possession under colour of title. To gain such a title by constructive possession it was essential that he should prove an *open, notorious, exclusive and continuous*

(1) 15 N. B. Rep. 304.

1904

WOOD
v.
LEBLANC.

Davies J.

possession of at the very least a part of the lands described in his deeds. So far from the evidence shewing such continuous, notorious and exclusive possession in the plaintiff it was, even if all of plaintiff's evidence is accepted, simply intermittent and isolated acts of lumbering on parts of the land, and which were suspended altogether in the summer months. Such evidence was entirely wanting in that essential element of a continuous occupation of at any rate part of the lands claimed and so far from being exclusive was found by the jury, on conflicting evidence, it is true, but which was for them to decide on, to be for many years back in the defendant.

Evidence that a party claims land by possession either with or without colour of title is not sufficient when it merely establishes that the claimant used the lands in the same way and for the same purposes as an ordinary owner would. A true owner of lands is not bound to use them in any way. He may prefer to leave them vacant. While they are vacant he still retains the legal possession, and he only ceases to be in legal possession when and during the time that he is ousted from it by a trespasser or squatter, who has acquired and maintained what the law holds to be an actual possession. If the squatter claims to have ousted him by constructive possession he must prove a continuous, open, notorious, exclusive possession of *at least part of the lands* the whole of which he lays claim to under his colourable deed.

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

NESBITT J.—I agree in the dismissal of the appeal.

KILLAM J.—After a very careful examination of the evidence in this case, I am of opinion that the appeal should be dismissed.

1904

WOOD v. LEBLANC.

Killam J.

Neither plaintiff nor defendant established a title to the logs in question, either directly or by ownership of the land on which they were cut. The real question was whether or not the plaintiff had a technical possession of land and logs, which enabled him to recover the logs from the defendant who could show no better title.

After a long and expensive trial the defendant had a verdict, which the Supreme Court of New Brunswick refused to disturb.

It is clear that this court should not interfere unless it finds the argument against the verdict to be of an overwhelming character.

It is not a case of a *primâ facie* title to be inferred from possession, but a case of a plaintiff who, upon his own showing, has no title to land or logs, asserting a technical right, upon a claim of a merely constructive possession which for thirty years has been actively disputed by the defendant and his associates, and which has never been effectively established in fact.

I quite accede to the plaintiff's contention that the jury were wrong in finding that the Bonhomme Gould settlers had any possession of the *locus in quo* prior to or at the time when Dickie and his associates assumed to lay out and appropriate the block of land subsequently known as the Dickie lot. Upon this point the evidence shows no more than a series of trespasses in cutting hay upon the meadows, or wood from the forest. And there is nothing whatever to warrant the conclusion that the old roads used by the settlers for hauling wood and hay were made or used as boundaries evidencing possession of the lands enclosed within them.

Down to the time of the construction of the brush fence, found by the jury, upon evidence warranting the finding, to have been built in 1869, there was

nothing to indicate an actual attempt to take possession of any part of the disputed territory by these settlers or to warrant a finding of possession by them.

On the other hand, the evidence was such as to amply warrant a finding by the jury that neither Wood, Palmer nor Dickie was in possession of any portion of the tract when Wood and Palmer conveyed to Dickie, and he to David Calhoun, in 1867. The basis of the original attempt at appropriation of this unoccupied wild land was in claims to "wilderness rights" by Benjamin Scurr, Jabez Palmer and William Sears. None of the counsel were able to inform us what was meant by this expression. There is nothing in the evidence to suggest that it designated any right recognized either by law or by custom. It was certainly open to the jury to reject it as evidencing any real *bonâ fide* claim of right.

The attempted description by metes and bounds in the conveyance by Sears to Wood was of a very vague character. On one side the boundary was by "wilderness lands." No courses or distances were given by which to trace the real boundaries intended to be assigned.

Dickie says that "he used to go in once in a while to see about it"—about twice in a summer, and that he sold some ship timber from it to one Dickson, who made a road into the property and cut and took away the timber. Upon Dickie's evidence, Dickson took off the timber in two winters, about 1860. Wood, also, sold off some timber.

There is no evidence of any continued occupation or use of the tract by Dickie, Palmer or Wood extending to 1867, when it was conveyed to Calhoun.

Upon the evidence of Thomas B. Calhoun, his father did enter upon active operations upon the property immediately after the conveyance to him, and carried

1904

WOOD v. LEBLANC.

Killam J.

these on continuously over the whole property until he conveyed to his sons in December, 1881, and they pursued the same course while they held it and afterwards for the plaintiff Wood down to the time of the cutting of the logs in question.

His evidence by itself made a fairly strong case of a real possession which would be carried by construction to the boundaries given by the deed to David Calhoun.

But Thomas Calhoun is still an interested party and it was open to the jury to distrust the reliability of his testimony either on that ground or on that of possible defects of memory as to the events of thirty years.

So far as I can find, no other witness corroborated Thomas Calhoun's statement that, from the commencement of his operations, in 1867, his father cut from the portion of the lot enclosed in 1869 within the brush fence.

Thomas Eadon, who cut under contract with David Calhoun from the very beginning and got out timber for him continuously for some fifteen years thereafter, and who placed the first camp upon that portion of the land, gave no such evidence. Upon his testimony and that of other witnesses, the erection of that camp and any attempt at actual continuous occupation by Calhoun of any part of the territory within that enclosure occurred after the erection of the brush fence. From the very initiation of such an attempt Calhoun was met with remonstrances and resistance by the settlers. The brush fence was evidently erected as a sign that he was to go no farther in that direction.

There was abundant evidence that these settlers who claimed to have previously held possession of a certain tract, and to have confirmed this by enclosing it within the brush fence, continued from the time of its erection to cut timber, logs, poles and firewood over

the tract until the cause of action arose, and this without active interference between the years 1874 and 1900. There was, also, evidence that the Calhouns, at times during this period, purchased from these settlers logs and timber known by the purchasers to have been cut on a portion of the Dickie lot included within the brush fence, without previous authority. In 1873 and 1874, several of the settlers transferred their claims to what they called the "company lot" to one Teakles who had a mill in the neighbourhood. In 1875 Jeremiah McManus began taking out logs upon the so-called "company lot" for Teakles, and in 1876 Teakles transferred his claims to McManus who continued thereafter, from time to time, until about 1896, to take logs from the land and cut them up at his mill, to the knowledge of the Calhouns and without any interference by them. McManus says that he took poles from the lot as late as 1900.

It was certainly open to the jury to find that the settlers and McManus had as much actual possession of the *locus in quo* from 1869 until the commencement of the action as the Calhouns or the plaintiff.

The main ground upon which, as I understand, the plaintiff relies is that John Dickie and Mariner Wood respectively, and then David Calhoun, and then his sons, and then the plaintiff himself, took actual possession of a portion of the whole lot now claimed by th plaintiff, including the *locus in quo*, under conveyances describing the property by metes and bounds, and continued one after the other in such actual use and occupation of, at least, parts thereof as the nature of the property admitted, and that this possession thus gained extended, by construction of law, to the bounds set by the conveyances, and was continuous.

As already intimated, the evidence of any continued actual occupation by Mariner Wood or John Dickie was of a very vague character.

1904

WOOD v. LEBLANC.

Killam J.

The principle of constructive possession of a tract of wild land, unenclosed and not separated from adjoining land of the same character, by entry upon and actual possession of a portion, under colour of title to the whole tract, has received its development chiefly in the United States, where, it seems to me, it has been carried, in many cases, to extreme lengths.

To some extent it has been accepted in the Courts of the Provinces of Canada. See *Cunard* v. *Irvine* (1); *Doe d. Baxter* v. *Baxter* (2); *Ferrier* v. *Moodie* (3); *Dundas* v. *Johnston* (4); *Davis* v. *Henderson* (5); *Mulholland* v. *Conklin* (6); *Heyland* v. *Scott* (7); *Harris* v. *Mudie* (8).

In the American and English Encyclopædia of Law, (2 ed.) vol. 1, p. 824, the principle is thus stated:

An entry into possession under a conveyance *from a person having colour of title* is presumed to be made according to the description in the deed, and his occupancy is construed as possession of the entire lot where there is no actual adverse possession of the parts not actually occupied by him.

At page 868, the following is said:

To entitle a claimant under colour of title to the benefit of the doctrine of constructive possession, there must be a *bonâ fide* reliance upon the merely apparent title as being good and valid. Therefore if the instrument constituting colour of title was obtained by fraud on the part of the grantee, or with a knowledge by him that it conveys no title, he cannot have the advantage of an entry under colour of title.

And on page 869:

The question of what is good faith in a person claiming under colour of title in one of fact for the jury.

In the Cyclopedia of Law and Procedure, 1 Cyc. 1125, the principle is rather more widely stated:

The general rule is well settled that where a party enters, under colour of title, into the actual occupancy of a part of the premises described

(1) 2 N. S. Rep. 31.
(2) 9 N. B. Rep. 131.
(3) 12 U. C. Q. B. 379.
(4) 24 U. C. Q. B. 547.
(5) 29 U. C. Q. B. 344.
(6) 22 U. C. C. P. 372.
(7) 19 U. C. C. P. 165.
(8) 7 Ont. App. R. 414.

in the instrument giving colour, his possession is not considered as confined to that part of the premises in his actual occupancy, but he acquires possession of all the lands embraced in the instrument under which he claims. This is true although the land is not actually enclosed, and though the tract may be divided by a river running through it.

Again, page 1134:

Actual possession of a part of the land under colour of title will not draw to it constructive possession of the balance, unless such colour of title is also accompanied by claim of title co-extensive with the boundaries.

In *Wright* v. *Mattison* (1), Daniel J., delivering the judgment of the Supreme Court of the United States, said:

The courts have concurred, it is believed, without an exception, in defining "colour of title" to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colourable title; the inquiry with them has been, whether there was an apparent or colourable title, under which an entry or a claim has been made *in good faith*.

Again he said, p. 59:

Defects in the title may not be urged against it as destroying colour, but, at the same time, *might have an important and legitimate influence in showing a want* of confidence and good faith in the mind of the vendee, if they were known to him, and he believed the title, therefore, to be fraudulent and void. What is colour of title is matter of law, and when the facts exhibiting the title are shewn, the court will determine whether they amount to colour of title. But good faith in the party in claiming under such colour is purely a question of fact, to be found and settled as other facts in the cause.

In *Dundas* v. *Johnston* (2), Draper C.J. said, p. 550:

When, therefore, a person without any title, or without any real or *bonâ fide* claim of title (though erroneous), entered upon any such lot, clearing and fencing only a portion thereof, I do not understand upon what principle this wrongdoer can be deemed to have taken and to be in possession of the whole of such lot.

In *Davis* v. *Henderson* (3), Wilson J. said, p. 352:

(1) 18 How. 50.
(2) 24 U. C. Q. B. 547.
(3) 29 U. C. Q. B. 344.

1904

WOOD v. LEBLANC.

Killam J.

I think, although the learned judge drew a marked distinction between the position and rights of a squatter as opposed to that of a person claiming a right which he believes and asserts he has, and upon which he enters and occupies, there was no misdirection, for he put the defendant's claim upon its proper basis.

And Morrison J. said, (p. 358.)

After the best consideration, in my judgment, if a person takes possession of a wild and partly cleared lot of land, consisting of one or two hundred acres, as the case may be, by virtue of a paper-title which he purchased and acquired from one whom *he believed to be the rightful owner*, and if for twenty years he occupies and deals with the cleared and uncleared portion of the lot in the same way that a rightful owner would deal with it (instancing various acts) such acts would be *evidence to go to the jury* that for such period the person so living on and so dealing with the land was in actual possession of the whole one hundred or two hundred acres.

And then (p. 359), after a citation.

The latter part of the quotation goes far to qualify the preceding portion, and I think it shews that that learned judge would have held that, if the occupier of the cleared portion was *bonâ fide* in possession as the owner of the whole lot under a title invalid, but under which he went into possession and remained there, *believing it to be good*, it would be *evidence* to shew that he was claiming and was in actual possession of the whole.

In *Shepherdson* v. *McCullogh* (1), Armour J., after referring to the doctrine of presumption of possession of all the lands described in a conveyance derived from possession of part, said, p. 597:

It is not for me to say whether this principle is well founded or not, or whether it should have been or should be extended beyond the case of a person in actual pedal possession of land under a conveyance which he *honestly believed*, and was *justified in believing*, conveyed to him the true title to the land.

And in *Harris* v. *Mudie* (1), Burton J., said p. 420:

The doctrine of constructive possession can obviously have no application to the case of a trespasser.

And, p. 427:—

(1) 46 U. C. Q. B. 573.

(1) 7 Ont. App. R. 414.

1904

WOOD
v.
LEBLANC.

Killam J.

But it has no doubt been treated as settled by a long current of authorities as the general rule that, when a party having colour of title enters *in good faith* upon the land professed to be conveyed, he is presumed to enter according to his title, and thereby gains a constructive possession of the whole land embraced in his deed.

And again, p. 428.

Under a good deed his possession would be co-extensive with the boundaries given in the deed, and under one which proves for some reason to be defective, although as against the true owner he is a trespasser, his entry would give him a right to maintain trespass against any one making a subsequent entry without right. But how can that apply to a trespasser entering without colour of right? His possession, so as to maintain trespass, must be an actual possession. What pretence would there be for his maintaining trespass against a person who had entered and cut timber upon woodland beyond his enclosure?

When a person so enters under a mere mistake as to his rights, purchasing or intending to purchase under what he believes to be a good title as from one whom he believes to be the heir-at-law or devisee under a will, or under a deed from a married woman defectively executed, or a forged deed, there is no good reason why his entry should not, as in the case of a valid deed, be co-extensive with the supposed title, and come within the class of cases intended, in my opinion, to be protected by the statute; but it must in every case be a *bonâ fide* claim, and ought not lightly to be extended to a purchaser from a squatter or other person having no title, where the party has neglected to ascertain from the registry office, as he can always do in this country, whether the land has been patented, and who is the registered owner; and clearly not to cases where he knows the grantor has no title.

The opinions which I have formed are that the person relying upon this doctrine must enter under a real, *bonâ fide*, belief of title; that, while in many cases it may be proper to assume this belief, yet circumstances may often warrant a jury, without direct evidence of want of such belief, in finding that the party knew or strongly suspected that he had acquired no real title; and that, in such cases, a jury is warranted in treating the party as in no better position than a mere trespasser, acquiring no possession of any

1904

WOOD v. LEBLANC.

Killam J.

land which he does not take into his actual and effective occupation.

Here I cannot think that the jury were bound to treat Dickie and his associates, or Mariner Wood, as having colour of title, or as being in possession, actual or constructive, of any part of the land. I think, too, that the jury could not be said to have erred if they imputed to David Calhoun, when he entered upon the land, full knowledge of the unreallity of the title conferred by the conveyance to him and full consciousness that he was but continuing a wrongful appropriation, or if they refused to recognize that he acquired possession of any portion until he reduced it to actual occupation.

The jury were warranted in refusing to accept the view that Calhoun entered upon any part of the tract enclosed within the brush fence until after it had been erected. When he did assert any rights over it others were doing the same. Whether or not the facts warranted the belief that these others had acquired any better possession than himself does not seem to me important.

All it appears to be necessary to say is that, if the evidence satisfied the jury that Calhoun never effectively asserted his claim or acquired any actual, exclusive possession, they were not bound by any rule of law to find a technical possession in him, and the case for a presumption of fact in favour of such a possession was not so overwhelmingly strong that the verdict should be disturbed.

And it appears to me that the jury were not bound to treat the younger Calhoun or the plaintiff as occupying any better position. Of course, as years went on, as transfers were repeated and the land actually occupied and used, the claim of right would grow apparently stronger. It would be difficult, if there

1904

WOOD
v.
LEBLANC.

Killam J.

were no adverse claim actively asserted, to impute absence of good faith or of colour of title to the younger Calhouns, and still more difficult to impute such to a mere mortgagee, as this plaintiff originally was. But adverse claims to possession and the title were being actively asserted during the whole period from 1869 to 1900. Under such circumstances I do not think that the jury should be held to have been bound, whether as a matter of law or of fact, to find that any of the Calhouns or the present plaintiff acquired a possession of the *locus in quo* which entitled any of them to say that, while we had no title to the land, we had a possession which entitled us to maintain an action such as the present against those claiming adversely but shewing no better title than our own.

Upon a view of the whole case, I think that it cannot be said that there was no reasonable hypothesis upon which the findings of the jury against any possession on the part of the plaintiff, necessary to maintain the action, could be properly based. It seems to me, therefore, that the verdict cannot properly be disturbed.

Appeal dismissed with costs.

Solicitor for the appellant: *M. G. Teed.*

Solicitor for the respondent: *Henry R. Emmerson.*

1904

*Mar. 18-23.
*April 27.

THE WATER COMMISSIONERS OF THE CITY OF LONDON AND THE CORPORATION OF THE CITY OF LONDON (DEFENDANTS)..... } APPELLANTS;

AND

JOSEPH DANBY SAUNBY (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Water commission—Act of Incorporation—Construction—Appropriation of water.

The Act for construction of waterworks in the City of London empowered the commissioners to enter upon any lands in the city or within fifteen miles thereof and set out the portion required for the works, and to divert and appropriate any river, pond, spring or stream therein.

Held, Sedgewick and Killam JJ. dissenting, that the water to be appropriated was not confined to the area of the lands entered upon but the commissioners could appropriate the water of the River Thames by the erection of a dam and setting aside of a reservoir, and that such water could be used to create power for utilization of other waters and was not necessarily to be distributed in the city for drinking and other municipal purposes.

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

The appellants, the Water Commissioners for the City of London, were incorporated by an Act of the Legislature of Ontario (36 Vict., ch. 102), passed on the 29th day of March, 1873. By the said Act, the Corporation of the City of London was empowered, by and through the agency of the Water Commissioners for the City of London, and their successors, to design,

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

construct, build, purchase, improve, hold, and generally maintain, manage and construct waterworks, and all buildings, matters, machinery and appliances therewith connected or necessary thereto, in the City of London, and parts adjacent, as thereinafter provided.

The said commissioners, and their successors, were declared to be a body corporate, under the name of "The Water Commissioners for the City of London," and to have all the powers necessary to enable them to build the waterworks thereinafter mentioned, and to carry out all and every the other powers conferred upon them by the said Act.

It was, by the said Act, declared to be lawful for the said commissioners, their agents, servants and workmen, from time to time, and at such times after the passing of the said Act as they should see fit, and they were thereby authorized and empowered, to enter into and upon the lands of any person or persons, bodies politic or corporate, in the City of London, or within fifteen miles of the said city, and to survey, set out, and ascertain such parts thereof as they might require for the purposes of the said waterworks; and also to divert and appropriate any river, pond of water, spring or stream of water therein as they should judge suitable and proper, and to contract with the owner or occupier of the said lands and those having a right in the said water, for the purchase thereof, or of any part thereof, or of any privilege that night be required for the purposes of the said Water Commissioners; and in case of any disagreement between the said commissioners and the owners or occupiers of such lands, or any person having an interest in the said water, or the natural flow thereof, or of any such privileges as aforesaid, respecting the amount of purchase or value thereof, or as to the damages such appropriations should cause to them, or otherwise, the same should be decided

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

by three arbitrators, to be appointed as thereinafter mentioned, namely, the commissioners should appoint one, the owner or owners should appoint another, and such two arbitrators should within ten days after their appointment, appoint a third arbitrator; but in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, the judge of the county court of the County of Middlesex should, on application by either party, appoint such third arbitrator; in case any such owner or occupier should be an infant, married woman, or insane, or absent from this province, or should refuse to appoint an arbitrator on his behalf, or in case such land or water privileges might be mortgaged or pledged to any person or persons, the judge of the county court of the County of Middlesex, on application being made to him for that purpose by the commissioners, should nominate and appoint three in different persons as arbitrators; the arbitrators to be appointed, as hereinbefore mentioned, should award, determine, adjudge and order the respective sums of money which the said commissioners should pay to the respective persons entitled to receive the same, and the award of the majority of the said arbitrators in writing should be final; and said arbitrators should be, and they were thereby, required to attend at some convenient place at or in the vicinity of the said city to be appointed by the said commissioners, after eight days' notice given for that purpose by the said commissioners, there and then to arbitrate and award, adjudge and determine such matters and things as should be submitted to their consideration by the parties interested and also the costs attending said reference and award; and each arbitrator should be sworn before some one of Her Majesty's Justices of the Peace in and for the said County of Middlesex, or alderman of the said City, well and truly to assess the

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

value or damages between the parties to the best of his judgment; and, the Justice of the Peace or alderman before whom the said arbitrators, or any of them, should be sworn, should give either of the parties requiring the same, a certificate to that effect: provided always, that any award under this Act should be subject to be set aside on application to the Court of Queen's Bench or Common Pleas, in the same manner and on the same grounds as in ordinary cases of arbitration, in which case a reference might be again made to arbitration, as thereinbefore provided, and that any sum so awarded should be paid within three calendar months from the date of the award, or determination of any motion to annul the same, and in default of such payment the proprietor might resume possession of his property, and all his right should thereupon revive, and the award of the said arbitrators should be binding on all parties concerned, subject as aforesaid.

The 17th Section of the said Act provides that the Commissioners and their officers shall have the like protection in the exercise of their respective offices and the execution of their duties, as Justices of the Peace now have under the laws of this Province.

The 31st section of the said Act provides that if any action or suit be brought against any person or persons for anything done in pursuance of the said Act, the same shall be brought within six calendar months next after the act committed, or in case there shall be a continuation of damages then within one year after the original cause of such action arising.

The appellants, the Water Commissioners for the City of London, erected a dam across the River Thames at a point about four miles below the City of London, and about four miles below the mill of the respondent. The dam was built to pen back, appropriate and ob-

1904.

WATER COMMISSIONERS OF LONDON v. SAUNBY.

struct the flow of the said river for the purpose of carrying out the duties of the Water Commissioners and as a part of their system for supplying water to be used by the inhabitants of the said City, as authorized by "The London Waterworks Act, 1873," and the "The London Waterworks Amendment Act, 1878," passed by the Legislature of Ontario in the 41st year of Her late Majesty's Reign, chapter 27. This dam was completed in the early part of the year 1879, and has ever since been maintained and used by the appellants, the Water Commissioners for the City of London, for the uses and purposes aforesaid.

One Burleigh Hunt, was, by an Act of the said Legislature, authorized to erect and maintain a dam across the said River, at a point about half a mile below the said dam of the appellants, The Water Commissioners for the City of London, and over forty years ago a dam was there erected by him under authority of the said Act, and the same has ever since been maintained by him, and his successors in title

At the time of, and at least six years before, the erec- by the appellants of their said dam, there was erected and placed across the said River, at a distance of about two and three-eighths miles from what is known as 'The Forks," at the junction of the two branches of the River Thames, and a point a short distance up stream from the appellants' said dam, another dam known as "Griffith's dam," which was of a height equal to the said dam erected by the appellants, and the said Griffith's dam was, at the time of the erection of the dam now complained of, acquired by the said appellants.

The respondent alleged that he had been damaged by back water at his mill caused by the damming of the River by the said dam and claimed to recover such damages, and to restrain the appellants, by injunc-

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

tion, from continuing to dam back such water to his injury.

The Commissioners now appeal from the judgment of the Court of Appeal by which the injunction granted at the trial and the reference as to damages were maintained.

Aylesworth K. C. and *Meredith K C.* for the appellants.

Hellmuth K.C. and *Ivey* for the respondents.

The CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Nesbitt.

SEDGEWICK J. (dissenting).—The above defendant corporation were, by 36 Vict. c. 102, created a body corporate for the purpose of erecting and maintaining waterworks to supply the city with water. Section 5 of the Act is as follows:

5. It shall and may be lawful for the said commissioners, their agents, servants and workmen, from time to time, and at such times hereinafter as they shall see fit, and as they are hereby authorized and empowered, to enter into and upon the lands of any person or persons, bodies politic or corporate, in the City of London, or within fifteen miles of the said city, and to survey, set out and ascertain such parts thereof as they may require for the purposes of the said waterworks; and also to divert and appropriate any river, pond of water, spring or stream of water therein as they shall judge suitable and proper, and to contract with the owner or occupier of the said lands, and those having a right in the said water for the purchase thereof, or of any part thereof, or of any privilege that may be required for the purposes of the said Water Commissioners; and in case of any disagreement between the said commissioners and the owners or occupiers of such lands, or any person having an interest in the said water, or the natural flow thereof, or of any such privilege as aforesaid, respecting the amount of purchase or value thereof, or as to the damages such appropriation shall cause them, or otherwise, the same shall be decided by three arbitrators, etc., etc.

The rights of the parties depend to a large extent upon the proper interpretation that is to be given to

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Sedgewick J.

the powers of expropriation in that section contained. The injury complained of was an obstruction to the plaintiff's mill and the overflow of his land by reason of the penning back of the water of the River Thames thereon, such penning back having been occasioned by a dam built by the appellants across the River Thames, some miles below the respondent's property. That there was an obstruction to the respondent's property, and more or less substantial injury occasioned thereby was, upon sufficient evidence, found by the trial judge, which finding was confirmed by the Court of Appeal, and should not now, in my opinion, be disturbed.

The dam referred to was not built for the purpose of obtaining a supply of water for the use of the citizens of London, but only for the purpose of creating a water power with which to drive certain machinery necessary for the distribution of water obtained from springs and streams other than the Thames River in the vicinity of the city. The powers of expropriation set out in section 5 are as follows;—

The commissioners are empowered

to enter into and upon the lands of any person * * * and to survey, set out and ascertain such parts thereof as they may require for the purposes of the said waterworks, and also to divert and appropriate any river, pond of water, spring or stream of water therein as they shall judge suitable and proper, and to contract with the owner or occupier of said lands and those having a right in the said water for the purchase thereof or of any part thereof, or of any privilege that may be required for the purposes of said water commissioners.

The only verbs in this quotation which can possibly refer to the case before us are "enter" and "appropriate," and the contention of the appellants is, and always has been, that although they did not either intentionally or otherwise pen back the waters of the river upon the respondent's land, yet if, as a matter of fact, they had done so, then that was an "appro-

priation" by them under the statute, and that therefore the remedy was not by action but by means of the arbitration provided for in the section. I am strongly of the opinion that this occasional and intermittent injury not intended or contemplated by the commissioners when they erected the dam in question, cannot in any sense be considered as an appropriation of the property injured or of any water privilege which the respondent had. The act of appropriation, it seems to me, must be something done fn pursuance of a plan formed by the authority appropriating. There must be a mental process resulting in a determination to do a positive act. There must be an exercise of volition and that volition completed by an act of appropriation. In other words, one cannot appropriate a thing involuntarily. Then the word "appropriate" involves in it the idea of the taking away from one his property or his right in property so that he thereafter ceases to have it, and the person so appropriating succeeds him in the exclusive enjoyment of that particular property or right. Expropriating statutes the world over generally make provision for two things, first, the taking of property, and secondly, the injurious affection of property.

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Sedgewick J.

In the present case this ordinary and necessary principle has been most signally departed from. There is no provision authorising the injurious affection of land, a thing which is absolutely necessary in order to make that injurious affection other than tortious, nor is there any provision authorising compensation to be paid to persons whose lands are not appropriated but only injuriously affected.

Another consideration in this connection appears to me to have great force. The section being considered authorises the commissioners to appropriate any river, spring or stream of water and to contract with the

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Sedgewick J.

owner or occupier for the purchase thereof of any part thereof or any privilege that may be required. The contention has been made that the overflowing of the respondent's land and the obstruction to his mill were an appropriation of what is called a water privilege, and a water privilege was stated at the argument to be land covered by flowing water which was physically suitable for the generation, conservation and distribution of motive power. Now, in what sense have the Commissioners in any way appropriated the respondent's water privilege or any part of his water privilege? Appropriation, as I have suggested, means the taking of dominion over, or the conversion to one's own use of the property of another. Have these Commissioners appropriated to their own use, that is to their exclusive use, and become the sole users and possessors of the respondent's water privilege or any part of it? The very question answers itself. This water privilege has never been appropriated nor taken, it has only been obstructed and interfered with. It was exclusively possessed and used by the respondent. The interference with his privilege was not an assumption of ownership, but simply a trespass. For my part, I do not see how the appellants could do what is complained of here without appropriating to themselves the whole of the water privilege or a definite portion of the area over which the water flows. They cannot make themselves co-users with the owners of any privilege or right which they may think it necessary to acquire.

But however this may be, there is, I think, another conclusive reason why this section does not cover a case like the present. If it had been part of the scheme of the commissioners at the inception of their undertaking to use the water of the Thames for culinary and other purposes for which water is usually

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Sedgewick J.

supplied to cities, then they might have had power under the general words of the section to first appropriate from the riparian proprietors the stream itself. They had power to take water wherever it might be found within a radius of 15 miles from the city, and to distribute that water as provided for in the Act, but it seems to me that they had no power to dam the river Thames for the mere collateral purpose of obtaining motive power that motive power being, without difficulty, obtainable by means of steam. The Legislature, it seems to me, never contemplated the giving of such authority to the appellants. If they require machinery or power for the purpose of conducting their works and distributing water when collected through pipes throughout the city, they must buy that power in the same way as the rest of His Majesty's subjects.

The case of *Simpson* v. *South Staffordshire Waterworks Co.* (1) is interesting in this connection. There the Lord Chancellor (Lord Westbury) held that a waterworks company authorized to take a field or part thereof for the purpose of making a tunnel, were restrained from taking part of the field for the purpose of making a well and erecting pumping machinery thereon.

See also *Bentinck* v. *Norfolk Estuary Co.* (2) and *Galloway* v. *Mayor of London* (3).

A persual of the judgment of the Judicial Committee of the Privy Council in the *North Shore Ry. Co.* v. *Pion* (4) is most helpful in the consideration of the present case. The questions involved there are substantially the same as here. The Act in this case was apparently somewhat modelled after the Railway Act which was in question in that case, and the prin-

(1) 34 L. J. Ch. 380.
(2) 26 L. J. Ch. 404.
(3) L. R. 1 H. L. 34.
(4) 14 App. Cas. 612.

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Sedgewick J.

ciples there asserted by Lord Selborne are to my mind conclusive here and justify the judgments of the courts below. It is true that in that case damages were allowed to be given as for a permanent injury to the plaintiff's land, but the judgment suggests that had the plaintiff, instead of asking for damages based upon the principle, asked for a demolition of the company's works, or an injunction restraining the railway company from interfering with the plaintiff's access and egress to the river, that also would have been a proper remedy.

As to the contention that notice of action was required pursuant to sec. 17 of the appellant's charter, and to ch. 88 sec. 14 of the Revised Statutes of Ontario, it is sufficient to refer to the judgment of the Court of Appeal delivered by Mr. Justice Maclaren upon that point, in which he cites authorities to shew that the statutory notice is not necessary where an injunction is sought, although damages at the same time be claimed.

The judgment below orders the taking of an account of the damages suffered by the respondent for six years before the commencement of the action. It is not at all clear that this judgment is not right but counsel for the respondent at the argument expressed willingness that the account should be taken for those damages suffered within the six calendar months next previous to the action as the action had been brought not so much for the purpose of obtaining compensation for the injuries complained of as to prevent the usurpation of the appellants from ripening into a prescriptive right.

With this variation of the judgment, I think the appeal should be dismissed with costs.

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Davies J.

DAVIES.—I agree substantially with the judgment of my brother Nesbitt. At the close of Mr. Hellmuth's able argument, however, I felt grave doubts whether the statutory powers given to the Water Commissioners were couched in language sufficiently broad to enable them to divert and appropriate the rivers and waters within the prescribed district by damming them up and back and thus to generate power with which to force these and other waters through their mains to and through the City of London. Was the work complained of done for the purpose of carrying out, and as part of, the system of supplying water for the use of the citizens?

I think it was, and that the Water Commissioners were, therefore, acting within their powers. It is not contended that if the waters so penned back were utilized as part of the supply provided for the city, the dam and works of the Commissioners would be beyond their statutory powers. Nor is it, as I understand, contended that they could not use the waters partly to generate power to enable them to supply the city provided the waters so supplied were part of the same waters as those penned back. What was argued was that these waters have been penned back by the dam and flashboards for the sole purpose of generating power to supply other waters than those penned back to the city.

It is true that, so far, other waters have been distributed to the citizens by means of the power generated at this dam. But these very waters of the Thames may be so distributed any day and by means of the power which the penning back of the Thames by the dam enables the Commissioners to generate.

The appropriation of the waters in advance of the time when they may reasonably be expected to be required would only be an act of prudence.

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Davies J.

I think it would be an altogether too strict a construction to put upon the Act to say that it permits the Commissioners to divert and appropriate streams and rivers and waters within a prescribed area for the maintenance, management and conduct of waterworks in the City of London only and while they use the waters so diverted and appropriated exclusively for distribution in the city or among its inhabitants, but that the whole scheme would become illegal if any part of the waters were utilized in generating power to distribute the waters of the same stream or river or any other stream or river through the city. But the argument against the exercise of the powers must go that fo-.

I fully agree with what was said, that where compulsory powers are given to a corporation of this kind, they cannot be invoked to cover merely indirect or incidental or collateral purposes. Their use can only be justified when shewn to be substantially and wholly for the purposes and objects for which the Act was expressly and obviously passed. Such powers cannot be invoked to support or defend other or different objects or purposes than those contemplated by the Act.

I think it can fairly and reasonably be said that the Water Commissioners in this case are not abusing their powers in using them as they have done here for the sole purpose of carrying out the object for which they were constituted, namely, the distribution of water in and through the city and in generating the power necessary to enable them to effect that object. The Water Commissioners are not a corporation established for private gain but one constituted for a necessary public purpose, and their charter should receive such reasonable and proper construction as is essential to the carrying out of the plain purposes of the Act.

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Davies J.

Once that difficulty is surmounted, I can have no serious doubts as the extent of the powers conferred on the Commissioners. I need not repeat the words of the fifth section. They seem to me to be broad enough and clear enough not only to enable the Commissioners to purchase or expropriate any lands within the prescribed area "required for the purposes of the waterworks," but also and further so to divert and appropriate any waters being in or upon or flowing through the lands so expropriated or taken as they may judge reasonable and proper. They were not to use these waters simply and only as an owner of lands could use the waters flowing through them. In such case no special legislation would be required. But they were authorised to divert or use them in any way and to any extent they might think reasonable and proper. Of course, proper precautions were taken that in any user by them of waters beyond the user which the law allows a riparian proprietor, they should pay injured parties all consequent damages.

It has been argued that a strict construction must be placed upon the words "divert and appropriate." I know no special reason why this should be done or why the ordinary and reasonable construction necessary to give them their proper and effective meaning in the relation in which they are used should not be given to them. I think the damming back and setting apart of the waters for a particular use and purpose having direct bearing upon the purposes of the corporation is such an appropriation.

As to the argument that there were certain conditions precedent to the exercise of the compulsory powers given by the Act, I am unable to agree with it.

The cases cited of *Jones* v. *The Stanstead, Shefford and Chambly Railroad Company* (1); *The North Shore Rail-*

(1) L. R. 4 P. C. 98.

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Davies J

way Co. v. *Pion* (1); and *Corporation of Parkdale* v. *West* (2), are controlling authorities as to how these compulsory powers or statutes should be construed. In the two latter cases it was held that, under the statutes there in question, the filing of the plans and the taking of the prescribed means of ascertaining and paying the damages were as much conditions precedent to the exercise of the powers authorising the "injurious affection of lands," as to the taking of lands themselves. But it is perfectly plain from the reasons given for their judgment by the judicial committee, if indeed authority was needed for the proposition, that such conclusion depended entirely upon the language of the statutes before them in those two cases, and that cases may occur where damages may arise from the execution of authorized works, which damages could not be foreseen and, *ex necessitate*, could not be paid before the execution of the works. The probability of such cases occurring seems to me so certain that the legislature may well be taken to have had it in mind when legislating in this case.

In delivering the judgment of the Privy Council in *Pion's Case* (1), the Earl of Selbourne said, at page 626:

> In both cases alike, (that is *Pion's Case* (1), then under consideration, and *West's Case* (2), the damage to the plaintiff's property was a *necessary, patent and obvious consequence of the execution of the work.*

Now, the statute before us does not make any specific act, such as filing of plans or ascertainment and payment of damages or anything else beyond "the survey, setting out and ascertaining of the lands required" a condition precedent to the exercise of the compulsory powers. It was plain that the damages which the exercise of the compulsory powers might cause must, in many cases, while a consequence of the execution of

(1) 14 App. Cas. 612. (2) 12 App. Cas. 602.

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Davies J.

the works, be "neither a patent nor an obvious consequence of such execution," and be only capable of being ascertained after the execution of the works. They are such damages as were in the mind of the Judicial Committee when they said in *Pion's Case*, (1) at page 627.

> It may well be that the statute gives the right of compensation for damages of a different kind which, at the time when the company had to give its notices and take the other necessary steps to enable it to execute its works, could not be foreseen, a different rule must be applicable, by necessary implication from the provisions, on the one hand, entitling the land owner to compensation, and authorising, on the other hand, the construction of the works.

No one can read the evidence in this case without being satisfied that, if the plaintiff has sustained damages, as the trial judge has found, they were damages which were certainly neither patent nor obvious at the time of the construction of the appellants' works, but which (assuming their existence) happened subsequently to the building of the works in question and as an unforeseen consequence of those works.

The duties of the several parties committing and sustaining the injuries were to take the statutory steps to have the damages assessed. The works constructed by the defendants, being legal works under the statutory powers, cannot be interfered with by injunction.

Nor, on the other hand, do I think that the plaintiff has lost his right to have his damages assessed. The right to maintain the works, on the one hand, and the right to have the damages caused by those works assessed, on the other, co-exist. Such damages are capable of being estimated once for all and should be so estimated and adjudged.

I agree with the finding of the trial judge, confirmed by the judgment of the Court of Appeal, that the defendants have not gained any right by prescription to dam back the waters of the river upon the plaintiff,

(1) 14 App. Cas. 612.

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Davies J.

as claimed by them. To gain such right there must be shown to have been a continuous exercise of the acts relied on through some definite portions of each and every year for a consecutive period of twenty years. I fully agree that no such evidence has been given.

Holding as I do that the appellants' works in the River Thames were constructed under and by virtue of their statutory powers and that any injuries or damages caused to the plaintiff thereby were legalised injuries, the damages for which he had a right to have assessed under the fifth section of the Act, I am clearly of the opinion that neither the seventeeth nor the thirty-first sections of the statute apply. It is quite clear to my mind that the latter section, limiting the time within which an action may be brought against the commissioners for things done by them in pursuance of the Act, can have no relation to proceedings taken by them expropriating lands or water privileges under the fifth section. In this I also agree with the trial judge and the Court of Appeal. But I see no reason whatever why any damages suffered by the plaintiff should not now and once for all be assessed by arbitrators to be appointed under the fifth section of the Act and, if we had the power in this action to grant a mandamus for the appointment of such arbitrators, I would certainly do so. As however, we cannot do this, we must leave the parties to their rights under the section referred to and no doubt proper steps will, at once, be taken to have the damages assessed.

NESBITT J.—This case turns upon the construction which is to be placed upon the Act for the construction of waterworks for the City of London. The first section empowers the Water Commissioners to construct, build, purchase, improve, hold, and generally

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Nesbitt J.

maintain, manage and conduct waterworks. The fourth section gives power to employ engineers and others, and to rent or purchase such lands, buildings, waters and privileges as in their opinion may be necessary to enable them to fulfil their duties under this Act. The fifth section authorises the Commissioners to enter into and upon the lands of any person in the City of London, or within fifteen miles of the said city, and to survey, set out and ascertain such parts thereof as they may require for the purposes of the said water works, and also to divert and appropriate any river, pond of water, spring or stream of water therein, as they shall judge suitable and proper, and to contract with the owner or occupier of said lands and those having rights in the said water for the purchase thereof, or any part thereof, or of any privilege that may be required for the purposes of the said waterworks. In case of any disagreement between the said Commissioners and the owners or occupiers of said lands, or any person having an interest in the said water or the natural flow thereof, or any such privilege as aforesaid respecting the amount of purchase or value thereof, or as to damages such appropriations shall cause to them or otherwise, the same shall be decided by three arbitrators.

What substantially was done was, the Commissioners, having purchased the land on either side of the river, about five miles below the city, erected a dam with stanchions for flashboards, which flashboards were inserted at certain seasons in order to raise the water in the dam.

The plaintiff, who was the owner of the mill privilege, some five miles above the dam, in the river, complains that the placing of the flashboards in position at times injures him in backing water in his raceway.

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Nesbitt J.

The courts have held, and I believe some of my learned brethren are very strongly of the opinion, that what has been done is not within section five of the Waterworks Act; that that Act simply enabled the Commissioners to enter upon any land within the city, or fifteen miles thereof, and to divert or appropriate water within the area of the lands entered upon, which lands must be paid for either by agreement or under arbitration proceedings, and that this is made plain by section six which provides that the lands, privileges and water, which shall be ascertained, set out or appropriated by the Commissioners, for the purposes thereof, as aforesaid, shall thereupon and forever thereafter be vested in the Corporation of the City of London and their successors, and as the mill privilege of the plaintiff was never ascertained, set out or appropriated, that the defendants are simply wrongdoers and trespassers upon his legal right to the natural flow of the water. If this construction of the section is correct I think that the judgment cannot be disturbed for any of the reasons urged. I do not think the Commissioners can be protected under the 17th section of the Act nor do I think that the thirty-first section would limit the damages to the period of six months; and I think that it is a case that, notwithstanding the remedy by injunction may seem a very drastic one, yet the plaintiff would be entitled under the authorities to such remedy, nor do I think the defendants can ask the court to define by its judgment to what point the water may be raised, as they must be at the risk, if they are wrongdoers, in anything they do which may prejudice the plaintiff.

In my view, however, the fifth section does apply I think the word "appropriate" is used in the sense of "setting aside for the purposes of," and the Commissioners, if they are so advised by their engineers,

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Nesbitt J

would be entitled to appropriate the waters of the river by the erection of a dam and the setting aside of a large pond or reservoir for waterworks purposes, and I do not think that the water need necessarily be taken from such pond for the purposes of distribution in the city either for drinking, fire, manufacturing or street purposes, but that as part of the design of a waterworks system the Commissioners would be entitled to say, we deem it the best system to appropriate the waters, in the way I have described, in order to create power for the utilization of other waters, as power is as necessary to a waterworks system as a supply of water or pipes to carry it in, and if the design of the Commissioners involves the notion of an appropriation of the water of the river by setting it aside in the mill-pond or reservoir, and if the necessary result of creating that mill-pond is to back the water, then, any person injured in the natural flow or in any privilege affected by the backing, is damaged by such appropriation and entitled to compel the Commissioners to pay damages under section five for such appropriation so causing damage.

Otherwise I do not think effect can be given to the language of section five which plainly contemplates purchase money for such property acquired and damages caused to other property by such acquisitions and subsequent user.

It is to be observed that the disagreement may arise in reference to the amount *of purchase or value* which is the case where appropriation has taken place, or it may arise as to the amount of damage *such appropriation* shall cause, and I do not think that can be read as only applicable to the actual appropriation which the commissioners may have attempted to set out or ascertain. Such a construction would be a strained one as it must necessarily have

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Nesbitt J.

occurred to the framers of the Act that in case the commissioners went on, say, above the plaintiff's mill privilege, and appropriated the water of the river, which they would be entitled to do, that the only person to be paid would be the person upon whose land the commissioners entered to so divert or appropriate. That diversion or appropriation would be lawful. The person upon whose land they entered would be a person who would be paid but, under the construction of the Act I have referred to, the plaintiff who would be a person entitled to the natural flow and entitled to a mill privilege would have no remedy.

The commissioners could answer him, "what we have done is a lawful act. There is no provision in the Act for injurious affection of property and we are not liable to you." This would seem a most curious result and one most unlikely to be contemplated by the framers of the Act. Of course it is settled law that the legislature could give the right of appropriation without payment of compensation either for taking or injurious affection, but where a construction can possibly be placed upon an Act to avoid such consequence it should be done.

It seems plain to me that in the illustration I have given the plaintiff could immediately have compelled, by mandamus, an arbitration, as being a person interested in the natural flow of the water, or in a privilege, and as being damnified by the appropriation of the water of the river made by the commissioners. If it is true that the appropriation could lawfully take place above the plaintiff, how can any different construction be supposed because the appropriation took place below, the necessary consequence of which is the damming back of the water on the plaintiff and the interference therefore with the natural flow and the partial destruction of his privilege. In such case it seems to me

reasonably clear that he was a person entitled to compel arbitration and that his remedy was under the Act.

A clear distinction must be drawn between a case like the present where, if my construction is correct, the act which is complained of was itself lawful, but the result of the act not obviously causing damage, and a case where certain conditions precedent are necessary upon the part of the person authorized before entry can be made upon the land of the person complaining, that is cases where it is obvious land must be taken or injury done.

This is a case where, it is true, there has been an appropriation of the plaintiff's mill privilege, an appropriation of his rights to the natural flow of the water, but that appropriation has taken place as a necessary result of a lawful appropriation further down the stream and is more in the nature of an injurious affection than of an actual appropriation by the commissioners, but in whichever way it is viewed it seems to be within the Act.

If a railway company is authorized to construct a railway and to enter upon lands, first filing plans, etc., then, as shewn by such cases as *West* v. *The Village of Parkdale*, (1) and *Pion* v. *North Shore Railway Co.* (2) such filing of plans, etc., is a necessary condition precedent, and otherwise the act is unlawful and plaintiff can claim demolition of the works, or may have his damages assessed once for all as for permanent works, and so in this case if what has been done were treated as an original appropriation of the right of the plaintiff to the natural flow of the river, there would be great force in the argument that there had been non-compliance with the conditions precedent under the Act, namely, the entry upon the land and the surveying, setting out and ascertaining the parts required for the purposes of the waterworks, and that as such had not

(1) 12 App. Cas. 602.

(2) 14 App. Cas. 612.

1904

WATER COMMISSIONERS OF LONDON v. SAUNBY.

Nesbitt J.

been done the plaintiff could at any time within the period of the Statute of Limitations treat the works so appropriating his privilege or right to the natural flow of the water as a trespass and require its demolition.

As I have pointed out this, however, while in a sense an appropriation, is rather a necessary result flowing from a lawful appropriation further down the river, and the plaintiff is a person damaged by such appropriation and a person who did not seek the remedy under the Act.

KILLAM J. (dissenting).—In my opinion this appeal should be dismissed. It appears to me that the statutes did not authorise the commissioners to do what they have done. They were empowered to divert and appropriate rivers and streams. Leaving entirely aside the question of the right of the commissioners to use their special statutory powers for the purpose of procuring the power to operate their works, as distinguished from the acquisition of the water to be supplied, it seems to me that they were not authorised to pen up, or keep or store, the water acquired for any purpose in such a manner as to injure others. They were further given power to acquire, either by purchase under contract or by compulsory method, lands or water privileges. They have not acquired or sought or attempted to acquire the plaintiff's lands or water privileges. They have merely committed occasional acts causing him injury, and they threaten and intend, unless prohited by judicial authority, to continue the commission of such acts

Upon the remaining points I agree with the conclusions of the Court of Appeal.

Appeal allowed with costs. *

Solicitor for the appellants: *Thomas G. Meredith.*

Solicitors for the respondent: *Hellmuth & Ivey.*

* Leave to appeal to Privy Council has been granted. (July, 1904.)

HIS MAJESTY THE KING (PLAINTIFF)..APPELLANT; 1904

AND *Mar. 14
*May. 4.

THE VESSEL "KITTY D." (DEFENDANT)..... ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, TORONTO ADMIRALTY DISTRICT.

Illegal fishing—Seizure of vessel—Evidence of vessel's position.

The American vessel "Kitty D." was seized by the Government Cruiser "Petrel" for fishing on the Canadian side of Lake Erie. In proceedings by the Crown for forfeiture the evidence was conflicting as to the position of both vessels at the time of seizure and the local Judge in Admiralty held that the evidence did not establish that the vessel seized was in Canadian waters at the time. On appeal by the Crown:

Held, Taschereau C.J., dissenting, that, as the "Petrel" was furnished with the most reliable log known to mariners for registering distances and her compass had been carefully tested and corrected for deviation on the morning of the seizure; as the "Kitty D." and the two tugs in her vicinity at the time whose captains gave evidence to shew that she was on the American side carried no log nor chart and kept no log-book; and as the local judge had misapprehended the facts as to the course sailed by the "Petrel," the evidence of the officers of the "Petrel" must be accepted and it established that the "Kitty D." had been fishing in Canadian waters and her seizure was lawful.

APPEAL from the decision of the local judge in Admiralty, Toronto division, in favour of the owners of the respondent vessel.

The "Kitty D." was seized on Lake Erie by the Government cruiser "Petrel" for fishing north of the boundary line and an action was brought by the Crown in the Court of Admiralty to have her declared

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

1904

THE KING v. THE KITTY D.

forfeited. The action was tried before Judge Hodgins' local judge in Admiralty for the Toronto district, who decided that the Crown had not proved that the vessel was on the Canadian side at the time of the seizure and he ordered that she be delivered up to the owners.

The following are the reasons given by the local judge for his judgment:

"The question in this case is whether a seizure of the United States fishing boat, "Kitty D." by the Dominion Cruiser "Petrel" on the 3rd July last for alleged fishing was made in Canadian waters, north of the international boundary line.

"Captain Dunn of the cruiser stated that he left Port Dover on that morning at 6.30 o'clock and directed his officers to take the course to clear Long Point by S. E. by S. ¼ S., which was the usual course in calm weather, but owing to the variation of the compass the true course would be represented by E. by N. 7-8 N. That he set the log when they were immediately abreast of the Long Point light-house, from which he was approximately about five eighths of a mile; that after registering five knots he turned the "Petrel" on her course down the lake and ran down the boundary line E. by N. ½ N., and that shortly before noon the second officer came and told him there were two tugs, one of which was nearly directly ahead, a little to the port, and the other away to the north of the boat; that he turned to the one on the north which was about two miles off and made a crescent towards the north-west for about ten minutes and then south-west and signalled her to slack speed, and so overtook and seized her. The distance of these different crescent courses was not stated.

"The other witnesses for the Crown were, first officer Inkster, who stated that the "Petrel" left Port Dover

at 6.30 o'clock that morning; that the usual course in calm weather was S. E. by S. ¼ S.; that he was on the bridge until 8 o'clock, when she was steering E. by S. ¼ S. from Port Dover, and that they passed Long Point about eight-thirty at the distance of about half a mile.

"Second officer McPherson corroborated the first officer as to the course of the "Petrel" on the 3rd July, except as to the steering E. by S. ¼ S.—he making it S. E. by S. ¼ S. He also said that he could not tell whether they were south or north of the International boundary line; and he estimated that they were about one-half mile from Long Point when the log was set, which, he says, is the usual distance, though it might vary several hundred yards.

"The seamen who steered the "Petrel" on that day were also examined. Slade said that when he took the wheel the vessel was steering S. E. by S. ¼ S, thus confirming second officer McPherson, but when asked the nature of the turn from S. E. by S. ¼ S., he gives the course E. by N. ½ N. He admitted that he had only been a mariner for one season, and had not much experience in steering, and that he was not known in marine circles as a 'wheelsman," and that this was the first time he had steered from abreast of Long Point out to the boundary line.

"Campbell said that when he took the wheel at 10 o'clock the "Petrel" was steering E. by N. ½ N. and that he continued her on that course; that he had never steered a boat until this summer. Neither of these sailors knew anything about a compass prior to their going on the "Petrel" last April.

"Captain Spain gave evidence that he came to Port Colborne on the 8th July and hired the "Golden City" and steered out into the lake to see if he could find the nets of the "Kitty D." which were reported to have been

1904

THE KING v. THE KITTY D.

left in the lake, and that he was accompanied by Captain Jones of the "Kitty D." and Mr. Dechert, one of the owners. He suggested that Capt. Jones should take the wheel, but the captain of the "Golden City" did not give it to him. Jones then offered that if he were taken across to Dunkirk and could start from there, as he knew that course, he could find the "Kitty D's" nets, and he described to Captain Spain the kind of buoy attached to the nets of the "Kitty D." Jones' offer was, however, declined and the "Golden City" returned, after failing to find the place where the "Kitty D's" nets had been set. Captain Spain further stated that the "Petrel" left Port Colborne on the following morning at 6 o'clock, and that he instructed Captain Dunn to go to Long Point and take the course he had reported to him he had taken on the 3rd July, S. E. by S. $\frac{1}{4}$ S. for five miles out; that after steaming out for about five miles from Long Point he said they got to about a mile and three-quarters north of the boundary line, and owing to not having allowed for the over-registering of the log the "Petrel" was a little further out than that. He also estimated from Captain Dunn's report that the place of seizure was nine and three-quarter knots from Lapp Point on the Canadian shore; and he showed that the British chart made Lapp Point ten and one-half miles from the boundary line, though the real boundary line there is $11\frac{1}{4}$ miles. According to his estimate the "Kitty D." was $\frac{3}{4}$ of a mile north of the Canadian side of the boundary line, to which he would add, on the statement of Captain Jones, that the place of the "Kitty D's" nets was "five minutes north," a further $\frac{3}{4}$ of a mile—making in all $1\frac{1}{2}$ miles north on the Canadian side. But he admitted that he could only give the distances approximately.

The only witnesses for the Crown who gave evidence of the locality of the seizure were Captain Dunn and

Captain Spain, the latter only estimating the locality of the seizure by the report made to him by Captain Dunn.

"The following may be taken as a fairly condensed summary of the defendants' evidence as to the seizure of the "Kitty D." on the 3rd July:—

"Jones, her captain, said that he started from Dunkirk about five o'clock that morning, and steamed out for about an hour and five minutes N. by W. ½ W. to where he had set his nets east by south on the 2nd July; that the buoy of his nets was about 9¾ miles from Dunkirk, and that his ship was seized by the "Petrel" at that distance from the United States shore. He also steamed out on the "Desmond" on the 7th on the same course, 9¾ miles, and found his nets and that one of the corks was then taken off with the owners' mark, "R. & D." on it, and that all the nets remained out until the 26th July, when they were taken up except one, which he left, and he asserts that he was fishing at the time of seizure on the United States side of the boundary line, and so stated to the captain of the "Petrel."

"Dewitt, one of the hands on board the "Kitty D." said they left Dunkirk about five or half past or six o'clock, and steamed out into the lake for somewheres in the neighbourhood of an hour. He also said that about the end of July he saw the "Kitty D." buoy and fished around it.

"Helwig, the captain of the tug "Lucy," said that on the 3rd July he was out from Dunkirk about nine or ten miles lifting his nets; that he was a little to the north of the "Kitty D." with his outer net; that he saw the "Petrel" go to the westward and seize the "Kitty D."; that on the 4th July he found that the "Kitty D.'s" nets, which had been set on the 3rd had crossed his, which he had previously set on the 2nd July north and south;

1904

THE KING v. THE KITTY D.

that his most northerly nets were a mile to the north of the "Kitty D's"; and he is positive that the "Kitty D." was in United States waters at the time of seizure, and that his outer (north) buoy was also in the same water.

"Connor, the engineer of the "Lucy," said that on the 3rd July they were about a mile north of the "Kitty D." and saw the seizure; that their nets had been set on about the 2nd July north and south, and that in lifting them on the 4th they found that the nets of the which had been set on the 3rd had crossed the "Lucy's"; that their outer buoy was about a mile north of the "Kitty D.'s" nets. He also said that it took him about thirty minutes to get to his inside buoy, and that his nets extended out 3¼ or 4 miles and made their distance from Dunkirk about 7 or 8 miles. And he also said that at the time of seizure the "Kitty D." was in United States waters.

"Captain Howison of the United States navy, who had been sent by the Secretary of the Treasury of the United States to investigate the case, said that on the 27th July he left Dunkirk on the United States Revenue Cutter "Fessenden," preceded by the tug "Desmond," to show him the locality of the "Kitty D.'s" buoy; that they found it and had two corks taken off marked "R. & D.," and on returning to Dunkirk he logged the distance from the "Kitty D.'s" buoy, which he found to be 9½ statute miles. He further stated that the International boundary line is about 11½ miles from Dunkirk, and a little over two miles north of the western buoy of the "Kitty D.'s" nets. He also added that from where he found the buoy he could see the American shore, but not very well the Canadian shore.

"Mr. Harvey, consul for the United States at Fort Erie, went out from Dunkirk on the "Desmond" on the 7th July to the western boundary buoy of the "Kitty

D.'s" nets, Captain Jones of the "Kitty D." and others being with him; that the time going out was one hour and six minutes; that he logged the distance, which was found to be 9¾ miles; that he took off a cork with the initials of the owners, "R. & D." on which he put his own initials, and produced it at the trial; that in returning to Dunkirk it took one hour and seven minutes, and that the log showed 9¾ miles from where the "Kitty D.'s" nets were found.

"Donnelly, the captain of the "Desmond" said he was setting nets on the 3rd July, and saw the "Kitty D." while about a mile south-east of the "Desmond"; that he was then about seven or eight miles from Dunkirk. He saw the "Kitty D." seized. He further said that he went out on the "Desmond" on the 7th July, with Mr. Harvey, Captain Jones and Mr. Ryan, one of the owners of the "Kitty D.," to take the distance from the shore to the "Kitty D.'s" buoy, and found the buoy, and took off one of the cords with "R. & D." on it; that the distance from Dunkirk to it was 9¾ miles, and that the time occupied was one hour and six minutes; and that on logging back the distance they found it the same.

"Burns, captain of the fishing tug "Charm," also went out on the "Desmond" on the 7th July and found the buoy of the "Kitty D.'s" nets less than one-eighth of a mile of 9¾ miles distance from Dunkirk, and took off a cork marked "R. & D." He also said that the place where they found the buoy was about 2½ miles on the United States side of the boundary line.

"Jones, on being recalled, stated that when he took Captain Howison out they went to the most northerly buoy of the "Kitty D.'s" nets.

"Dechert, one of the owners, who went out with Captain Spain on the "Golden City" on the 8th July, and on the "Petrel" on the 9th July to find the "Kitty

1904

THE KING v. THE KITTY D.

D.'s" nets, stated that they were unable to find their locality on both occasions.

"From the above it will be seen that the weight of evidence as to the place of seizure of the "Kitty D." is with the defence.

"But there are also incidents to be taken into consideration which seem to be material to the decision. In taking the turn into the lake from Long Point on the 3rd July, Captain Dunn stated that the rounding of the "Petrel" might increase the outward distance from Long Point by say 200 yards, and it might throw the ship out of her bearings that much, and that the turning might fluctuate from 200 to 500 yards off Long Point, which would seem to throw doubt as to the locality where the turning to the international boundary line actually took place; and to this he added that in taking a course along the international boundary line there would, of course, be some deviation from a straight course to the right or left—a fact which it is reasonable to assent to, seeing that the vessel was proceeding on a liquid highway and out of sight of any distinctive land-mark on the shores, and on this day through an atmosphere described in the log book 'wind, light baffling to calm; heavy thunder squall with rain,' and by several witnesses as, cloudy, raining, misty; weather thick, kind of squally, rainy weather, quite a storm came up that day.'

"Then with these atmospheric difficulties there was the inexperience of the seamen in the practice of steering a ship, and their recent acquaintance with the points of a ship's compass, which leaves it somewhat doubtful as to their knowledge of its deviations, and especially, as it came out in the evidence, that the change of a quarter of a point in a compass would make a difference of a mile and a half right or left in a vessel's course over a distance of some thirty miles.

"Add to this the fact that the buoy of the "Kitty D.'s" nets was a red pole, ten feet high, with an oil-skin flag at the top, then a piece of a pair of overalls, and next below a piece of shirt, which, neither on the search of the "Golden City" on the 8th, nor the search of the "Petrel" on the 9th July, was discovered—although the course of the "Petrel" on the 9th July is said by Captain Dunn to have been precisely the same as that taken by the "Petrel" the day he captured the "Kitty D."

"It has been well said by Judge Black of the Quebec Admiralty Court that 'statements as to time and distance in maritime cases are probably more or less erroneous.' And Sir Wm. Scott when dealing with the evidence of estimated distances at sea in the case of the '*Twee Gebroeders*' (1) at page 163 says: 'An exact measurement cannot be easily obtained, but in a case of this nature, in which a court would not willingly act with an unfavourable minuteness towards a neutral state, it will be disposed to calculate the distance very liberally.' And this conclusion was approved by the United States Admiralty Court, '*Soult* v. *L'Africaine*' (2), at page 205. For, as Sir William Scott afterwards said (3) on page 338: 'It is scarcely necessary to observe that a claim of territory is of a most sacred nature. In ordinary cases where the place of capture is admitted it proves itself,' but he adds that it is otherwise when it happens in places where it is contended that no right exists, and then, the facts on which the right depends must be competently established.

"These cases affirm the doctrines of International Law, which have been truly stated in Bar's Private International Law, page 1067-8:

'In the case of any real doubt the decision must be against the subjection of a ship to a territorial

(1) 3 Rob. 162.
(2) Bee's Admiralty Reports 204.
(3) 3 Rob. 336.

1904

THE KING v. THE KITTY D.

sovereignty. The hull of the ship presents at once to the mind the notion of the subjection of that ship to the law of her own flag. We cannot regard that subjection as removed unless some sensible and unmistakable cause for its removal has intervened. Any other determination of the question would involve legal relations in uncertainty and confusion.

'On land-locked lakes surrounded by several states the same principles as regulate the application of territorial law on dry land must rule, in so far as there are distinct boundary lines recognized. The well-known rule for fixing these is that the centre of the lake determines them, just as in the case with rivers. But if there is a condominium of the surrounding states, we are forced to consider a ship in matters of civil law, while she is on a voyage on the lake, as a part of the territory from which she hails, just as we do in the case of a ship upon the high seas. As regards contentious jurisdiction there is a question about arresting a ship, but this expedient seems not to be desirable, because it might easily be abused, and would be exceedingly apt to lead to a small warfare of jurisdictions.'

"On the facts disclosed in the evidence, and aided by the authorities cited, I must find that the locality of the "Kitty D." fishing on 3rd July last was not within the Canadian waters on the north of the international boundary line in Lake Erie, and that her seizure on that day by the cruiser "Petrel" cannot be sustained, and that an order do issue for her restoration to her owners."

"TORONTO, December 3rd, 1903.

"Since disposing of this case the counsel for the Crown has moved for a certificate under sec. 15 of the Act respecting Fishing by Foreign Vessels, R. S. C.

ch. 94, that there was probably cause for the seizure of the "Kitty D." on the 3rd July last. That section provides that if such certificate is issued the owners 'shall not recover more than four cents damages, and shall not recover any costs, and the defendant shall not be fined more than twenty cents.' But I think section 20 of the Act relieves me of the responsibility of considering whether such a certificate should issue or not; for that section declares that 'the Act shall apply to every foreign ship, vessel or boat in or upon the inland waters of Canada.' My finding on the evidence was that this foreign ship, "Kitty D.", was not 'in or upon the inland waters of Canada' at the time of her seizure, and I must therefore hold that such finding negatives the statutory power to grant the certificate moved for.

"By rule 132 of the General Rules in Admiralty Cases it is provided that costs are to follow the event, and under that rule the owners are entitled to their costs of this action against the Crown.

Newcombe K. C. Deputy Minister of Justice and *Kinnear* for the appellant.

German K. C. for the respondent.

C. H. Ritchie K. C. for the Government of the United States of America.

THE CHIEF JUSTICE.—I regret not to be able to concur in the allowance of this appeal that the majority of the court has agreed upon. It seems to me impossible to reverse the findings of fact of the court below without disbelieving the evidence of witnesses whom the judge who has heard them has believed. Now, I can see nothing in the case that would justify us in doing so. Then the judgment about to be rendered is based upon a question of fact

1904

THE KING v. THE KITTY D.

The Chief Justice.

raised for the first time in this court, and upon which, had it been directly raised at the trial, evidence might have been brought to affect it and elucidate it.

I am of opinion, with deference, that this should not be done. *City of Victoria* v. *Patterson* (1); *Owners of the Ship "Tasmania"* v. *Smith et al.* (2); *Lyall* v. *Jardine* (3); *Mussumat Imam Bandi* v. *Hurgovind Ghose* (4); *The "Tasmania"* (2), per Lord Herschell at page 225; *The Owners of S.S. "Pleiades"* v. *Page et al.* (5).

I would have agreed to a judgment ordering a new trial, so as to give the respondent an opportunity of meeting the point in question, but I cannot agree to a judgment against him. An appellant has no right so to ask us to act as a court of first instance.

SEDGEWICK J.—I am of opinion that the appeal should be allowed.

DAVIES J.—The "Kitty D." was an American tug boat engaged in fishing in Lake Erie in the year 1903. On the 3rd day of July of that year about mid-day she was seized by the Canadian cutter "Petrel" for fishing in Canadian waters, some two miles north of the boundary line. The line is not marked by buoys or otherwise across the lake, and the question for our determination was solely one of fact. Was the tug "Kitty D." at the time she was engaged with her nets in fishing on the 3rd July, and when a few minutes afterwards she was captured by the cruiser "Petrel" as she was running away south from her nets, on the Canadian or American side of the line? The contention on the part of the Crown was that the evidence shewed the nets and the tug boat to have been at least two

(1) [1899] A. C. 615.
(2) 15 App. Cas. 223.
(3) L. R. 3 P. C. 318.
(4) 4 Moo Ind. App. 403.
(5) [1891] A. C. 259.

miles north of the line, while for the defence it was contended that they were at least two miles south of the boundary and in their own waters. The differences are not reconcilable on any theory of mistakes of memory or misjudgment of distances on the part of the seizing officers, but can be accounted for possibly if the singular error with regard to the course sailed by the "Petrel" that day which seems by the report of the trial judge's decision to have been adopted by him was once accepted. 'I am inclined to think that the trial judge reached the conclusion he did very largely because of the error respecting the course of the "Petrel" with which his judgment opens He says that Capt. Dunn stated

> that he left Port Dover on that morning (3rd July) at 6.30 o'clock and directed his officers to take the course to clear Long Point S. E. by S. ¼ S. which was the usual course in calm weather, but owing to the variation of the compass the true course would be represented E. by N. 7-8 N.

This unfortunate mistake has arisen from the trial judge confounding the course E. by N. 7-8 N. which is stated by Capt. Dunn to be the true course when running down the lake parallel to the boundary, with the course which he evidently thought she followed from Port Dover past Long Point towards the boundary line and before and until she turned down the lake. Comparing the charts produced in evidence with the concurrent testimony of all the witnesses for the Crown who could speak upon the point that the course the "Petrel" took and followed from Port Dover past Long Point towards the boundary line was S. E. by S. ¼ S. the error with which the learned judge starts of upwards of 7 points in the course is a fatal one. If the learned judge was correct in that and the officers of the ship wrong, he might well have distrusted their con-

1904

THE KING v. THE KITTY D.

Davies J.

clusions as to their position in the lake some five hours afterwards. I also think the learned judge was led to look with doubt upon the testimony of the ship's officers by a discrepancy which he thought existed between their statements as to the course of the ship from Port Dover to the boundary line. The captain stated the course to be S. E. by S. ¼ S. The first officer, Inkster, and second officer, McPherson, both corroborated this and the seamen who were at the wheel confirmed it. No doubt was attempted in the argument at bar to be thrown upon a fact so clearly and indisputably proved. The printed record however in one part of officer Inkster's evidence omits the first letter S. and makes him say in one place that at 8 o'clock the course of the ship was E. by S. ¼ S. It does not appear whether the error was one of the printers or stenographers but the context of officer Inkster's evidence makes it quite patent that the omission of the letter S. on that line of the printed record was a mistake. The difference between the two courses is 4 points and if the course E. by S. ¼ S. had been the course followed, the steamer would have gone almost directly away from Long Point to the eastward and not towards the boundary line at all.

The learned judge in a later part of his judgment seemed to entertain grave doubts whether the position of a vessel on a lake could be determined with any degree of accuracy by its officers under the circumstances that accompanied the short voyage of the "Petrel" on the 3rd. After referring to Capt. Dunn's statement that the turning of the vessel might fluctuate from 200 to 500 yards off Long Point which the judge remarks

> would seem to throw doubt as to the locality where the turning to the international boundary line actually took place

the trial judge goes on to say:

And to this he added that in taking a course along the international boundary line there wou of course, be some deviation from a straight course to the right or left a fact which it is reasonable to assent to seeing that the vessel was proceeding on a liquid highway and out of sight of any distinctive land-mark on the shores, and on this day, through an atmosphere described in the log book as "wind light baffling to calm; heavy thunder squall with rain" and by several witnesses as cloudy, raining, misty, weather thick, kind of squally, rainy weather, quite a storm came up that day.

Then with these atmospheric difficulties there was the inexperience of the seamen in the practice of steering a ship, and their recent acquaintance with the points on a ship's compass, which leaves it somewhat doubtful as to their *knowledge of its deviations*, and especially, as it came out in the evidence, that the change of a quarter of a point in a compass would make a difference of a mile and a half right or left in a vessel's course over a distance of some thirty miles.

I merely quote the above extract to shew that the trial judge evidently was under the impression that when a vessel sails on "a liquid highway out of sight of any distinctive land-mark on the shores" and is steered by men at the wheel whose knowledge of the deviations of the compass is somewhat doubtful, the course of such vessel may well be accepted as erratic and uncertain. But, as we know, sailors who steer ships are not supposed to know anything of the compass' deviation or to act on such knowledge if they do possess it. They simply steer the ship by the points shewn on the compass before them and under the direction of an officer. The captain of the ship when making up his run, either from the log or observation or both, in determining and marking his position on the chart makes the proper allowance for the deviation and variation of his compass. If the unfortunate wheelsman had to make the necessary allowances for deviation when steering, pitiable indeed would be the captain's position when he came to determine the ship's location. I have thought it desirable to call attention to what I conceive to be car-

1904

THE KING v. THE KITTY D.

Davies J.

dinal errors in the trial judge's assumption of the facts in order to shew that his conclusions were not based upon any questions arising out of the demeanour or credibility of witnesses, matters which would be peculiarly within his province and with a decision upon which an appeal court would not interfere.

The question, it appears to me, we have to decide, is whether or not the evidence satisfies us beyond reasonable doubt that the "Kitty D.," at the time of her seizure was in Canadian waters, and had been immediately before her capture fishing there. We have had the advantage of having had the evidence for and against the Crown subjected to able criticism, and careful comparison and collation. So far as the direct evidence for the Crown is concerned, it would, if accepted, seem to leave no room for doubt as to the positions of the cruiser and the tug when the latter was seized. The direct distance across the lake at the point of seizure is 22½ miles and the boundary line running through the middle of the lake would be 11¼ miles from the Canadian shore. At the time and place of seizure there was no land in sight, and it was therefore necessary to establish the position of the cruiser by reference to the courses and distances which she had sailed from the land.

The "Petrel" had sailed from Port Dover on the morning of the 3rd July, and had taken her usual course towards the boundary S. E. by S. ¼ S., passing Long Point light at a distance of about ½ a mile, and with the light bearing directly abeam had set her patent Negus log to indicate the distance run from that point. It is not disputed that the Negus log is one of the most approved logs known to mariners for the purpose of registering distances sailed.

All these patent logs have to be corrected from experience.

The "Petrel's" log had been carefully tested and corrected and found by actual experience and measurement to over register 2¼ knots in every 40 knots.

Likewise her compass had been carefully tested and corrected for deviation and the variation in the locality, of course, was known.

In fact the "Petrel's" compass carried a quarter of a point westerly deviation and the variation was 3.30 degrees.

The "Petrel" then, according to her officers, having set her log with Long Point light abeam, on her compass course S. E. by S. ¼ S. continued that course until her log registered 5 knots, which brought her 1¾ miles to the north of the boundary line.

At this point she turned to run down eastwardly parallel with the line within Canadian waters, and her compass course was as usual from there E by N. ½ N., which course she continued until her log registered 27 knots from the turn, making in all 32 knots from Long Point light.

Arrived at this point the "Kitty" D.. was sighted fishing about 2 miles to the northward of the *Petrel*, and a pursuit took place which ended in the capture of the former.

The pursuit lasted at full speed of both vessels for 10 minutes, the courses steered by the "Petrel" during that time beginning with a northwest course and changing to westward until, at the point of the capture. the "Petrel" was steering W. by N. a course considerably to the northward of that which the "Petrel" had sailed down the lake. The place of fishing, of course, was still further north.

The wind during the voyage of the "Petrel" down the lake was light, baffling to calm from the southeast.

1904

THE KING v. THE KITTY D.

Davies J.

The effect of this wind if any would have been to set the "Petrel" further into Canadian waters during her voyage down the lake.

There were no currents or other conditions to affect the course of the "Petrel" on her voyage.

Immediately after the seizure Captain Dunn says he laid down the true position upon his chart, having regard to the courses and distances sailed. This chart, which is Exhibit 5, is a chart issued by the United States Government, and shows the boundary line at the point in question somewhat south of the middle of the lake. According to this chart, which was in use on the "Petrel" the seizure took place two miles north of the boundary.

The soundings at this point as shewn by the chart gave 15½ fathoms, and upon taking the soundings subsequently to verify the position it was found that they corresponded absolutely.

Commander Spain says that when on board the "Petrel" using the same compass and log, on the 9th July following the seizure, he verified the position as stated by Captain Dunn, starting from Long Point and running the same courses and distances.

Having thus arrived at the point of seizure, Commander Spain steered directly to the nearest Canadian land, to which he approached within three quarters of a mile, being as near as the vessel could go—the distance so sailed being 9 knots by the "Petrel's" log.

The place of seizure is, therefore, established by his evidence to have been precisely 9 knots according to the "Petrel's" log, plus ¾ of a mile, from the Canadian shore. Making the correction mathematically for error in the "Petrel's" log:

9 knots of "Petrel's" log=8.52 true knots.

8.52 knots=9.79 statute miles.

9 79 statute miles (being the distance logged) plus ¾ of a mile (being the distance from land)=10.54 miles.

The seizure, therefore, if his premises are accepted, took place $\frac{3}{4}$ of a mile, as nearly as may be, north of the middle of the lake, which is the boundary line.

The "Kitty D" had run according to her own admission about a mile towards the American shore from where she was fishing previous to the seizure.

According to Captain Dunn, she had run considerably further, because when the pursuit began the "Kitty D." was about 2 miles to the northward of the "Petrel," and the pursuit lasting ten minutes ended by the seizure only $2\frac{1}{2}$ points north of the "Petrel's" course coming down the lake. Upon the most favourable conclusions for the defence therefore, accepting the accuracy of the courses and distances run by the "Petrel" from Port Dover that morning, the fishing took place $1\frac{3}{4}$ miles within Canadian waters.

At the hearing I was much impressed with the argument presented by Mr. German with respect to this exact location and the corroborative evidence the Crown had offered in Captain Spain's test. Mr. German submitted that accepting the evidence of Captains Spain and Dunn with regard to this distance the result shewed that the "Petrel" was at the place of capture well south of the boundary line instead of about a mile north of that line. This however is erroneous and is caused mainly by omitting to allow mathematically for the error in the "Petrel's" log proved by Captain Dunn. I have made the necessary correction in this respect and have shewn that, assuming the courses and distances proved by the officers of the "Petrel," to be correct the seizure was $\frac{3}{4}$ of a mile or more north of the boundary. I see no reason whatever to justify this court in declining to accept the evidence of Captain Dunn and his officers Inkster and McPherson. With respect to Slade and Campbell, the wheelsmen, they steered the ship as ordered and always with

1904

THE KING v. THE KITTY D.

Davies J.

one of the officers standing by to see that the course was correctly kept. It is not a question of their being a few hundred yards north or south of where they believed themselves to be. It is a question of from 4 to 6 miles on a short run of 32 miles and to throw over this mass of evidence unless some very strong doubts are thrown upon its accuracy by some proved facts would, in my opinion, be impossible.

Now the facts upon which we are asked to disbelieve or not to accept the evidence for the "Petrel" are the statements of Capt. Jones and Dewitt, one of the hands of the tug seized, and of Captain Hellwig of the fishing tug "Lucy" and Thomas Connor, her engineer. This latter tug was near the "Kitty D." at the time and also steamed away, or, as the witnesses say, "ran away" southward towards the boundary line, the moment the thunder storm cleared up and shewed her the cruiser. Capt. Donnelly, of the tug "Desmond," is also referred to as confirming the evidence of the other witnesses respecting the place of fishing. I have very carefullygone over the evidence of each of them. The locality of the seizure is variously stated by them to have been from 6 to $9\frac{3}{4}$ miles from Dunkirk depending upon uncertain estimates of time, distance and speed. These tugs did not carry or use any log, or chart or keep any log book. The witnesses relied entirely upon their memory and judgment as to time, distance and courses. When out of sight of land, as they admittedly were on the occasion of the seizure, it must be apparent that their judgment would often be at fault, and that the best they could do would be to form an approximate judgment, the accuracy of which would depend largely upon experience and might vary with the interest the witness had. Mr. German argued that because when seized Capt. Jones stated that he felt quite sure he was within his own waters, the statement made at the

moment ought to be accepted as some evidence of his *bonâ fide* belief. But even if it was so accepted *bonâ fide* belief would not alter actual facts and the very fact that every one of the tugs in the vicinity including the "Kitty D." and the "Lucy" started full steam southward apparently to escape from the cruiser is strong evidence against even the existence of such *bonâ fide* belief. In this connection I noticed a statement made by Dewitt the seaman aboard the "Kitty D." He was asked:

Q. Were there many other fishing tugs out in the lake at that time? —A. Yes. There was quite a lot of others around there.

Q. Any further out in the lake than your boat?—A. Yes. One was outside of us, to the north of us, one or two of them.

Q. One or two of them were out to the northward of the "Kitty D."? —A. Yes, when the "Petrel" saw us I would say there was one to the north of us, it must have been a couple of miles. *We were wondering why the "Petrel" didn't go and seize them; he could have got them all right.*

Now why would they wonder the "Petrel" did not go and seize the tug to the north if they thought themselves in American waters? Mr. German, however, relied chiefly upon the positive testimony respecting the locality in which the nets of the "Kitty D." were found by the witnesses who went out with Capt. Jones on the 7th July, Capt. Donnelly of the tug "Desmond," Capt. Burns of the tug "Charm," and American Consul Harvey and Capt. Harrison, who went out on the 26th July.

It is not necessary, however, in my judgment, to discredit the testimony of any one of these gentlemen as to what they saw or was shown to them on either of these occasions. Their testimony is not inconsistent with the fact that the "Kitty D." had set out her nets and was fishing on the 3rd July in Canadian waters. The nets so set out by her on the 3rd may well have been removed before the 7th and set south of the line,

1904

THE KING v. THE KITTY D.

Davies J.

or, as seems much more probable, in fact almost certain from the evidence, the "Kitty D." had two sets or gangs of nets, and the gang of nets seen by and shown to the witnesses on the 7th and 26th, and which were not taken up until after the latter date, were those which were set on the day before the seizure. As to the removal of the "Kitty D.'s" nets which were set by her *on the day of the seizure*, it seems to be explained by Thomas Connor, the engineer of the "Lucy," who said, in answer to Mr. German:

Q. You say that when you saw the "Petrel" seize the "Kitty D." you took up what nets had been set on the 3rd?—A. *It was the "Kitty D.'s" nets that she set on the day she was seized.*

Q. On the 3rd July you saw the "Petrel" seize the "Kitty D."?—A. Yes.

Q. At that time had you set any nets from the tug "Lucy"?—A. *These nets that she crossed ours were set on the 2nd July.*

Of course it was not essential to the case for the Crown to prove the removal of these nets, but to appreciate the full significance of this statement of the witness Connor, it must be remembered that the "Lucy" had not set her nets on the morning of the seizure. She was "getting ready to do so," as her captain says, but had not got them out. The nets that were out were those set by the "Kitty D." and left behind her when she steamed away, and it was these nets the "Kitty D.'s" "nets that she set on the day she was seized" that the "Lucy" "took up." But they did not cross the nets set out by the "Lucy" on the 2nd, away to the south. That fact stated by Connor would sufficiently account for the inability of Captain Spain in the "Golden City" to find them on the 7th, four days after the seizure even with such assistance as Captain Jones of the "Kitty D." gave. Connor does not answer question 95, put to him by Mr. German, whether at the time he saw the "Petrel" seize the "Kitty D." they had set any nets from the tug "Lucy." He gives what might seem

an irrelevant answer. But Captain Hellwig, of the "Lucy," puts that important and vital question at rest. His evidence as to what he did and did not do when he saw the "Petrel" is as follows:

Q. When the "Petrel" came along and seized the "Kitty D.", did you put all your nets down?—A. I started in for the south shore.

Q. When you saw the "Petrel"?—A. Yes.

Q. Before you saw her had you set any nets?—A. I was getting ready to start.

Q. Had you put any nets down before you saw the "Petrel"?—A. No.

Q. But you were getting ready and were going to put them down?—A. Yes.

Q. And when you saw the "Petrel" you steamed for the south side?—A. Yes.

Q. As fast as you could go?—A. No.

Q. What is your speed?—A. Seven and a half; but we can go eight or nine miles.

Q. What steam did you carry then?—A. One hundred and ten pounds.

Q. Are you the master of your boat?—A. Yes.

Q. What is her name?—A. The "Lucy."

Q. You were at the wheel, I suppose, when you started for the south side?—A. Yes.

Q. Did you come back to where you were setting those nets that day?—A. No.

Q. Did you set your nets that day?—A. Yes.

Q. Afterwards?—A. Yes.

Q. At what time?—A. After 12 o'clock, we started.

Q. It was about 12 o'clock that the boat was seized?—A. Yes.

Q. How far did you run toward the south shore?—A. I should judge about a mile.

Q. Did you see the "Petrel" take the "Kitty D." in tow?—A. Yes.

Q. And steam away for the Canadian side?—A. Yes.

Q. You saw her do that?—A. Yes.

Q. Then you went back to this place and put your nets down?—A. Yes.

Q. You put your nets down from where you had run to?—A. Yes.

Q. In what direction?—A. South.

Q. You went south putting down your nets?—A. Yes.

Q. That was after they had taken the "Kitty D." away to the Canadian side?—A. Yes.

1904

THE KING v. THE KITTY D.

Davies J.

Q. Whereabouts from where you began to put your nets down was it they seized the "Kitty D."—A. A little to the west—about a mile —not a mile.

Q. A little to the north?—A. It might have been a trifle, but not much.

By His Lordship:

Q. A mile where?—A. About a mile from where I was setting the nets to where the "Kitty D." was seized.

Then the further evidence of Hellwig, shows beyond reasonable doubt to my mind, first, that each tug has two sets of nets, and secondly, that the set put out by the "Kitty D." on the day she was seized was not the set which crossed Hellwig's. He says:

Q. In the setting of the "Kitty D.'s" nets east and west did they come in contact at all with your nets that were set north and south? —A. Yes.

Q. Were they across yours or were yours across the "Kitty D.'s"? —A. They were across the gang I had set the 2nd day of July; and I went across them with the gang I was setting on the 3rd; I had two sets.

I admit other parts of his evidence do not seem consistent with this, but when it is recollected that he had not put out his nets on the day of the seizure until after the "Kitty D." had been seized, and after he had run away he judged *a mile to the southward*, it does not seem to leave room for doubt that both tugs had two sets, that the "Lucy's" set put out on the 2nd were crossed by a set of the "Kitty D.'s" put out on the same day, or at the utmost on the early morning of the third, and that both of these were within American waters and were again crossed by the second set of the "Lucy's" nets put down after she had seen the "Kitty D." captured on the third, and had herself escaped into her own waters. The second set serves to explain and make consistent the evidence of all the officers and men who speak of the place where they saw the "Kitty D.'s" nets on the 7th and 26th. There was no

suggestion on the part of either Jones or Dewitt of any crossing of the nets of the "Kitty D." put out just before the capture. The "Lucy's" nets were not put out till after the capture and after she had run away to the southward and was satisfied she was in her own waters.

On the whole I am of the opinion that no room for reasonable doubt exists as to the fact of the "Kitty D." having been engaged in fishing in Canadian waters on the morning of the 3rd July and being in those waters at the time of her capture. I think, therefore, the appeal should be allowed with costs, and judgment of condemnation of the tug "Kitty D." her tackle, apparel and appurtenances awarded with costs.

NESBITT J.—I concur in the judgment of Mr. Justice Davies which I have read, and would only add that it appears to me the case is another illustration of the clash of scientific accuracy with human guess work. Either ships can be and are run by the improvements of modern science so that a captain can tell where he is without the sun, or all our boasted advances are naught. If compasses and logs, &c., are to be defeated by the judgment or estimate or guess of interested fishermen, poaching is made easy.

KILLAM J. concurred in the judgment allowing the appeal.

Appeal allowed with costs.

Solicitor for the appellant: *Louis Kinnear.*

Solicitors for the respondents: *German & Pettit.*

1904

*March 25.
*May 4.

THOMAS E. RANDALL AND ANOTHER (PLAINTIFFS)..... } APPELLANTS;

AND

AHEARN & SOPER, LIMITED, (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Electric wire—Trespasser—Evidence—Contributory negligence—New trial.

Ahearn & Soper had a contract to illuminate certain buildings for the visit of the Duke of York to Ottawa and obtained power from the Ottawa Electric Co. For the purposes of the contract wires were strung on a telegraph pole and fastened with tie wires the ends of which were uninsulated. R., an employee of the Ottawa Electric Co., was sent by the latter to place a transformer on the same pole and, in doing so, his hands touched the ends of the tie-wire by which he received a shock and fell to the ground being seriously injured. To an action for damages for such injury Ahearn & Soper pleaded that R. had no right to be on the pole and was a trespasser, and on the trial, their counsel urged that the work he was doing was connected with the lighting of a building in the city. The Court of Appeal held that this defence was established and dismissed the action.

Held, reversing the judgment appealed from, (6 Ont. L. R. 619) that the counsel's address did not indicate that the building referred to was not one of those to be illuminated under the contract and the evidence did not shew that R. was not engaged in the ordinary business of his employers and the case should be re-tried, the jury having failed to agree at the trial.

A rule of the Ottawa Electric Co. directed every employee whose work was near apparatus carrying dangerous currents to wear rubber gloves which would be furnished on application. R. was not wearing such gloves when he was hurt.

Held, that the mere fact of the absence of gloves was not such negligence on R.'s part as would warrant the case being withdrawn from the jury; that as to Ahearn & Soper, R. was not bound by said rules;

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard Davies, and Killam JJ.

1904

RANDALL v. AHEARN & SOPER.

and that though his failure to take such precaution was evidence of negligence he had a right to have it left to the jury and considered in connection with other facts in the case.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court which refused to enter judgment for either party on findings of the jury who did not agree on a verdict.

The facts are stated as follows by Mr. Justice Osler in the Court of Appeal.

"The facts lie in small compass. The defendants, electrical contractors and engineers, contracted with the Government to light the Government Buildings on the occason of the visit of the Duke of York to Ottawa in September, 1901, and they arranged with the Ottawa Electric Company to supply them with the necessary power. For the purposes of their contract the defendants carried two wires along Wellington Street and connected them with the equipment in the Departmental Block. At the south west corner of Wellington and O'Connor Streets there are two poles between 6 and 7 feet apart, one belonging to the Great North Western Telegraph Company, the other to the Ottawa Electric Light Company. The former carried telegraph and telephone wires only, and on it at a considerable distance below the wires, and about 29 or 30 feet from the ground, the defendants placed their wires which were about sixteen inches apart, and were attached to the usual glass insulators on the ends of small side blocks or wooden projections nailed diagonally to the pole. The wires were tied or fastened to these insulators by common wire which was not itself protected by any insulating covering. The projecting ends of the tie wire were two or three inches long. The defendant Soper said that their wires

(1) 6 Ont. L. R. 619. *sub. nom. Randall* v. *Ottawa Elec. Co.*

1904

RANDALL v. AHEARN & SOPER.

were put up with the knowledge of the telegraph company, but could not be sure of their permission had first been asked or not. These two wires were the only ones on that pole carrying the electric current, the only live or danger wires, and they were intended to be and were taken down as soon as the defendants' contract had been carried out. About 24 feet from the ground there was fastened to the pole a cross arm, whether put there by the defendants' men, or the telegraph company does not appear. Shortly after the defendants' wires had been put up, the Ottawa Electric Company, in the course of their own business, sent three of their men, one of whom was the plaintiff, to put up a transformer for the purpose of carrying a current for electric lighting into Victoria Chambers or some adjacent building on Wellington Street. The evidence leaves it to be inferred that this was put up in some way on the G. N. W. Telegraph Company's pole, but there is no detail of the manner in which it was accomplished or how the connection with Victoria Chambers was made, except that the transformer was hoisted by means of a block and tackle tied to the G. N. W. pole, about five feet above the cross arm. Having served the purpose the tackle was being taken down, and the plaintiff was standing on the cross arm engaged in untying the rope when in some way he received a shock which threw him to the ground and caused the injuries he complains of.

A. E. Fripp and *D'Arcy McGee* for the appellants.

Riddell K. C. and *Harold Fisher* for the respondents.

THE CHIEF JUSTICE and SEDGEWICK and GIROUARD JJ. concurred in the judgment allowing the appeal and ordering a new trial.

1904

RANDALL v. AHEARN & SOPER.

Davies J.

DAVIES J.—This action for damages sustained by plaintiff was one brought against the respondents for negligence in the manner in which they affixed certain electric wires to a pole of the North-West Telegraph Company, in Ottawa, along which wires they had contracted with their co-defendants, the Ottawa Electric Co., to transmit the electric current to enable them (Ahearn & Soper) to illuminate the outside of the Parliament Buildings during the visit of H. R. H. The Prince of Wales. The trial judge left three questions to the jury, two of which they answered in favour of the plaintiff, leaving the one as to his contributory negligence unanswered. The trial judge treated the neglect of the jury to answer this question as a disagreement and discharged them. Both parties appealed to the Divisional Court asking for judgment, the plaintiff on the two findings and the defendant for dismissal of the action.

The Divisional Court held that the trial judge was right, that judgment could not be entered on the findings for the plaintiff nor could the action be dismissed. Thereupon the defendants applied for and obtained leave to appeal to the Court of Appeal, conditional on their admitting the finding on the question of contributory negligence to have been for the plaintiff.

The Court of Appeal gave judgment for the defendants and dismissed the action on what, I think, was clearly shown to us on the argument to have been a misapprehension of the facts. That court proceeded upon the ground that it had been proved that the plaintiff was a mere trespasser in going up the North West Telegraph pole to affix a transformer to that pole, and that being such a trespasser the defendants owed no duty to him to take care that their wires strung on this post were so strung in a careful and safe manner. The learned judge who delivered the judgment of the

1904

RANDALL v. AHEARN & SOPER.

Davies J.

court appealed from stated that there was a misapprehension of the facts on this point by the Divisional Court and goes on to say:

> The putting up of the transformer had nothing to do with the defendant's business. It was put up by the Ottawa Electric Co., solely in connection with their own business arrangements for supplying light to Victoria Chambers. This indeed was stated by counsel for the plaintiff in opening the case to the jury and there is in fact nothing to connect the work which the plaintiff was doing with the defendants.

Mr. Fripp in argument before this court strenuously contended that these assumed facts upon which the Court of Appeal based its judgment were inaccurate and not justified by the evidence.

A careful examination of the evidence has satisfied me that he is correct, and that it would not be a legitimate inference from it to assume that Randall in placing the transformer on the poll was there as a mere trespasser and not, as contended by the plaintiff, in order to transform or supply the power of the Ottawa Electric Co. to the wires of the defendant. If the latter was the purpose for which plaintiff placed the transformer on the pole, or if it was necessary to be put there for the purposes of Ahearn & Soper, then plaintiff was legally there as one of the workmen of the Ottawa Electric Co, in connection with their contract with defendants, and so being was entitled to have from defendants the exercise of proper skill and care in relation to the manner in which they strung their wires on the post, and to hold them responsible for damages caused by want of such care and skill, to which he had not, by his own negligence, contributed. My understanding of the facts which are not at all clear in the evidence on this crucial point of plaintiff's presence on the pole, accords with that reached by the Divisional Court, and I assume also by the trial judge; and as I also concur with that court

in its statement of the law that the bald fact of the absence of gloves on the plaintiff's hands at the time of the accident was not of itself sufficient to withdraw the case from the jury, however cogent it might be as evidence of contributory negligence, I think a new trial should be had. That single fact of the absence of gloves must be taken and weighed in connection with all the other facts of the case, which might or might not according to circumstances as between plaintiff and defendants betweeen whom there was no contractual relation with respect to gloves, convince or fail to convince a jury of such negligence. Standing baldly by itself it is not conclusive.

The appeal should be allowed with costs in this court and the Court of Appeal and a new trial had, the costs of the first trial and of the appeal to the Divisional Court to be costs in the cause.

KILLAM J.—This is an action brought in the High Court of Justice for Ontario by an employee of the Ottawa Electric Co. against that company and the present respondents, Ahearn & Soper, Ltd., to recover damages for an injury received by the plaintiff. At the time the accident occurred the plaintiff was engaged in untying from a pole a rope which had been used to hoist up a transformer of the Ottawa Electric Co. to a place on the pole. The injury was caused by the plaintiff's falling to the ground from the pole, a distance of some thirty feet or more. Ahearn & Soper, Ltd. is an incorporated company carrying on business as electrical contractors and engineers. This company had a contract with the Dominion Government to light Government Buildings in Ottawa in September, 1901, and they arranged with the Ottawa Electric Co. to supply them with the necessary power. For the purposes of their contract Ahearn & Soper,

1904

RANDALL v. AHEARN & SOPER.

Killam J.

Ltd., carried two wires along Wellington Street. At the corner of Wellington and O'Connor Streets, these two wires were fastened upon a pole belonging to the Great North Western Telegraph Co. at a short distance from which was another pole belonging to the Ottawa Electric Co. The former pole was used to carry telegraph and telephone wires only. Ahearn & Soper, Ltd., fastened their wires to the Telegraph Co's pole by a common iron wire tied round insulators. The tie wires were not insulated, and had ends projecting two or three inches from the insulators. For some reason which is unexplained the plaintiff and other employees of the defendant company placed the transformer upon the pole of the Telegraph Co., and plaintiff, in untying the rope mentioned, appears to have put his hand upon one of the wires of Ahearn & Soper, Ltd., where it was fastened to the pole, and thus touched the uninsulated tie wire. The result was that he received a shock which caused him to unloosen his hold and fall to the ground.

By the rules of the Ottawa Electric Co., shewn to have been known to the plaintiff, it was provided:

1. Employees must always bear in mind that their occupation is a dangerous one, but no employee will take any risk of injury other than that which is necessarily incident to his particular work.

2. Every employee whose work is near the live wires or with apparatus carrying dangerous currents shall, whenever there is any possibility of receiving a shock, wear rubber gloves; such gloves will be furnished on application, and no excuse will be accepted for neglect to wear them.

The evidence also showed that it was the rule to treat all wires as "live wires," that is, as carrying currents strong enough to injure. Randall was wearing no gloves when he received the shock.

The action was tried before Mr. Justice Meredith, with a jury. The case was submitted to the jury only as against Ahearn & Soper, Ltd. Three questions

were submitted by the learned judge to the jury. These questions and the answers of the jury were as follows:

1. Was any negligence of the defendants Ahearn & Soper, Ltd. the approximate cause of the plaintiff's injury?—A. Yes.

2. If so, what was such negligence? State fully and plainly.—A. By using uncovered tie wires, and careless construction of tie wires.

3. Might the plaintiff, by the exercise of ordinary care, have avoided his injury?—No answer was given to the third question.

The learned judge treated the case as one of disagreement on the part of the jury, and discharged them. Both parties then moved before a divisional court for judgment, when the court dismissed both motions. Application was then made by Ahearn & Soper, Ltd. for special leave to appeal to the Court of Appeal, and the leave was given upon the condition that the case should be treated as if the jury had answered in favour of the plaintiff the question as to contributory negligence submitted to them, and as if judgment had been entered in favour of the plaintiff upon this and the other findings and Ahearn & Soper, Ltd. were appealing from that judgment. The Court of Appeal decided that Ahearn & Soper, Ltd., were entitled to judgment, and dismissed the action. They considered that the plaintiff had failed to prove any negligence on the part of Ahearn & Soper, Ltd., towards the employees of the Ottawa Electric Co., as in their opinion the plaintiff was a mere volunteer, a person on the pole without any license or authority, and also that the evidence showed that the plaintiff was the author of his own wrong, and to have brought his injury on his own head by the omission to employ the usual means of protection against danger from electric shock. The evidence did not disclose distinctly what authority Ahearn & Soper, Ltd., had for using the pole of the Great North Western Telegraph

1904

RANDALL v. AHEARN & SOPER.

Killam J.

Co. Mr. Soper, an officer of Ahearn & Soper, Ltd., being asked :—

Did you have to get permission from the Great North Western Co. to string your wires on their poles? It was done with their knowledge, I suppose?

said :

Yes, but I am hazy as to whether I asked their permission or not.

No other evidence was given of any authority on their part to so use the pole.

In delivering the judgment of the Divisional Court, Sir Wm. Meredith C.J. said :

The transformer which the plaintiff had been engaged in putting up, the appliances for raising which he was taking down when he was injured, as I understand the testimony, was put up by the Ottawa Electric Co. under their contract with the Ahearn Co. to supply the electric current for the line which the latter Company had put up, and whatever may have been the position of the plaintiff as between him and the owner of the pole, as between him and the Ahearn Co. it must, I think, be taken that he was using the pole under circumstances that made the duty of the Ahearn Co. towards him as great at least as it would have been had the plaintiff been an employee of the owner of the pole and had been engaged in doing the work upon which he was engaged for that owner.

In delivering the judgment of the Court of Appeal, Mr. Justice Osler said :

If the transformer had been put up by the Ottawa Electric Co. under their contract with the defendants in order to supply the power to their wires, as the judgment below assumes, there would be no difficulty in affirming the existence of a duty towards the workmen of the Electric Co. to take care that their wires were put up in a safe and careful manner * * It is, however, stated in the reasons of appeal and was again stated before us and not denied, that there is a misapprehension in the judgment on this point, and that the putting up of the transformer had nothing to do with the defendants' business. It was put up by the Ottawa Electric Co. solely in connection with their own business arrangements for supplying light to Victoria Chambers. This, indeed, was stated by counsel for the plaintiff in opening the case to the jury, and there is in fact nothing to connect the work which the plaintiff was doing with the defendants.

With all respect for both the courts below, it appears to me that both were alike under misapprehension in respect of this matter. There appears to be nothing in the evidence to suggest that the transformer was put up for any purpose of Ahearn & Soper, Ltd., or in any way connected with the supply to that company of electric current. On the other hand, there seems to be an equal lack of evidence as to the purposes for which the transformer was to be used by the Ottawa Electric Co., although, I admit, the *primâ facie* presumption is that it was for the purpose of the Ottawa Electric Co. alone. The remarks of the plaintiff's counsel in opening the case to the jury are set out in the appeal book. After stating that Ahearn & Soper, Ltd., had a contract with the Dominion Government to light the Parliament Buildings upon the occasion referred to, and that they had contracts to light other buildings in close proximity thereto, the learned counsel said (referring to Randall):

> He was sent to put up a transformer, that is a box, the effect of which is to reduce the current from one wire so as to carry a similar quantity of current into a building near the Victoria Chambers.

But there seems to have been nothing in the address of the learned counsel to indicate that the transformer was to be used in connection with the lighting of Victoria Chambers, or whether the building referred to was or was not one of those which he stated Ahearn & Soper, Ltd., were lighting under their contract. By their statement of defence Ahearn & Soper, Ltd., alleged that Randall at the time of the accident was a trespasser who had climbed upon the pole from which he fell without authority or right to do so. Mr. Soper was asked: "You say in your statement of defence that the plaintiff Randall was a trespasser on this pole. What do you mean by that?", and he replied: "I mean he was not our employee."

1904

RANDALL v. AHEARN & SOPER.

Killam J.

The printed case gives no indication that the defendants, Ahearn & Soper, Ltd., raised any objection at the trial to Randall's right to recover on the ground of his being in the position of a trespasser only. The learned judge in charging the jury pointed out the difference between the duty which Ahearn & Soper, Ltd., would have owed to the public generally if they had left the wires on or near the ground, and the duty which they owed to any person likely to be upon the pole at a distance sufficiently near to the point of attachment to receive a shock. In this connection he said:

> But when placed high up on these poles it is entirely different. There they knew it would be a man of experience, a man who knew the danger of these wires, and a man who ought to take care and avoid apparent dangers, and a man who, in his own interests, ought to take care, would be working there. * * And you are to say whether they did anything which was a want of ordinary care to a person of experience going there.

No objection appears to have been made to the charge of the learned judge or to his leaving to the jury the question of negligence on the part of Ahearn & Soper, Ltd. While it appears to me that, in the absence of evidence to the contrary, it should be assumed that Ahearn & Soper, Ltd., had their wires rightfully upon the pole in question, yet I think that under the circumstances the action should not be dismissed upon an assumption that the plaintiff was upon the pole without authority.

Then, upon the question of contributory negligence, I am of opinion that it cannot be said that the evidence is so clear against the plaintiff that the question should not have been left to the jury. As between himself and Ahearn & Soper, Ltd., the plaintiff was not bound by the rules of the Ottawa Electric Co., although his neglect to employ an ordinary precaution was strong evidence of negligence on his part.

Alfred Dion, Superintendent of the Ottawa Electric Co., gave the following evidence:

Q. Was it his duty to wear gloves at any such work like this?—A. Yes.

Q. At any rate it was his duty to wear gloves?—A. Yes.

Q. Could the accident have happened had he worn gloves?—A. Very unlikely.

No stronger evidence was given of the efficiency of the protection afforded by the use of gloves. Of course the plaintiff would see that these wires of Ahearn & Soper, Ltd., were used for the purpose of carrying a strong electric current, and he would also be aware of the danger of finding a strong current on any of the wires of the Telegraph Co. or Telephone Co. through contact with wires carrying high current. But it appears to me that there was still a question for the jury such as the third question left to them by the learned judge at the trial.

In my opinion, then, the court of Appeal was not warranted in disturbing the order of the Divisional Court dismissing the applications of both parties for judgment.

I would allow the appeal with costs, and discharge the order of the Court of Appeal, with costs in that court.

Appeal allowed with costs.

Solicitors for the appellant: *Fripp, Henderson & McGee.*

Solicitors for the respondents: *Murphy & Fisher.*

1904

*March 23.

*May 4.

JOHN BELLAMY MILLER (DEFENDANT) ..... APPELLANT;

AND

ELIZABETH KING, ADMINISTRATRIX OF THE PROPERTY OF PETER KING, DECEASED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Master and servant—Workmen's Compensation Act.

M., proprietor of iron works, had built an engine in the course of business, and while it was standing on a railway track in the workshop a heavy dray standing near owing to the horses attached being startled was thrown against it whereby it was overturned and killed a workman at a bench three or four feet away. On the trial of an action by the administratrix of the workman's estate the jury found that the accident was due to the negligence of M. in not having the engine properly braced.

Held, that this finding was justified by the evidence and M. was liable under the Workmen's Compensation for injuries Act (R. S. O. [1897] ch. 160.

Held also, that the accident did not occur through a defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises with, intended for or used in the business of the employer.

APPEAL from a decision of the Court of Appeal for Ontario affirming the verdict at the trial in favour of the plaintiff.

The husband of the respondent at time of his death was a machinist, 52 years of age, and had been working in the appellant's establishment for about a year.

The works of the appellant are situate on the esplanade, Toronto, and occupy a space of about 400 feet by

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ.

400 feet, and are for the manufacture of engines, castings and other machinery. The particular shop in which the accident happened is a large place.

Running from north to south at the east side of the shop is a space 14 feet wide with a large door of same width for entrance, and occupied by a railway track, on which railway cars are taken into the shop for the purpose of loading and taking away machinery, and the space being level is also used by waggons or drays as a roadway for the same purpose. Over this space or roadway a travelling crane extends from the shop, for the purpose of lifting machinery on to the railway or waggons. Close to this roadway and running westward in length with tube some fifty or sixty feet altogether, a dredge engine had been built, preparatory to being shipped to British Columbia. The engine itself, apart from the tube, was about ten feet long, four feet wide and five or six feet high, larger at the top and centre than at the bottom, but how much does not appear. It weighed four or five tons, and had been erected where it was for about three months. Each end rested on a piece of timber about twelve inches square and was supported in addition by timbers against flanges at the side.

The deceased was on the day of the accident, and had been for some time, working at a bench running along the north wall of the shop and some three or four feet from the engine. A large lorry or waggon belonging to the defendant Colville, who had a general contract with appellants for carriage of goods, had been backed into the shop for the purpose of taking away a retort to the Gas Company's works. The waggon and horses backed down the roadway and past the engine in question, and was there loaded on the roadway with the retort under the superintendence of one Dowie in the employment of and representing the

1904

MILLER v. KING.

person for whom the retort had been made, and who had sold it to the Toronto Gas Company. The retort extended over the edge of the waggon a foot or fifteen inches, but there was room for it to pass the engine. The waggon had been loaded, when suddenly the horses started, from what cause does not appear, and going forward swerving to the left, the engine in question was struck by the waggon and thrown over upon the deceased.

The trial took place at Toronto before Mr. Justice Meredith and a jury in September, 1902.

Questions were submitted to the jury which with their answers are as follows:

1. Q. Was Peter King's death caused by a mere accident not attributable to the negligence of any one?—A. No.

2. Q. If not was the proximate cause of it the negligence of the defendants or either of them?—A. Yes.

3. Q. If so, which?—A. Miller.

4. Q. And what was the negligence? State fully and plainly.—A. Improper bracing of engine.

5. Q. Did King voluntarily incur the risk of the injury he suffered so far as the defendant Miller is concerned?—A. No.

6. Q. Might King by the exercise of ordinary care have avoided the injury?—A. No.

7. Q. Assess the damages?—A. Widow King $1,000; invalid daughter, Bessie, $200.

Upon these findings judgment was entered by the order of the learned trial judge in favour of the plaintiff against the appellant Miller for $1,200 and the costs of action, and the action was dismissed as against the defendant Colville with costs.

The appellant thereupon appealed to the Court of Appeal for Ontario, and his appeal was by an unanimous judgment of the court on the 14th day of September, 1903, dismissed.

The appellant's appeal now is from the judgment of the Court of Appeal.

Riddell K.C. and *G. L. Smith* for the appellant. The finding of the jury that the engine was improperly braced is against evidence and that is the only negligence imputable to the defendant.

This court will set aside improper findings though affirmed by an intermediate court of appeal. *Montgomerie & Co.* v. *Wallace-James* (1); *Cowans* v. *Marshall* (2); *Wood* v. *Canadian Pacific Railway Co* (3).

The engine was not machinery "connected with, intended for or used in the business of the employer" under the workmen's Compensation for Injuries Act (4) sec. 3; *Griffiths* v. *London and St. Katharine Docks Co.* (5); *Rudd* v. *Bell* (6).

Aylesworth K.C. and *E. B. Stone* for the respondent. The fact that the engine was overturned was evidence that it was not properly supported. *T. Eaton Co.* v. *Sangster* (7).

It was a defect in the premises under the Act and also negligence at common law.

The judgment of the court was delivered by:—

DAVIES J.—Without expressing any opinion whatever upon the possible liability at common law of the defendant, a liability which was not charged upon the pleadings and was in no wise in issue at the trial, I concur in the conclusion reached by the Court that the defendant is liable under "The Workmen's Compensation for Injuries Act" for the negligence of the superintendent under whose orders the engine was braced and supported. There cannot be, in my opinion, any reasonable doubt that the findings of the jury are justified by the evidence as to this inefficient shoring

(1) [1904] A. C. 73.
(2) 28 Can. S. C. R. 161.
(3) 30 Can. S. C. R. 110.
(4) [1897] R. S. O., ch. 160.
(5) 13 Q. B. D. 259.
(6) 13 O. R. 47.
(7) 25 O. R. 78; 21 Ont. App. R. 624; 24 Can. S. C. R. 708.

1904

MILLER v. KING.

Davies J.

up or bracing of the engine. It was the duty of the superintendent, considering the position in which the engine was placed, alike with respect to the bench where King was working and to the roadway along which heavy loads were constantly being hauled from the factory, to see not only that the bracing was sufficient to support the inherent weight of the engine and the probable forces the workmen engaged in its construction might bring against it, but also that it was sufficient to securely support the engine against any shock it was reasonably likely to receive from the drays and loads being hauled past it. That it was not so braced the result sufficiently proved, and that the defendant's superintendent ought to have provided against such a shock as the engine received is, under the circumstances of this case, in my opinion quite clear. As a matter of fact the evidence shewed that between the end of the engine where struck by the loaded dray and the load on that dray there was only a space of about five inches. Of course a very slight swerve of the horses was sufficient under these conditions to press the load against the engine. The impact seems to have been slight but it was sufficient to overturn the engine and cause the death of the unfortunate man King. I think this danger of contact between the loaded drays and the engine where placed was one which the defendants' superintendents were under the circumstances reasonably bound to consider and provide against, and that for their neglect to do so the defendant is under the statute liable for the damages resulting.

I am, however, clearly of the opinion that the facts do not shew or constitute any

defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for, or used in the business of the employer,

1904

MILLER v. KING.

Davies J.

within the meaning of the Act. The engine overturned was not part of the ways, works, plant or machinery of the workshop. It was an article in process of manufacture or construction for sale and could not be held either with respect to its location or to its bracing to constitute such a defect as the statute was intended to cover, and for which the master or owner was to be held liable.

I think on the ground I have stated above the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Smith, Rae & Green,*

Solicitors for the respondent: *Stratton & Hall.*

1904
*May 3.
*May 11.

CHARLES COUTURE AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

PHILOMÈNE COUTURE (PLAINTIFF) ..... } RESPONDENT.

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

Title to land—Sea beaches—Servitude—Possession annale—Possessory action.

The possession necessary to entitle a plaintiff to maintain a possessory action must be continuous and uninterrupted, peaceable, public and as proprietor for the whole period of a year and a day immediately preceding the disturbance complained of.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, sitting in review, at Quebec, which had reversed the judgment of the Superior Court, District of Gaspé, (de Billy J.) maintaining the plaintiff's action to recover the possession of the lands in dispute.

The case is stated in the judgment of the court delivered by His Lordship Mr. Justice Girouard.

Lemieux K.C., Solicitor General for Canada, and *N. K. Laflamme K.C.* for the appellants.

Labrie for the respondent.

The judgment of the court was delivered by:

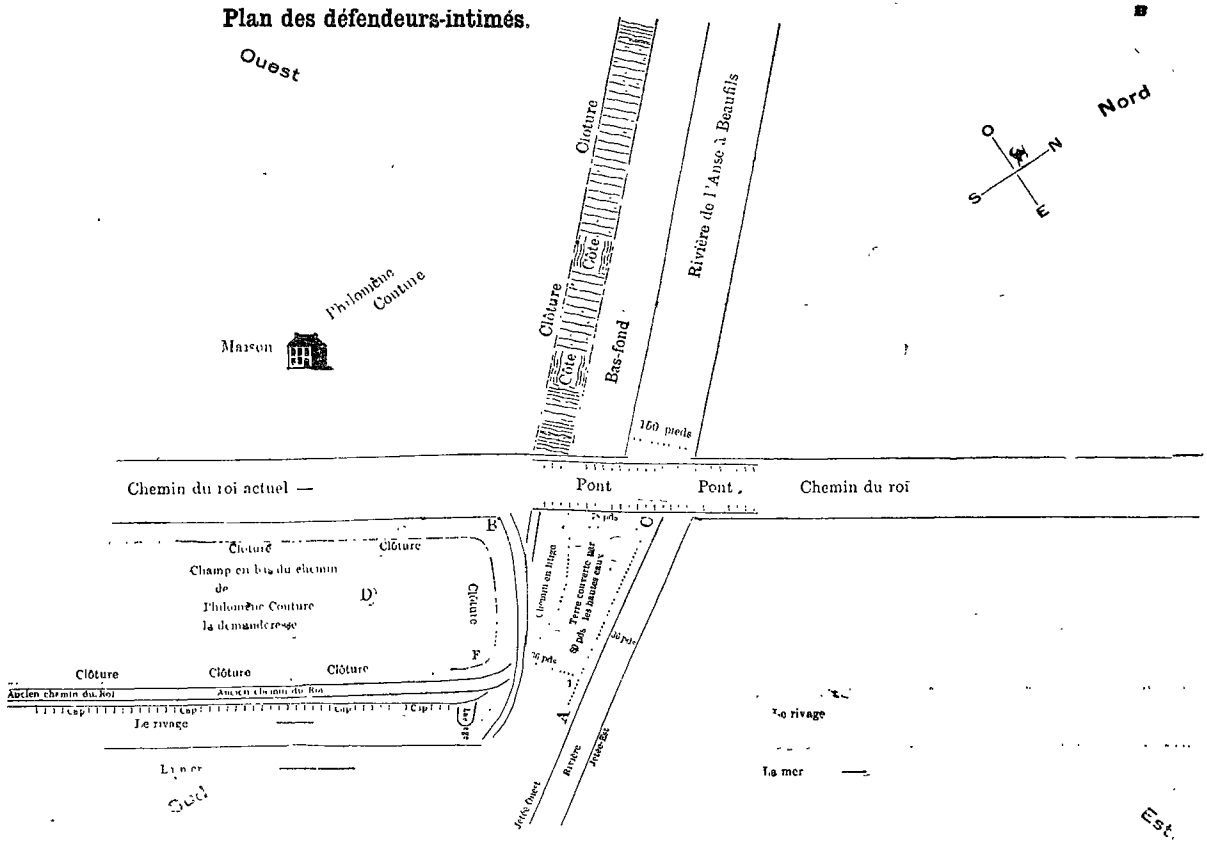
GIROUARD J.—Il s'agit d'une action possessoire au sujet d'une petite lisière de terre sise sur la côte de Gaspé, d'une valeur insignificante, de quelques piastres seulement; mais tant que le loi n'aura pas

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

limité le droit d'appel dans ces cas là, soit en considérant la valeur de l'immeuble ou ce qui serait peut-être plus pratique, en soumettant ces procès aux juges de paix du district comme en France, sans appel si ce n'est pour, erreur de droit, il faut s'attendre à des résultats parfois surprenants, toujours ruineux. Quelque soit leur pauvreté, les parties se passionnent, et les avocats, les amis et de premiers succès aidant, elles finissent par gravir toutes les juridictions du pays. Ici, la Cour Supérieure de Gaspé (de Billy J.) jugea en faveur de la demanderesse. La Cour de Révision (Routhier et Langelier JJ., Andrews J. différant) renversa ce jugement, qui fut finalement rétabli à l'unanimité par la Cour d'Appel. Ce n'est donc pas sans hésitation, et seulement après avoir acquis la ferme conviction qu'il y avait erreur dans son jugement, qu'à notre tour, nous sommes unanimement arrivés à la conclusion de rétablir le jugement de la Cour de Révision.

La demanderesse est propriétaire d'une terre sur la côte de la Gaspésie, à quelques milles du roc de Percé, bornée en front à la mer et coupée ou bornée à différents endroits par une petite rivière navigable au moins à son embouchure, qui se décharge dans la mer, précisement à l'endroit où est située la lisière de terre en litige. Le plan suivent produit dans la cause donne une idée assez exacte de la situation des lieux. La lisière de terre se trouve près du pont entre les lettres A. B. C. F.

Plan des défendeurs-intimés.



Depuis un temps immémorial, les pêcheurs de la localité déchargent leurs poissons sur cette lisière de terre et ancrent leurs barques dans cette rivière, en bas et en haut du pont, passant, aller et retour, sur cette lisière de terre qui était en dehors de la clôture du champ de la demanderesse, ne fut jamais enclose et à quelques pas de distance donnait communication ouverte au chemin du roi de la côte. Des témoins appellent cette lisière de terre une espèce de commune, d'autres un chemin public pour se rendre à la rivière, y prendre de l'eau, laver, descendre ou se rendre aux barques, etc. La clôture de travers qui la sépare de son champ existe, dit-elle, dans son témoignage, depuis cent cinquante ans. Bref, le public était en possession de ce petit terrain, non pas à titre de simple tolérance, mais comme étant dans l'exercice d'un droit. Jamais permission ne fut demandée, si ce n'est récemment par quelques-uns pour avoir la paix, après le commencement des travaux du gouvernement ou le barrage du terrain au chemin du roi. Le plus grand nombre ne voulut pas se soumettre à cette exigence et démolit le barrage comme étant une nuisance publique. La demanderesse connaissait si bien les droits du public qu'elle posa une barrière dans le but avoué par elle d'y laisser passer les pêcheurs et la public, en attendant la décision du conseil de la municipalité qui ne fut jamais donnée.

Il importe peu de savoir, à cette phase de la cause, qui est le propriétaire de ce petit terrain, si c'est la demanderesse dont le titre couvre toute sa terre jusqu'à la mer, ou la Couronne qui, comme représentant le public, est propriétaire des rivages, lais et relais de la mer, des rades et des rivières navigables et flottables et d'un chemin de hâlage (1). Il est également inutile de rechercher s'il y a eu donation ou dédication en faveur

(1) Arts. 400 et 507 C. C.

1904

COUTURE v. COUTURE.

Girouard J.

du public ou non. Ce qui est certain c'est que la demanderesse n'avait pas la possession annale requise par la loi, c'est-à-dire, une possession *paisible, publique et non équivoque* (1) et pour cette raison, et uniquément pour cette raison, nous sommes d'avis de rétablir le jugement de la Cour de Révision. Mr. le juge Routhier, qui a prononcé le jugement de cette cour, résume la situation sur ce point dans des termes si clairs que nous croyons ne pouvoir mieux faire que de reproduire ses observations :

L'immeuble dont la possession est réclamée est un petit terrain en forme de triangle ou de jib, comme les témoins, qui sont des pêcheurs et des marins, l'appellent. Son étendue est de 60 pieds de longueur, dit le jugement, 78 pieds de largeur à un bout et 36 à l'autre bout. Il longe la petite rivière de l'Anse à Beaufils, comté de Gaspé, dans sa longueur et il touche dans sa plus grande largeur au chemin du roi ; à l'autre bout à la mer et du côté opposé à la rivière, il joint le terrain de la demanderesse.

La première condition requise pour réussir dans cette action possessoire, était une preuve suffisante de possession de ce terrain pendant au moins un an, possession ayant tous les caractères exigés pour la prescription.

Or cette preuve de possession fait défaut. La demanderesse a bien prouvé qu'elle possédait le terrain lot n° 241 du Cadastre du Canton de Percé, et que d'après son titre ce terrain serait borné à la rivière ; mais sa possession a toujours été *limitée* par une clôture séparant son terrain du jib en question.

Il est incontestable d'après la preuve qu'elle n'a jamais possédé ce triangle qui était en réalité la grève de la rivière. Et pourquoi n'en avait-elle pas pris la possession ? 1. Parce que c'était dès l'origine, *de facto*, sinon *de jure* un chemin public, la continuation du chemin du roi, fréquenté par tous ceux qui allaient à la mer ou au bord de la rivière, chercher du poisson, ou du varech ? 2. Parce que ce terrain, ouvert à la circulation du public, était séparé du terrain de la demanderesse par une clôture ; 3. Parce que jusqu'à il y a 4 ans, ce terrain était la grève de la rivière et que les grandes marées l'inondaient.

Il est prouvé que cette rivière est navigable à cet endroit, et même un peu plus haut, et qu'elle est flottable sur une plus grande longueur.

(1) Art. 2193 C. C.

1904

COUTURE v. COUTURE.

Girouard J.

Or, l'art. 400 C. C. faisait de sa grève une dépendance du domaine public et, conséquemment, la demanderesse ne pouvait en avoir la possession. Aussi admet-elle dans son témoignage que son champ a toujours été borné à la clôture.

Ni elle-même, ni ses auteurs n'ont jamais prétendu empêcher le public de vaquer sur ce terrain, et n'en ont jamais, avant l'année dernière, réclamé la possession. Pourquoi la demanderesse la réclame-t-elle maintenant ? C'est que la nature du terrain est bien changée. Le gouvernement, dans l'intérêt des pêcheurs, y a fait construire une jetée qui élargit ce terrain et le défend contre la mer ; de sorte qu'au lieu d'être comme autrefois, une grève que les grandes mers lavaient, c'est un terrain que la mer ne couvre plus et qui est bordé par un quai.

Mais, s'imagine-t-on que le gouvernement a fait ces travaux pour agrandir la propriété de la demanderesse ?

Evidemment non. Les témoins des deux parties le reconnaissent, ça été fait pour permettre aux barges des pêcheurs d'entrer dans la rivière, d'accoster au quai et d'y décharger leur poisson, qu'ils y viennent chercher par ce chemin ouvert au public depuis un temps immémorial.

Or, si la demanderesse réussissait dans ses prétentions, les pêcheurs ne pourraient plus arriver à la jetée où sont amarrées leurs barges et où leur poisson est déchargé.

L'appel est donc accordé, mais sans frais devant cette cour et devant la Cour d'Appel, auxquels M. le Soliciteur général Lemieux, l'un des avocats des appelants, a gracieusement—et avec raison dans les circonstances—renoncé en faveur de la demanderesse.

Le jugement de la Cour de Révision est donc rétabli purement et simplement.

Appeal allowed without costs.

Solicitor for the appellants ; *Auguste Beaudry.*

Solicitor for the respondent : *D. N. Labrie.*

INDEX

CHAMPERTY — *Conveyance of land—Description of property sold—Partition—Petitory action—"Quebec Act, 1774"—Introduction of English criminal law — Champerty — Maintenance—Affinity and consanguinity—Parties interested in litigation—Litigious rights—Pacte de quotâ litis—Contract—Illegal consideration—Specific performance—Retrait successoral.*] The